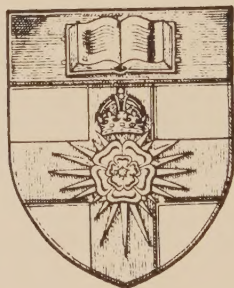


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Within two months after service of notice	851
Working-place	1110
Working proprietors	521
	196

CORRIGENDA

- [1950] 1 All E.R.
P. 1073. *EDWARDS v. NEWLAND*. Case referred to No. 8, and p. 1078, line F.3: for "1923 S.C. 43" read "1923 S.C. (H.L.) 43."
- [1950] 2 All E.R.
P. 139. *R. v. HACKNEY, ISLINGTON AND STOKE NEWINGTON RENT TRIBUNAL*. *Ex p. KEATS*. Line H.5.: for "chairman" read "deputy chairman."
P. 211. *R. v. FULHAM, HAMMERSMITH AND KENSINGTON RENT TRIBUNAL*. *Ex p. PHILIPPE*. Line H.4.: for "tenant had assigned" read "tenant had not assigned."
P. 241. *Re JONES (decd.)*. Solicitors: insert "*W. J. McMillin*, Liverpool (for the trustees);"
P. 355. *COLEBORN AND SONS, LTD. v. BLOND*. Line B.3: for "Appeal dismissed with costs" read "Appeal allowed with costs."
P. 513. *Re FRERE (decd.)*. Line D.1: for "who died on Aug. 22, 1941" read "who died on Jan. 15, 1949."
P. 561. *MOORE v. RAY*. Line F.4.: for "s. 38 (1)" read "s. 83 (1)."
P. 565. *LEGGATE v. BROWN*. Line D.3.: for "trailer" read "tractor."
P. 573. *Re MANOR FARM, KYTES HARDWICK*. Counsel: for "*K. J. T. Elphinstone*" read "*W. T. Elverston*."
P. 663. *LONDON-GRIFFITHS v. SMITH*. Case referred to No. 14: read "*McKernan v. Fraser*, (1931), 46 C.L.R. 343" instead of as printed. P. 677, line F.1: for "*McKenna v. Frazer*" read "*McKernan v. Fraser*." Line F.3: for "[1946] C.L.R. 405" read "46 C.L.R. 405."
P. 732. *LARNER v. FAWCETT*. Solicitors: after "*Gibson & Weldon*" read "agents for *Albert E. Maith*, Doncaster."
P. 734. *R. v. SANDBACH JUSTICES*. *Ex p. SMITH*. Line A.2: for "mother was not resident" read "father was not resident."
P. 956. *Re WILSON'S WILL TRUSTS*. Counsel: for "*J. H. Lazarus*" read "*Robert S. Lazarus*."
P. 958. *BURNS v. JOSEPH TERRY & SONS, LTD.* Counsel for the defendants: read "*Geoffrey Veale (Rauden-Smith with him)*" instead of as printed. P. 993, line A.4: for "employee must at his peril" read "employer must at his peril."

THE ALL ENGLAND LAW REPORTS

INCORPORATING THE
LAW TIMES REPORTS
AND THE
LAW JOURNAL REPORTS

Re RIDLEY (*deceased*). NICHOLSON *v.* NICHOLSON
AND ANOTHER.

[CHANCERY DIVISION (Harman, J.), April 20, 1950.]

*Administration—Fund for payment of legacies and testamentary expenses—
Liability of realty—Administration of Estates Act, 1925 (c. 23), s. 34 (3),
sched. I, Part II, para. 2.*

Will—Residuary gift—“All my real estate.”

By her will made in 1946, a testatrix, who died in 1948, leaving a gross estate consisting of £83,616 personalty and £31,100 realty, made bequests of specific articles valued at £14,100 and gave the residue of her personal chattels to G. By cl. 6 the will provided: “I give free of all death duties all my real estate which includes Manmead Covert and Maperton and my advowsons to the said [G.] absolutely.” By cl. 7 the testatrix gave pecuniary legacies (some of them free of legacy duty) amounting to £29,240. By cl. 8, the testatrix gave “the residue of my property including property over which I have a general power of appointment to the said [G.]”. The estate duty on the personalty amounted to £34,902 and the estate and succession duties on the realty amounted together to £8,300. The debts and funeral expenses together amounted to £1,632. It was admitted that the pecuniary legacies were payable only out of the personalty, but, as the sum of the legacies, debts, expenses, and duties on the realty and personalty exceeded the amount of the personalty, it was argued that the realty ought to bear a proportion of the testamentary expenses (including duties). The property described in cl. 6 was the only realty which the testatrix possessed at the date of her death.

HELD: the terms of cl. 6 and the fact that it was followed by the bequest of pecuniary legacies and a residuary gift showed an intention that the realty should not be resorted to for the payment of legacies and testamentary expenses until the personalty was exhausted, but, if that were not so, the property devised by cl. 6 was not property “not specifically devised or bequeathed but included (either by a specific or general description) in a residuary gift” within the Administration of Estates Act, 1925, sched. I, Part II, para. 2, and, therefore, could not be made to bear a proportion of the testamentary expenses in order to avoid abatement of the legacies.

Dictum of FARWELL, J., in Re Rowe ([1941] Ch. 348), applied.

[AS TO ORDER OF APPLICATION OF ASSETS OF SOLVENT ESTATES, see HALSBURY, Hailsham Edn., Vol. 14, pp. 375-386, paras. 704-718; and FOR CASES, see DIGEST, Vol. 23, pp. 496, 497, 501-503, Nos. 5621-5639, 5667-5694.]

Cases referred to:

- (1) *Re Anstead*, [1943] 1 All E.R. 522; [1943] Ch. 161; 112 L.J.Ch. 161; 168 L.T. 309; 2nd Digest Supp.
- (2) *Lancefield v. Iggulden*, (1874), 10 Ch. App. 136; 44 L.J.Ch. 203; 31 L.T. 813; *revsg.*, L.R. 17 Eq. 556; 23 Digest 522, 5900.
- (3) *Hensman v. Fryer*, (1867), 3 Ch. App. 420; 37 L.J.Ch. 97; 17 L.T. 394; 23 Digest 387, 4581.
- (4) *Re Rowe*, [1941] 2 All E.R. 330; [1941] Ch. 343; 110 L.J.Ch. 145; 165 L.T. 76; 2nd Digest Supp.
- (5) *Re Thompson*, [1936] 2 All E.R. 141; [1936] Ch. 676; 105 L.J.Ch. 289; 155 L.T. 474; Digest Supp.
- (6) *Re Boards*, [1895] 1 Ch. 499; 64 L.J.Ch. 305; 72 L.T. 220; 23 Digest 510, 5758.

ADJOURNED SUMMONS to determine, *inter alia*, (i) out of what fund or funds the pecuniary legacies bequeathed by Mary Stephanie Ridley ought to be paid; (ii) how the testatrix's debts, funeral and testamentary expenses, and duties in respect of the realty, ought to be borne.

N. S. S. Warren for the plaintiff, one of the executors of the will.

Wilfrid Hunt for the first defendant, the second executor, beneficially interested under the will as devisee and residuary legatee.

R. O. Wilberforce for the second defendant, a pecuniary legatee.

HARMAN, J.: This is a curious point which arises because of the magnitude of the exactions of the State. The testatrix, Mary Stephanie Ridley, left a considerable estate. She died on Mar. 22, 1948, leaving a will dated Feb. 9, 1946. She left gross personalty amounting to about £83,616 on which the estate duty is about £34,902. She left real property valued gross at £31,100 on which the estate and succession duties amount to about £8,300. The debts and funeral expenses amount to £1,632. The will is in a somewhat unusual form. The testatrix appointed two nephews, the plaintiff and the first defendant, to be her executors and trustees. She then gave free of duty a number of bequests set out in a memorandum: those are specific legacies and only valued at some £14,000. She then gave the residue of her personal chattels to Godfrey Nicholson, the first defendant. By cl. 6 she made a devise in these words:

"I give free of all death duties all my real estate which includes Manmead Covert and Maperton and my advowsons to the said Godfrey Nicholson absolutely."

At the end of cl. 6 she requests the devisee of her said real estate to keep in good order certain family graves in the parish church. By cl. 7 she gives a number of pecuniary legacies, some of them free of legacy duty, and some not. Those legacies amount to £29,240. By cl. 8 she proceeds:

"I give the residue of my property including property over which I have a general power of appointment to the said Godfrey Nicholson . . ."

The first question raised by the summons is whether the pecuniary legacies given by cl. 7 are charged on or payable out of both the residuary personal estate and (if the personalty be deficient) the realty, or whether they are charged only on the personalty. It was admitted, and the admission was inevitable, that on the peculiar form of this will pecuniary legacies could only be paid out of the personal estate and that the real estate was not subject to them. The effect of that is that the pecuniary and specific legacies added to the debts and the death duties on both realty and personalty more than exhaust the personal estate, and that if there be no other source from which to pay both the duties and the pecuniary legacies, the latter will have to abate to some extent. It is said that, having regard to the Administration of Estates Act,

1925, that is not right, but that the primary fund for payment, not of the legacies, but of the testamentary expenses, in which are included death duties on both realty and personalty, is the realty and the personalty not specifically bequeathed. It is to be noted that the devise of the real estate is a general devise which would cover any realty of which the deceased died possessed: that realty is devised free of all death duties. The result of such a devise is to cast the burden of the death duties which are ordinarily charged on the real estate on to the personal estate. Consequently, it was the intention of the testatrix that her real estate should have the burden of this duty discharged by the personalty. It is also noticeable that she does not describe it as "the rest of my real estate" or "my other real estate." She describes it as "my real estate" including certain named properties which were in fact all the real estate she had. Having disposed of that, she then by the next clause gives the pecuniary legacies and by cl. 8 gives what she calls "the residue of my property": this is a true residuary clause which would sweep up realty as well as personalty if any were undisposed of. If, for instance, the devise in cl. 6 failed, cl. 8 would be sufficient to take it up. So that cl. 8 is not confined to personalty, but is a general residuary devise and bequest.

I take it therefore that it is clear that the intention of this testatrix was that her realty should be given separately from whatever would remain, and that the devisee thereof was meant to take it free of the imposition of death duties, and whoever took the residue was to take whatever there was left after payment of the legacies which follow the devise under the will.

Nevertheless, counsel for the second defendant says that, having regard to the terms of the Administration of Estates Act, 1925, s. 34, a result follows which I will explain in a moment. Section 34 provides:

"(3) Where the estate of a deceased person is solvent his real and personal estate shall . . . be applicable towards the discharge of the funeral, testamentary and administration expenses, debts and liabilities payable thereout in the order mentioned in Part II of sched. I to this Act."

It has been decided, and is not now disputed, that that has nothing to do with legacies. Here, an even larger amount than legacies is the estate duty on personalty, and that is obviously included in this section. Paragraph 1 of Part II of sched. I to that Act deals with property undisposed of by will, with which we are not concerned here. Paragraph 2 deals with

"Property of the deceased not specifically devised or bequeathed but included (either by a specific or general description) in a residuary gift, subject to the retention out of such property of a fund sufficient to meet any pecuniary legacies . . ."

Reference to *Re Anstead* (1), decided by UTHWATT, J., shews how that schedule is meant to work. He said ([1943] Ch. 164), after reading the paragraph which I have just read:

"It follows that the first thing to be done in administering a solvent estate is to set aside out of residue a fund to satisfy the pecuniary legacies. That is the first charge, and it is a charge primarily on residuary personalty rather than on the residuary real estate."

In the present case the charge is solely on the residuary personalty. Therefore, if the schedule is to apply you must set aside out of the residuary personalty the pecuniary legacies and in addition the estate and succession duty on the realty and the legacy duty, on the latter because giving the realty free of duty is to give a legacy along with the realty, so that you have about £38,000 set aside. The learned judge goes on (*ibid.*):

"The result is notionally to divide the residue into two separate funds, the first to meet pecuniary legacies (and for the purposes of this fund personal

estate is the primary fund and only in so far as it is insufficient is there to be any resort to realty) and a second fund consisting of the balance of the residue, including residuary real estate. In meeting debts and testamentary expenses the second fund must be exhausted before the first is touched."

If, than, cl. 6 be a residuary gift, the property included in it ranks with the personalty included in cl. 8 subject to the retention out of the latter of the sum of £38,000 or so to which I have referred, and the result will be that about half the estate duty on the personalty will fall on the realty. This is obviously a topsy-turvy result. It defeats every intention that the testatrix has expressed. She wanted the duty on the realty to be paid by the personalty. The result of her will is said to be that duty on the personalty is borne in part by the realty. That is a most surprising conclusion, but one which, says counsel for the second defendant, is the result of the order of payment in which I am directed by the statute to proceed. A

I have two further matters to consider in that respect. Section 34 (3) of the Act of 1925 was made specifically subject to the provisions, if any, contained in the will and the schedule itself says in para. 8 B

"(a) The order of application may be varied by the will of the deceased." C

Is there then enough in the will of this deceased to alter the order of this application? In my judgment, there is. I think that a will which gives the realty by a general devise of this sort, which is not on the face of it residuary and expressly throws the duty in respect of that realty on to the personalty, is followed by a gift of legacies, and followed again by what is obviously a true residuary clause, shows an intention that the legacies and also the expenses shall not come on to the realty until the personalty is exhausted. That seems to me to be, as a mere matter of construction, the inevitable result of the way in which the testatrix has made her will. D

If I am wrong on that point there arises a question of some nicety, namely: Is this property, the realty, "not specifically devised or bequeathed but included (either by a specific or general description) in a residuary gift within para. 2 of sched. I, Part II, to the Act?" In other words, is cl. 6 a residuary gift? It seems there is much to be said on both sides of the question. It has been pointed out that before the Wills Act, 1837, all devises of realty were specific. A devise had no ambulatory character so as to embrace subsequently acquired realty. That was altered by the Wills Act, 1837, s. 24, which did not give a devise of realty the same effect as a bequest of personalty, but provided that, in reference to the real estate comprised in it, the will should be construed as if executed immediately before the death. In that way the legislature cured that particular blot, because if one treated the devise as if it were made immediately before the death, any real estate which a man acquired in his lifetime must be included in the description of "all my real estate." That was commented on in *Lancefield v. Iggulden* (2), where the headnote is: "A residuary devise of real estate is still specific notwithstanding s. 24 of the Wills Act." LORD CAIRNS, L.C., after reciting s. 24 said (L.R. 10 Ch. 141): E

"There is nothing in the Act to alter the well-settled rule of law as to the effect of a residuary devise when you know the time at which it was made, namely, that for the purpose of payment of debts it is to rank *pari passu* with the specific devises." F

He goes on to deal with *Hensman v. Fryer* (3) which decided that a residuary devise of realty was specific. It is said by counsel for the second defendant, and he cited a passage in JARMAN ON WILLS, 7th ed., vol. 2, p. 916, that that is an inaccurate expression only used as a compendious way of saying that the G

H

residuary realty used to stand on the same footing as specifically devised realty for the purpose of payment of debts. He says the object of the schedule has been to cure that defect. I do not think that is a matter I need discuss further because what I have to consider is whether this is a residuary gift.

A In my judgment, cl. 6 of this will, although it contains a general devise of realty, is not a residuary gift. I cannot think that a clause placed as this one is, even though it might have a certain sweeping-up effect by virtue of s. 24 of the Wills Act, 1837, is a residuary gift within the meaning of the Act of 1925. I am supported in that view by a *dictum* of FARWELL, J., in *Re Rowe* (4), where he was considering this schedule. The decision was that the law had not been altered by Part II of sched. I to the Act of 1925. The form of the will was: "I devise all my real estate and bequeath all the residue of my personal estate . . ." FARWELL, J., decided (following the decision of CLAUSON, J., in *Re Thompson* (5)) that real estate there had not been given in one mass with personal estate and that the old rule in *Re Boards* (6) still applied and went on ([1941] Ch. 348):

C "Accordingly, I hold that the 'property of the deceased not specifically devised or bequeathed but included by a specific or general description in a residuary gift' for the purpose of sched. I, Part II, para. 2, of the Act does not include the real estate of the testator in this case: for according to the construction which I place upon this particular will the real estate is devised, not as part of the residue, but as a specific devise to the named persons, the residue which is given being the residue of the personal estate."

D Having regard to the fact that the will there being construed dealt with the two species of property in one sentence, that case is very much less strong than the present one. Nevertheless, it was held that the real estate devised by that will was not, within the meaning of sched. I, included in the residuary clause. If that be right, it is clear that the present case is a stronger one, and although I am not bound by that decision because it was not necessary for the conclusion E at which he arrived, it is none the less a decision of that learned judge and I should be very sorry to differ from it. I agree with the reasoning: I cannot think that cl. 6 was what is meant in this schedule as being a residuary gift, and if necessary I should be prepared so to hold, but the reason for my decision is that the statutory order has been altered by the terms of the will, and, therefore, it does not apply.

F *Order accordingly. Costs of all parties as between solicitor and client to be paid out of the estate in due course of administration.*

Solicitors: *Withers & Co.* (for all parties).

[*Reported by R. D. H. OSBORNE, Esq., Barrister-at-Law.*]

KNOWLES v. ATTORNEY-GENERAL.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Willmer, J.), April 28, May 1, 2, 3, 1950.]

Legitimation—Declaration of legitimacy—Declaration of legitimacy of uncle—“Ancestor”—Jurisdiction of court to make declaration—Legitimacy Act, 1926 (c. 60), s. 2 (1)—R.S.C., Ord. 25, r. 5; Ord. 34, r. 1.

On Feb. 6, 1866, K., the petitioner's grandfather, who was at all material times domiciled in England, married the petitioner's grandmother, who, prior to that date had borne him three sons, R., A., and A.T. On May 23, 1866, the petitioner's father was born. In 1919 R. died without issue, in 1939 A. died, and in 1947 A.T. died, both also without issue. Both A. and A.T., who were ordinarily resident in France, where most of their property was situate, bequeathed their estates to strangers. The petitioner desired to impeach the wills of A. and A.T. in the French courts on the ground of undue influence, and to afford himself *locus standi* he sought a declaration that A. and A.T. were legitimated on Jan. 1, 1927, by the Legitimacy Act, 1926, s. 1 (1). At all material times the petitioner's grandfather and grandmother were free to marry, and it was not disputed that A. and A.T. had in fact been legitimated by s. 1.

HELD: (i) the court had no jurisdiction to make a declaration of legitimacy either under R.S.C., Ord. 34, r. 1, because that rule contemplated the submission of a Special Case in writing, which was not the procedure adopted in the present case, or under R.S.C., Ord. 25, r. 5, or otherwise than in pursuance of s. 2 (1) of the Act of 1926.

Procedure adopted in Jones (R.E.), Ltd. v. Waring & Gillow, Ltd. ([1925] 2 K.B. 612), *distinguished.*

Warter v. Warter (1890) (15 P.D. 35), *followed.*

(ii) “ancestor” in s. 2 (1) meant “lineal progenitor” and, therefore, neither A. nor A.T. was a “remoter ancestor” within the meaning of that sub-section; the petitioner had not brought himself within the jurisdiction conferred by the sub-section; and the declaration could not be made.

Zetland (Earl) v. Lord Advocate (1878) (3 App. Cas. 505), *distinguished.*

[AS TO DECLARATION OF LEGITIMACY, see HALSBURY, Hailsham Edn., Vol. 2, pp. 571-574, paras. 783-785; and FOR CASES, see DIGEST, Vol. 3, pp. 369-372, Nos. 100-130.]

Cases referred to:

- (1) *Millard v. Millard and Addis*, [1945] 2 All E.R. 525; *sub nom.*, *M. v. M.*, [1946] P. 31; 115 L.J.P. 29; 173 L.T. 305; 2nd Digest Supp.
- (2) *C. v. C.*, [1947] 2 All E.R. 50; 177 L.T. 399; 111 J.P. 442; *sub nom.*, *Colquitt v. Colquitt*, [1948] P. 19; [1948] L.J.R. 897; 2nd Digest Supp.
- (3) *Jones (R.E.), Ltd. v. Waring & Gillow, Ltd.*, [1925] 2 K.B. 612; 94 L.J.K.B. 594; 132 L.T. 807; *on appeal*, [1926] A.C. 670; 95 L.J.K.B. 913; 135 L.T. 548; 35 Digest 149, 470.
- (4) *Warter v. Warter*, (1890), 15 P.D. 35; 59 L.J.P. 45; 62 L.T. 328; 3 Digest 372, 130.
- (5) *Yool v. Ewing*, [1904] 1 I.R. 434; 3 Digest 363, 46iv.
- (6) *Gunner v. Gunner and Stirling*, [1948] 2 All E.R. 771; [1949] P. 77; [1948] L.J.R. 1904; 2nd Digest Supp.
- (7) *Zetland (Earl) v. Lord Advocate*, (1878), 3 App. Cas. 505; 38 L.T. 297; 21 Digest 96, 702.
- (8) *Valentine v. Wetherill*, (1860), 31 Barbour 655.

PETITION under the Supreme Court of Judicature (Consolidation) Act, 1925, s. 188, for a declaration under the Legitimacy Act, 1926, s. 2, or under the inherent

jurisdiction of the court pursuant to R.S.C., Ord. 25, r. 5, or Ord. 34, r. 1, that certain persons were rendered legitimate by virtue of s. 1 of the Act of 1926 on Jan. 1, 1927.

Salt, K.C., and *R. J. A. Temple* for the petitioner.

J. E. S. Simon for the Attorney-General.

A **WILLMER, J.:** The petitioner claims a declaration that two of his uncles were legitimated under the Legitimacy Act, 1926. The prayer in the petition, as originally drawn, was for a declaration in pursuance of s. 2 of the Act, but I have in the course of the argument allowed an amendment claiming a similar declaration in the alternative under the inherent jurisdiction of the court. It is clear to me that the petitioner has an abundant interest in establishing the legitimation of his two uncles. The real question which I have had to decide is whether or not in the circumstances I have jurisdiction to make the declaration asked for. That is by no means a simple or easy problem, and I will say at once that I could have wished to have had an opportunity of thinking it over and of putting my judgment into writing, but it has been represented to me that my view of the matter is required by the petitioner at an early date in view of certain proceedings which are about to take place in France, and it appears obvious to me that, if I take time for consideration, what I might have to say may well be too late to assist in the French litigation.

B The grandfather and grandmother of the petitioner had four children. They were respectively Robert Townley Knowles, who was born in 1856, Alexander Townley Knowles, who was born in 1858, Arthur Townley Knowles, who was born in 1862, and Townley Rigby Knowles, who was born on May 23, 1866. It was proved to my satisfaction that the petitioner's grandfather was, at all material times, domiciled in England. It was also proved to my satisfaction that the petitioner's grandfather and grandmother were, at all material times, free to marry. But they did not in fact marry until Feb. 6, 1866. That meant that the first three of the children whom I have named were born before the marriage, and only the youngest son, Townley Rigby Knowles, was born in wedlock. The petitioner is the only son of Townley Rigby Knowles, that is to say, he is the only son of the only son of his grandfather who was born legitimate. There is no question with regard to the petitioner's own legitimacy. His parents were married on Feb. 2, 1896, and the petitioner was born on Aug. 8, 1896. As to the three brothers of the petitioner's father—apparently none of them had any children, so that the petitioner is the only member of what I might call the third generation. Of the petitioner's three uncles, Robert Townley Knowles died in 1919 and, for all purposes of this suit, passed out of the picture. Arthur Townley Knowles died in 1939 and Alexander Townley Knowles died in 1947. It will be seen, therefore, that the two latter survived the coming into force of the Legitimacy Act, 1926, and it is in respect of them that the petitioner seeks his declaration. Both of those uncles were resident, at any rate for a considerable part of their later years, in France, where they owned property inherited from the petitioner's grandfather at Gan, near Pau.

C It will be convenient to deal first with the history of Arthur who, although the younger, was the first to die. In 1933 Arthur made both French and English wills, the effect of which was to leave all his property to a lady named Léonie Camougrand, who was described in the English will as being the sister of his deceased wife, and it was stated in the English will that it was made in contemplation of his marriage to her. That marriage did not take place, Léonie Camougrand, is now dead, and I am informed that one Dr. Lafitte is the sole beneficiary under her will. Arthur died in France. In 1940, his brother, Alexander, who was also resident in France, commenced proceedings against Léonie Camougrand impeaching the will of his brother, Arthur, on the ground of undue influence. To that action he appears to have joined the petitioner as a co-plaintiff. The

petitioner has told me that it was done without his consent or knowledge. The petitioner himself had ordinarily been resident in France, but he came to England at the time of the German invasion, so that at no material time thereafter was he in France until after the war.

The action started by Alexander came on for hearing at Pau, and on Dec. 26, 1941, it was dismissed by the tribunal at Pau who gave judgment in favour of the defendants. Alexander Townley Knowles appealed, but on Feb. 10, 1943, the court of appeal confirmed the decision of the tribunal. Apparently, the French courts decided that they could not entertain the action, because, in the absence of any legitimacy declaration, they could not accept the status of the plaintiffs or their *locus standi* to pursue the action. It would seem that the French courts took the view that, until a declaration of legitimacy had been made, such as is provided for by s. 2 of the Act of 1926, the plaintiff, Alexander, could not be regarded as being legitimate any more than the deceased uncle, Arthur, could be regarded as being legitimate. Of course, as I have said, the action was decided by the court of appeal at a time when France and England were, unhappily, cut off from each other, and it appears, so I am told, from a perusal of the records, that there is nothing to show that there was any evidence as to English law available to the tribunal at Pau. Alexander, as I have said, has since died, but, before doing so, he appears to have lodged an appeal to the Cour de Cassation, the highest tribunal in France. The petitioner has told me that it is his intention to continue the prosecution of that appeal, but I understand that it is still pending and it is not known at what date that appeal may be heard. However, it seems clear that the petitioner has an interest in establishing the legitimation of his uncle, Arthur, if for no other reason for the purpose of obtaining the status of heir in French law, so as to give him a *locus standi* for the prosecution of the French proceedings.

So much for the petitioner's interest in his uncle Arthur. So far as the uncle Alexander is concerned, it appears that very shortly before his death, when he was a very old man, he made a will in France where he was then resident. By that will he made a number of bequests, but the principal property which he had to dispose of, namely, the estate where he lived, he left by that will to his farmer tenants, a man called Castaignon and his wife. No residuary legatee was appointed by the will of Alexander, and there is evidence to show that there is some undisposed of residue after the various specific bequests have been dealt with. Apart from anything else, the petitioner wishes to establish his title to be considered as residuary legatee by reason of being the nephew of his uncle Alexander. Moreover, the petitioner seeks to impeach the will of his uncle Alexander, again on the ground of undue influence. It is said that before his death Alexander was very much in the hands of the Castaignons, husband and wife, and that they improperly used their influence over him to persuade him to make a will from which the petitioner appears to be completely cut out, at any rate, so far as concerns Alexander's French estate. The petitioner brought an action in France, and it was tried before the tribunal at Pau in December, 1948. The tribunal decided that action in favour of the petitioner and against the defendant Castaignon. In other words the petitioner's argument that the will was induced by undue influence on the part of Castaignon was accepted by the tribunal. An appeal, however, against that decision has been lodged by Castaignon and I am informed that it is due for hearing, I think, at Pau in the course of the next week. Hence the urgency of the matter before me.

It appears that in the court of appeal at Pau Monsieur Castaignon is about to take the same point as was taken in relation to the litigation over the will of Arthur, namely, that, in the absence of a legitimacy declaration under the Act of 1926, Alexander must be regarded as having continued illegitimate, and, therefore, the petitioner shows no relationship with him, and, consequently, has no *locus standi* to contest the will or prosecute the French proceedings. I am

told that there is reason for fearing that the French court of appeal at Pau may follow the precedent which they set for themselves in the case of Arthur's will, and, if they were to do that, they would, presumably, have to allow the appeal of Monsieur Castaignon. That would mean not only the end of the petitioner's attempt to impeach the will of his uncle Alexander, but, I imagine, it would also be the end of his claim as heir to the residue of his uncle's estate. Clearly, therefore, in relation to his uncle Alexander as well, the petitioner has abundant interest in obtaining a declaration, if he can obtain one, of legitimacy.

The petition was duly served on the Attorney-General, as prescribed by the rules, and, partly as the result of the Attorney-General's plea and partly as the result of the petitioner's own act, it has also been served on the personal representative of Léonie Camougrand and also on Monsieur and Madame Castaignon. None of these parties has elected to appear. The Attorney-General has appeared by counsel to assist me. On behalf of the petitioner it has been argued, and this much has not been contested on behalf of the Attorney-General, that, in dealing with the case about the will of the petitioner's uncle Arthur, the French court acted on a wrong view of English law. It is contended that on the proper view of English law, even without a declaration, both Arthur and Alexander Knowles, having survived Jan. 1, 1927, were automatically legitimated under the provisions of the Legitimacy Act, 1926, s. 1. It is said that had proper evidence of English law been available to the court in France when this matter was determined during the war, the French court could not possibly have come to the conclusion they did.

In support of the proposition that no declaration of legitimacy was necessary *Millard v. Millard and Addis* (1) and *C. v. C.* (2) have been cited to me. Having heard the evidence, I am satisfied that the petitioner has proved the necessary facts to bring his uncles Alexander and Arthur within the provisions of the Legitimacy Act, 1926, s. 1. As I say, that part of the case has not been contested by the Attorney-General, and I am satisfied on the evidence with regard to the facts. If this were the only question before me, namely, whether under s. 1 of the Act these two uncles of the petitioner had been legitimated I should have no difficulty in following the decisions of *Millard v. Millard and Addis* (1) and *C. v. C.* (2). Indeed, I should feel bound to follow those decisions, and I should have no difficulty in coming to the conclusion that, even without a declaration of legitimacy having been made, the petitioner's uncles, Alexander and Arthur, were, on a true view of English law, duly legitimated by the mere fact of surviving the coming into force of the Act on Jan. 1, 1927. That, however, is not the real point which I have to decide. The question which is raised is whether I have jurisdiction to make a declaration under s. 2 of the Act, or, alternatively, under the inherent powers of the court, and, more particularly, under the provisions of Ord. 25, r. 5, or Ord. 34, r. 1. I think it might be convenient if I dispose first of the alternative claims made under the rules.

In the first place it is contended that this court can make a declaratory judgment, apart altogether from the Legitimacy Act, 1926, s. 2, under the inherent powers of the court as regulated by R.S.C., Ord. 25, r. 5. Alternatively, it is said that a similar result can be achieved by following the procedure laid down in Ord. 34, r. 1, which deals with special cases. In support of the latter contention I was referred to *Jones (R.E.), Ltd. v. Waring & Gillow, Ltd.* (3) ([1925] 2 K.B. 625). I have no difficulty in rejecting the argument in so far as Ord. 34, r. 1, is concerned. The rule contemplates a Special Case in writing, divided into paragraphs, numbered consecutively, and so on. There has been no such thing in this case, nor has the Attorney-General through his counsel seen fit to accept the suggestion that the petitioner's counsel's opening should be treated as an agreed statement of facts. That is more or less what was done in *Jones (R.E.), Ltd. v. Waring & Gillow, Ltd.* (3), and in the absence of any such concurrence or acceptance of the facts stated by the petitioner, clearly the procedure prescribed by Ord. 34, r. 1, cannot apply. With regard to the alternative claim

under Ord. 25, r. 5, that is, perhaps, slightly more formidable although I have no hesitation whatsoever in rejecting the argument that I can make a declaration of this character under the powers regulated by that rule. Be it said at the outset that, if it were competent to make a declaration in that way in pursuance of Ord. 25, r. 5, it would never have been necessary, as I see it, to enact s. 2 of the Act of 1926 at all. It has been pressed on me, and I think properly pressed on me, by counsel for the Attorney-General that a declaration of legitimacy is, if I may use the expression, something peculiarly sacred because it is a judgment binding *in rem*. It has been pointed out that the court would not shrink from deciding a question of legitimacy *inter partes* where it is necessary for the proper disposal or determination of some question arising in an action—that, of course, is only a judgment *inter partes*—but there is good authority for the proposition that the court will not lightly make a declaration binding *in rem* except where the statute specifically authorises it. I would refer to the decision of BUTT, J., in *Warter v. Warter* (4) where he dealt with the matter by asking himself this rhetorical question (15 P.D. 36):

“How can you say that this claim for a declaration of legitimacy is brought properly before me, when the Legitimacy Declaration Act prescribes that it shall be brought before me by petition and not by writ?”

That was a case in which a writ had been issued and it was sought to include with another matter a prayer for a declaration of legitimacy, and BUTT, J., ordered it to be struck out. It is said that that decision is no longer binding on me, because it is a decision arrived at with reference, not to the Legitimacy Act, 1926, but to the Legitimacy Declaration Act, 1858, now replaced by the Supreme Court of Judicature (Consolidation) Act, 1925, s. 188. I confess I do not follow that objection. The only effect of s. 2 of the Act of 1926 is to make available to a wider range of persons the facilities to present a petition which were provided by the Legitimacy Declaration Act, 1858, and preserved in s. 188 of the Judicature Act. It seems to me that a petition under the modern Act is entirely *in pari materia* with a petition under the previous Act. In those circumstances I think I am precluded by a decision now sixty years old from making a declaration of legitimacy otherwise than in pursuance of the powers conferred by the Act. I think it is proper also to say that I was referred to the Irish case of *Yool v. Ewing* (5). That case, of course, is not binding on me, but there a similar matter was very carefully considered by the Irish court which came to much the same conclusion as BUTT, J., had come to in *Warter v. Warter* (4), and, particularly having regard to the care with which the Irish court went into the whole matter and gave its decision, I am bound to treat that decision as one which demands respect. The view of the editors of the *ANNUAL PRACTICE* is certainly open to no doubt. The learned editors state dogmatically in the notes to Ord. 25, r. 5 (1949 ed., p. 454):

“A declaration of legitimacy cannot be made under this rule: it can only be made on petition under the Judicature Act, s. 188 (*Warter v. Warter* (4); *Yool v. Ewing* (5)); or in the case of children legitimated under the Legitimacy Act, 1926, by a petition under s. 2 . . .”

For the reasons which I have given I think the view expressed by the learned editors of the *ANNUAL PRACTICE* is the right view.

I come back, therefore, to the main question in this case, namely: Is it competent for me to make the declaration asked for under s. 2 of the Act of 1926? The powers of this court to make declarations of legitimacy are, as I have stated, entirely the creature of statute, and those powers are derived from the two statutes to which I have referred—the Act of 1858, which is now embodied in s. 188 of the Judicature Act, 1925, and s. 2 of the Act of 1926. Section 2 (as amended by the Administration of Justice Act, 1928, s. 19 and sched. I) provides:

“(1) A person claiming that he or his parent or any remoter ancestor became or has become a legitimated person may . . . present a petition under s. 188 of the Supreme Court of Judicature (Consolidation) Act, 1925, and that Act, subject to such necessary modifications as may be prescribed by rules of court, shall apply accordingly.”

- A In other words, the Act of 1926 extended the relief prescribed by s. 188 of the Judicature Act to the case of persons desiring to claim either that the petitioner or the parent or any remoter ancestor of the petitioner had become legitimated. The question which arises in the present case is whether the petitioner's uncles, Alexander and Arthur, in respect of whom this declaration is sought, can properly be regarded as being “remoter ancestors” within the meaning of s. 2 (1).
B That is the phrase on the consideration of which the whole of this question turns. What is meant by “any remoter ancestor”?

- On behalf of the petitioner it is contended that that expression is apt to include any blood relation in whose legitimacy or in whose legitimation the petitioner has an economic interest, whether by succession or otherwise. In his very careful argument before me counsel for the petitioner rather shrank from drawing an exact line between those included under such a definition and those excluded,
C but he contended that on any view the relationship contemplated must, at least, include the statutory next-of-kin prescribed under the Administration of Estates Act, 1925. Furthermore, he wisely said that it does not really matter for the purpose of this case where you draw the line because, on his contention, on any view this case (being concerned with uncles) must fall well on the right side of the line wherever drawn. I was invited on behalf of the petitioner to view this Act, more particularly s. 2 of the Act, against the background of the property legislation of 1925, and, in the light of that legislation, to give the Act a wide and liberal interpretation. It was pointed out correctly that the Act of 1926, if regarded as a whole, is concerned not only with the status of the petitioner or the legitimated person, but also—and very much concerned—with property rights. It deals specifically with property in s. 2 (2); and it deals specifically with property again in s. 9. Again, s. 3, s. 4 and s. 5 certainly deal with questions of interest in property and succession to property. It is said on behalf of the petitioner, in support of the contention that the Act should be interpreted in a liberal way, that one should follow the precedent of liberal construction adopted by this court in relation to s. 192 of the Judicature Act which deals with the power of this court to vary ante-nuptial or post-nuptial settlements, and it was pointed out that as recently as *Gunner v. Gunner and Stirling* (6) this court accepted a very loose and popular definition of the word “settlement” for the purposes of that Act—an interpretation which would doubtless shock the practitioners of Lincoln's Inn. That case is cited as a useful analogy, which I might well follow in this case, for giving liberal interpretation to this statute which is described by counsel as an “enabling” statute.
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- So far as this statute is concerned, neither side has been able to produce any direct authority as to the construction of the word “ancestor,” but an authority of the House of Lords was produced by the petitioner with regard to the meaning of “ancestor” in another connection. I refer to *Earl of Zetland v. Lord Advocate* (7). I do not propose to rehearse the complicated facts of that case. It is sufficient to say that the question at issue was as to the rate of succession duty payable under the Succession Duty Act, 1853. It was a case in which a nephew had succeeded his uncle—an interesting circumstance because the relationship in question in this case is the same. Two rates of succession duty were provided by the Act—one rate if the succession was by virtue of a disposition of the settlor, another, and higher rate, if the succession was by devolution. The decision of the House of Lords was a decision, against the taxpayer, that in the circumstances the succession was by devolution from the uncle, who was held to
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be an ancestor within the meaning of the Act of 1853. Section 2 of that Act, or the material part of it, provides:

"... the term 'predecessor' shall denote the settlor, disponer, testator, obligor, ancestor, or other person from whom the interest of the successor is or shall be derived."

Against the background of that section it is interesting to quote the views of LORD HATHERLEY and LORD SELBORNE on the true construction of the word "ancestor" in relation to that statute. LORD HATHERLEY says (3 App. Cas. 518):

"The expression 'ancestor' is perfectly accurate in a case of this kind. The word 'ancestor' is properly assignable to the person who really preceded in the estate, although that person may not be the progenitor of the successor—he may be, as in this case, his uncle."

LORD SELBORNE said (*ibid.*, 520):

"Devolution by law takes place whenever the title is such that an heir takes under it by descent from an 'ancestor,' according to the rules of law applicable to the descent of heritable estates; and in all cases of descent the estate of the successor is immediately 'derived' from the 'ancestor' from whom the estate descends. The word 'ancestor' does not mean, either etymologically or technically, a lineal ancestor only; in illustration of which proposition, I may refer to a passage in COMYNS' DIGEST as to the English writ of 'mort d'ancestor'; which (it is said) 'does not lie upon the death of any ancestor, except a father, mother, brother, sister, uncle, aunt, nephew, or niece; for, upon the death of another ancestor, an *aiel*, *besaiel*, or *cosinage*, lies.'"

That was put forward as being powerful authority, to which I am bound to pay a great deal of respect, to the effect that the word "ancestor," as used in that statute, has what I may call this extended meaning in relation to the question of succession to property, *i.e.*, something which goes beyond any question of mere lineal descent. Clearly if "ancestor" is capable of that extended meaning in relation to the Act of 1926 the petitioner would be justified in saying that his two uncles were "ancestors." Equally clearly he cannot say so if the expression "ancestor" connotes merely a lineal progenitor.

The reference to the ancient writ of mort d'ancestor made by LORD SELBORNE in his speech in the House of Lords has prompted a good deal of inquiry in this case as to the usage of the writ of mort d'ancestor in mediaeval England. I do not think it is necessary for me to deal exhaustively with the authorities that were presented to me in regard to the early history of that writ. It is sufficient to say that it was a writ available for the relief of a dispossessed heir, and it was equally available whether he was heir to his father or to his uncle or to some other more distant relation. In other words, it covered something other than mere lineal descent. The inquiry into the history of the writ of mort d'ancestor, however, has not altogether been wasted, because I think it has thrown a light on the history of the word "ancestor" itself. Etymologically, as was pointed out and has been accepted by both sides, the word means "antecessor," one who goes before, and in this wider sense it has, I suppose, been replaced in modern times by the word "predecessor." I am tempted to take the view, from the etymological authorities to which I was referred, that the word was imported into this country as part of the Norman-French which the Norman conquerors brought with them, and I can well believe that in the early days of its use its primary meaning was to connote the idea of succession, the "ancestor" being the person prior in succession to the "heir." That is the meaning, as I understand it, which is attributable to the word in connection with the writ of mort d'ancestor. That is, of course, a technical meaning, and it is at least clear that for some purposes that technical meaning has survived,

- otherwise the House of Lords, in dealing with the question of succession duty in the case to which I have referred, could not have come to the conclusion that they did come to, but it is equally clear that, at some time in English history, another, and new, meaning of the word "ancestor" grew up, namely, as being the equivalent of forefather or lineal ascendant, and it is in that sense that it is in common use in ordinary language in modern times. It is interesting to note,
- A as a matter of history, that the ousting of "forefather" in favour of "ancestor" does not seem to have taken place, at any rate, before the seventeenth century because in the authorised version of the Bible we still find the old-English word "forefather" regularly used, but in modern times we talk less of our forefathers and rather more of our ancestors, and there is no doubt, I think, that in ordinary usage in modern times it has replaced the older English word to a large extent.
- B On reference to modern English dictionaries, it appears clearly that in modern times the primary meaning of the word is "progenitor," *i.e.*, it connotes lineal descent—indeed MURRAY'S OXFORD ENGLISH DICTIONARY fails to notice altogether the older and rather more technical meaning of the word which I have endeavoured to describe, and which appears in the House of Lords case to which I have referred.
- C In those circumstances, the question raised by this case is whether, in using the word "ancestor," the draftsman of the Act of 1926 intended to use the word in what I may call its technical sense, or whether he intended to use it in the sense of forefather or lineal progenitor, as I venture to think it would ordinarily and commonly be understood in modern speech. It is contended on behalf of the Attorney-General that, having regard to the modern meaning of the word in ordinary usage, it is of little use, in these days, to refer to the archaic meaning of the word as it was used in connection with the writ of mort d'ancestor. Counsel for the Attorney-General further seeks to distinguish the decision of the House of Lords in *Earl of Zetland v. Lord Advocate* (7) on the ground that it was a decision under a special Act, dealing specifically with succession duty in relation to succession to property, in connection with which he points
- E out it might very well be that the word was used in its more ancient and more technical sense. At that time, the draftsman of the Act of 1853 had to deal with the old historic rules with regard to succession, and he may well in those circumstances, it was contended, have necessarily had to use words in their ancient, historic and perhaps technical sense. It is said on behalf of the Attorney-General that the Legitimacy Act, 1926, is in an entirely different category.
- F In effect it is to be read as one with that part of the Judicature Act, 1925, which deals with matrimonial affairs, although it is not specifically so described. Nevertheless, it is an Act of a general character, intended to govern the relations of ordinary members of the public in their ordinary lives, and in such circumstances one would expect that *prima facie* words would be used, not in their technical or ancient sense, but rather in their modern and popular sense. Counsel
- G for the Attorney-General also relied on *Gunner v. Gunner* (6) because, he said, that was an excellent illustration of the way in which the court in relation to a kindred matter construed a word such as "settlement" in its popular rather than in its technical sense. He, like counsel for the petitioner, confessed himself unable to find any direct authority on the construction of the word "ancestor" in relation to the Act of 1926, but, by way of counter-blast to the House of
- H Lords decision relied on by the petitioner, counsel for the Attorney-General referred me to an American decision in *Valentine v. Wetherill* (8). Obviously I cannot rely on this American decision as an authority, and, indeed, it was not suggested by counsel that it was in any way binding on me. In any case, he was bound to concede that it was only a decision of the New York Court of Appeal as against a decision of the House of Lords which is produced on the other side. It was a decision in relation to succession, but it does at least show that there are two views on what is meant by the word "ancestor" in relation

to the question of succession. In that case, the president of the court, delivering the judgment of the court, said in relation to the use of the word "ancestor" under the American statute to which he was referring (31 Barbour 659):

"The term 'ancestor' is used in its proper sense, in the statute, and designates the immediate not the remote source of the intestate's title. It is not equivalent to the expression 'the parent or other kindred of the intestate,' as used in the statutes of Rhode Island. 'Ancestors,' derived from antecessores, designates the ascendants of the intestate in the right line, as father and mother, grandfather and grandmother, and does not include collateral relatives as brothers and sisters."

That, as I say, is some authority, though not one binding on me, for the construction of the word "ancestor" in what I think anyone would regard as its normal and popular use.

Faced with this difficult problem as I am, it seems to me that what I have to remember is that it is for the petitioner to bring himself within the statute on which he relies. As I have stated, this court has jurisdiction only in so far as it is conferred by statute, and it is for the petitioner who claims relief in pursuance of that statute to satisfy me that he brings himself within it. I accept the argument presented on behalf of the Attorney-General that *prima facie* in a statute such as this words are to be construed in accordance with their ordinary and natural meaning, and, having regard to the English dictionaries to which I have been referred, I feel bound, at any rate at this date, to accept that "ancestor" in its ordinary and natural meaning connotes a progenitor or one in direct lineal line of descent. In view of the wide usage of the word in that sense in modern times in popular speech, I should have expected the draftsman in 1926, if he desired to use the word in any other sense, in drafting the statute to insert a definition in the "definition clause" of the statute. This statute includes a definition clause, but that clause makes no mention of the word "ancestor," from which I must infer that no unusual or artificial interpretation of the word "ancestor" was intended.

In my judgment, a review of the provisions of the Act as a whole supports what I have said with regard to the *prima facie* meaning of the word, namely, that it was intended to be used in its natural and ordinary sense of lineal progenitor. If one studies the Act as a whole, one becomes aware of the fact that the legitimation under it of any one person may affect numbers of other persons who claim through him. Equally, and conversely, a number of other persons may be affected by the legitimation of a person through whom they claim. In other words the draftsman of the Act necessarily had to look both upwards and downwards in framing the provisions consequential on the legitimation of this new class of persons. In relation to the former class—*i.e.*, persons who claim through somebody who is to be legitimated under the statute—the scope of the statute is clearly confined to a well-defined class, namely "spouse, children, or remoter issue." That phrase, not always quite in the same words, but substantially that phrase, is used again and again in the Act. It appears in s. 1 (3), in s. 3 (1), in s. 4, in s. 5, and in s. 8 (2). The expression: "parent or any remoter ancestor" occurs only once, namely in s. 2 (1), the section which I have to construe. It is perfectly true, as pointed out by counsel for the petitioner, that most of the Act is dealing with change in substantive law. Section 2, on the other hand, is purely procedural. It provides the remedy for persons affected by the Act. That, to my mind, is no reason against drawing the inference, which, as a matter of construction, I am tempted to draw, having regard to the fact that the draftsman of the Act necessarily had to look both ways, so to speak, upwards and downwards, and that is that those expressions "parent or any remoter ancestor," and "children or remoter issue" must be regarded as correlative with each other. So far as "issue" is concerned, there can be no possible doubt what is meant by that word. Clearly the word "issue" is confined to children

and lineal descendants. I have had the benefit of various entries in various dictionaries put before me. I do not think I need enlarge on that point. I think it is obvious that that is the only meaning which the word "issue" is capable of bearing, and, if that is right, it strikes me as being a very strong argument in support of the contention that "ancestor" is being used in the opposite and correlative sense, namely, that of lineal progenitor as opposed to lineal descendant. Furthermore, there is this much extra assistance to be derived from a study of the Act as a whole. As pointed out by counsel for the Attorney-General, if you look at s. 7 of the Act you will find that when the draftsman did desire to go outside the range of lineal progenitors or lineal descendants he changed the language he was using and used instead the words "any relative." Again, that is an argument in favour of restricting the meaning of "ancestor," as used in s. 2, to the narrower meaning which it has in popular speech to-day rather than giving it the extended meaning contended for by the petitioner—a meaning which one would have thought would have been better expressed by the word "relative," the word actually used by the draftsman in s. 7. I think that this construction of the Act is further confirmed having regard to the provisions of the Judicature Act, 1925, s. 188. It appears to me that s. 2 of the Act of 1926 must be read closely with s. 188 of the Act of 1925 because the former is a section which extends the relief or remedy already prescribed by the latter section to the enlarged class of persons brought into existence by s. 1 of the Act of 1926. Indeed, all that s. 2 of the Act of 1926 does is to say that any such person may present a petition under the previous Act. It is, therefore, to my mind, by no means irrelevant to see what the previous Act says. Section 188, reproducing in this respect the provisions of the Legitimacy Declaration Act, 1858, is careful to confine the petitioner seeking relief to a claim that he is a legitimate child of his parents or that the marriage of his father and mother, or of his grandfather and grandmother, was a valid marriage, or that his own marriage was a valid marriage. In other words, s. 188 of the Act of 1925 was concerned only with a limited class of persons, *i.e.*, lineal progenitors or descendants, and there is nothing that I can see in the wording of s. 2 of the Act of 1926 to show that Parliament had any intention of going outside lineal progenitors or descendants in relation to the new class of persons entitled to claim relief.

That, I think, is enough to dispose of this case. There are other points advanced by counsel for the Attorney-General as reasons for adopting this construction of the Act. I do not think it is necessary to deal in detail with the other various arguments which he advanced, and which I have very carefully considered. I have approached this matter primarily as a matter of construction, and, doing the best I can, having regard to the paucity of authority, bearing in mind what I conceive to be the true canons of construction, and, more particularly, having regard to the onus which is on the petitioner to bring himself within the jurisdiction conferred by the statute, I have come to the conclusion that the petitioner has not made out his case, has not brought himself within the range of persons who can petition under s. 2, and is, therefore, not entitled to have the declaration made in his favour.

Order accordingly.

Solicitors: *Rowe & Maw* (for the petitioner); *Treasury Solicitor*.

[*Reported by R. HENDRY WHITE, ESQ., Barrister-at-Law.*]

HABERMAN v. WESTMINSTER PERMANENT BUILDING SOCIETY.

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Asquith and Jenkins, L.JJ.), May 3, 4, 1950.]

Rent Restriction—Premium—Recovery—Agreement made after March 25, 1949—Counterclaim for avoidance of lease and for possession—Premium paid and agreement executed before June 2, 1949—Landlord and Tenant (Rent Control) Act, 1949 (c. 40), s. 2 (5).

The Landlord and Tenant (Rent Control) Act, 1949, which came into force on June 2, 1949, prohibits, by s. 2 (1), the taking of a premium as a condition of the grant, renewal or continuance of any tenancy of a dwelling-house to which the Rent Restrictions Acts apply. By s. 2 (5): "Where, under an agreement made after Mar. 25, 1949, any premium has been paid which, or the whole of which, could not lawfully be required under the foregoing provisions of this section (or, if the premium was required before the commencement of this Act, which could not lawfully have been required if this Act had then been in force), the amount of the premium, or so much thereof as could not lawfully be required or have been required, as the case may be, shall be recoverable by the person by whom it was paid: Provided that where an agreement has been made since the said Mar. 25, and before the commencement of this Act, and the agreement includes provision for the payment of a premium which could lawfully be required under the enactments hereby repealed but which, if paid in pursuance of the agreement, would be recoverable, wholly or in part, by virtue of the foregoing provisions of this sub-section, the agreement shall, without prejudice to the operation of this section, be voidable at the option of either party thereto."

On Mar. 30, 1949, the tenant entered into an oral agreement with the landlords to take the lease of a flat for a term of fourteen years at a monthly rent of £6 19s., and to pay a premium of £400. He paid £25 of the premium and was given a receipt for it. The balance of £375 was paid by him on Apr. 4, 1949. On that date the terms of the oral agreement, which had been embodied in the receipt given to the tenant on Mar. 30, were incorporated in a formal lease. The tenant then entered into possession of the flat and paid the rent regularly until January, 1950. On Nov. 3, 1949, the tenant brought an action in the county court claiming the return of the premium paid by him, and the landlords counterclaimed for avoidance of the lease under the proviso to s. 2 (5) of the Act of 1949 and for possession of the flat.

Held: the proviso to s. 2 (5) of the Act of 1949 referred only to cases in which it had been agreed that a premium should be paid, but the agreement had not yet been carried out, and not to cases in which a premium had already been paid, and, therefore, the proviso did not apply and the landlords could not recover possession.

Semble: *Per ASQUITH, L.J.* (i) the acceptance of rent by the landlords after they discovered that they had an option under the proviso to s. 2 (5) of the Act of 1949 to avoid the tenancy did not amount to an act unequivocally affirming the tenancy and to an election not to avoid it. (ii) if the contractual tenancy were avoided by a valid exercise of the option, that tenancy would be destroyed *ab initio*, and no statutory tenancy could spring up in its place.

[FOR THE LANDLORD AND TENANT (RENT CONTROL) ACT, 1949, s. 2 (5), see HALSBURY'S STATUTES, Second Edn., Vol. 13, p. 1097.]

APPEAL by the tenant from an order of His Honour JUDGE SIR HENRY BRAUND, sitting at Willesden County Court, dated Feb. 1, 1950.

A The tenant claimed the return of a premium of £400 which was paid by him to the landlords for the grant of a lease for a term of fourteen years under an agreement, dated Mar. 30, 1949, and executed before June 2, 1949, the date when the Landlord and Tenant (Rent Control) Act, 1949, came into operation. The landlords counterclaimed for avoidance of the lease and for possession on the ground that they had validly exercised the option conferred by the proviso to s. 2 (5) of the Act of 1949. The county court judge gave judgment for the tenant for the return of the premium, and for the landlords for avoidance of the lease and recovery of possession. On appeal by the tenant against the judgment on the counterclaim the principal contention made on his behalf was that the proviso to s. 2 (5) of the Act of 1949 applied only to agreements which had not been performed or, in respect of which, though a premium had been stipulated, the premium had not, in fact, been paid. The facts and the relevant provisions of the Act of 1949 appear in the judgment of ASQUITH, L.J.

M. Waters for the tenant.

L. A. Blundell for the landlords.

C ASQUITH, L.J.: This is a tenant's appeal against a judgment upholding the landlords' counterclaim and granting them an order for possession of a flat let by them to the tenant. The tenant had been awarded £400 on his claim, which was practically uncontested and which is not the subject of appeal.

D On Mar. 30, 1949, the tenant orally agreed to rent a flat from the landlords for a term of fourteen years at a rent of £6 19s. monthly and to pay a premium of £400. He paid £25 of that premium on that date and the balance on Apr. 4, on which day the orally agreed terms, which had been embodied in a receipt given on Mar. 30, were incorporated in a formal lease. Shortly afterwards the tenant took possession and remained in occupation, paying rent, till about January, 1950. The Landlord and Tenant (Rent Control) Act, 1949, which came into operation on June 2, 1949, made, *inter alia*, any demand for payment of premiums in respect of tenancies within the economic limits of the Rent Restrictions Acts illegal in certain cases where the Rent Acts previously in force had not prohibited such payments, for instance, in the case of tenancies of fourteen years and upwards. The Act also made premiums actually paid recoverable. True, the present agreement of tenancy was made and became operative before the Act of 1949 received the Royal Assent, but some of its provisions, notably certain provisions in s. 2, are retrospective, and it is with the possible application of those provisions that we are concerned in this case.

F Section 2 of the Act provides:

G " (1) A person shall not, as a condition of the grant, renewal or continuance of a tenancy to which this section applies, require the payment of any premium in addition to the rent . . . (3) This section applies to any tenancy of a dwelling-house, being a tenancy to which the principal Acts apply, such that when the dwelling-house is let under the tenancy it is a dwelling-house to which the principal Acts apply."

There is no dispute that this flat is a dwelling-house to which the principal Acts apply. By sub-s. (5), which is the most material provision:

H " Where, under an agreement made after Mar. 25, 1949, any premium has been paid which, or the whole of which, could not lawfully be required under the foregoing provisions of this section (or, if the premium was required before the commencement of this Act, which could not lawfully have been required if this Act had then been in force), the amount of the premium, or so much thereof as could not lawfully be required or have been required, as the case may be, shall be recoverable by the person by whom it was paid: Provided that where an agreement has been made since the said Mar. 25

and before the commencement of this Act, and the agreement includes provision for the payment of a premium which could lawfully be required under the enactments hereby repealed but which, if paid in pursuance of the agreement, would be recoverable, wholly or in part, by virtue of the foregoing provisions of this sub-section, the agreement shall, without prejudice to the operation of this section, be voidable at the option of either party thereto."

The question here is: What is the effect on the tenancy of the proviso to sub-s. (5)? The main part of the sub-section enables the tenant to recover on his claim the premium of £400 which he had paid. The landlords in their counterclaim relied on the proviso as entitling them to possession. They claim to have exercised validly the option conferred by the proviso and so to have avoided the tenancy agreement.

By Aug. 16, 1949, the Act having then come into force, the tenant realised that the Act entitled him to repayment of the premium which he had paid, and his solicitor demanded repayment by letter of that date. The landlords, after disputing at first his right to it, later withdrew their opposition, but by Aug. 26 they, in their turn, had realised that the proviso existed and they wrote to the tenant saying, in effect, that, if he recovered his premium, they would avoid his tenancy. On Nov. 3, 1949, the tenant lodged his plaint. Up to January, 1950, the tenant continued to pay, and the landlords continued to accept, the monthly rent. On Dec. 15 the landlords filed their defence and counterclaim, claiming possession. In para. 3 of their counterclaim they purported to exercise the option conferred by the proviso to avoid the agreement. In his reply and defence to counterclaim, the tenant denied that the landlords had any rights under s. 2 (5), and, alternatively, claimed to be entitled to remain in possession as a statutory tenant.

The argument turns entirely on the construction of the proviso to s. 2 (5). The learned county court judge held that the proviso applied to the facts of this case, that it vested in the landlords an option to avoid the tenancy which was validly exercised by them, and that they did not waive their rights by accepting rent, or otherwise. In the court below and in this court the tenant relied in substance on three contentions. He argued, first, that the proviso only applied to agreements which had not in any degree been performed or, at all events, in respect of which, though a premium had been stipulated, the premium had not, in fact, been paid. In the present case, he said, long before the attempted exercise of the option the premium had been paid, the lease had been executed, and possession had been taken. In support of the limited construction for which he contended the tenant relied mainly on the last few words of the proviso to s. 2 (5):

"Provided . . . the agreement includes provision for the payment of a premium which could lawfully be required under the enactments hereby repealed but which, if paid in pursuance of the agreement, would be recoverable, wholly or in part, by virtue of the foregoing provisions of this sub-section . . ."

The words "if paid . . . would be recoverable" must surely mean if it had been paid, and implies that the proviso is limited to cases in which it is not paid. The alternative construction really involves writing in after the words "would be recoverable" some further words, such as "or has been paid and therefore is recoverable," or "whether or not such premium has in fact been paid." No such words are in the proviso. Indeed, as the Master of the Rolls pointed out at one stage of the argument, if the construction contended for by the landlords were right, the draftsman might have saved himself a lot of pains by simply writing "includes provision for the payment of a premium recoverable under the foregoing provisions of this sub-section." The words "which . . . if

paid ... would be recoverable" would then have been a quite unnecessary rigmarole.

- The argument of the tenant assumes that the agreement referred to in the proviso is not a lease which in this case was executed after, and in pursuance of, the precedent oral agreement, but was that oral agreement. It was put to counsel for the tenant that a lease was, *inter alia*, an agreement, hence the proviso may
- A apply to a lease. He countered this successfully, in my view, by pointing out that the lease in this case, even though an agreement, was not an agreement which provided for payment of a premium, a subject on which it was wholly, and, no doubt, advisedly, silent. I agree with counsel that the material agreement in this case was the oral agreement of Mar. 30, the terms of which are set out in the receipt of that date. It was an agreement whereby, in exchange for a
- B premium of £400 to be paid by the tenant, the landlords agreed to give him a lease of fourteen years at the rent of £6 19s. per month.

- The construction for which the tenant contended has another incidental advantage. If the proviso extends beyond executory agreements to agreements in actual operation, or with a premium actually paid, the question arises: At what point in time does the option to avoid the agreement become exercisable?
- C The proviso is silent on this point. Suppose a tenant after paying the premium remained in occupation under a lease for ten years paying rent regularly, could the landlord then suddenly turn round, avoid the agreement, and oust him, or are we forced to say that the right is only exercisable within a reasonable time of some *terminus a quo*, and, if so, from what *terminus a quo*—the passing of the Act or the realisation by the party of his rights? If the right is limited to
- D executory agreements and only subsists so long as they remain executory, then the moment that by payment of the premium or otherwise they are in part performed the option ceases, and everybody knows where he is.

- There is another argument, which I consider merely to put it aside as indecisive, *viz.*, that towards the end of the proviso the words occur, "without prejudice to the operation of this section." In the result those words appear to me to be
- E too obscure to assist either of the rival constructions put forward. Counsel for the landlords suggested that the phrase was inserted to show that if a premium has been paid under an agreement avoided by the proviso, the fact of its avoidance is not to preclude the tenant from recovering his premium. If that was its object, of course, the presence of the words in the proviso is consistent with the suggestion of counsel for the landlords that the proviso applied to cases
- F where the premium had, in fact, been paid as well as to cases where it had not. As my brother JENKINS has pointed out, however, the words might have been inserted for a different purpose. The phrase might mean that if, instead of avoiding the contract, a tenant pays the premium, he is not to be met, when he claims repayment of it, with the argument that avoidance was his only remedy and that he has forfeited his right to recover it back. Therefore, the phrase,
- G according to which of those two views is the true one, is consistent either with the construction of the proviso which limits its application to executory contracts, or with a construction which extends its application to cases where, indeed, the premium has been paid. It remains obstinately neutral and unilluminating. For these reasons, among others, but mainly for the first of them, I am of opinion that the proviso does not apply to the present case where the
- H premium has been paid and the agreement fully executed, and that the learned county court judge was mistaken on this point. Since no option to avoid the tenancy exists except in the event of the proviso applying, this is sufficient to entitle the tenant to succeed.

The second contention of counsel for the tenant, which arises only if the first is wrong, is that the option to avoid the agreement is comparable to, and governed by, the same incidents as the election to which a landlord is put on a "forfeiture"—a breach of covenant by the tenant which entitles the landlord

to re-enter. Among the incidents of a forfeiture is that the right to re-enter is waived if an unequivocal act on the part of the landlord affirms the continued existence of the tenancy, an act done at a time when he knows of the breach of covenant, the commonest instance being unqualified acceptance of rent with such knowledge. Here it is said that the landlords discovered their right under the Act to avoid the tenancy at the latest by Aug. 26, since by then they threatened to exercise that right. Yet they accepted rent not only on Sept. 21 and Oct. 23, but on Nov. 23—that is three weeks after the plaintiff had been issued —and again in December after the counterclaim had been filed, and again in January. If they had an option, it is argued that they waived their right. On the view I take on the first point, that they had no option, it is unnecessary to decide this issue, but if it were necessary I should hesitate to decide it in favour of the tenant. The incidents of this statutory option given both to landlord and tenant by the proviso, and exercisable by either of them irrespective of any wrongful act done by the other, need not, it seems to me, be the same as the incidents which govern the rather narrow specialised rule relating to forfeitures, with their unilateral operation, and the necessity of a breach of covenant to set the process in motion. Those were the sort of considerations which impelled the learned county court judge to reject the tenant's argument under this head, and I think he was right. No doubt, the right to avoid could be waived, but I do not feel it would be waived by, say, the acceptance of a single month's rent after the optionor had discovered his rights as it would be in the case of a forfeiture. True, several months' rent were paid and accepted, but this was mostly at a time when it was quite uncertain whether the landlords would disgorge the premium, and the continued acceptance of rent where the circumstances were in such a fluid state could hardly, I should have thought, amount to an act unequivocally affirming the tenancy and electing not to avoid it. Therefore, I think the second argument of the appellant fails.

By his third contention counsel claims, on the footing that he was wrong on both of the preceding points, that, if his contractual tenancy was avoided by a valid exercise of the option in December, 1949, his statutory tenancy sprang up in its place. This surely cannot have been intended. What would be the use of enabling a party to avoid a tenancy and entitling him, *prima facie*, to say to his tenant: "You must leave," if the automatic result of exercising that option would be to confer on the tenant not only the right to stay on, but a status of comparative irremovability? It should be remembered that no part of s. 2 applies to any premises to which the Rent Restrictions Acts do not apply. Therefore, on the view I am criticising, in every case where the option to avoid could be and was validly exercised by the landlord he would fail to oust the tenant. The Rent Restrictions Acts take away with the left hand what the proviso to s. 2 (5) of the Act of 1949 gives with the right hand. I also think that the learned judge was right in saying that the effect of avoidance of the contractual lease is to destroy it *ab initio* as never having existed. If it never had existed there could be no contractual tenancy, and no statutory tenancy on its cessation, under the proviso. The contractual tenancy is not stated to be determinable on exercise of the option. It is stated to be voidable, and it is entirely destroyed.

For these reasons, I think that the first contention of counsel for the tenant succeeds, and that the appeal should be allowed.

JENKINS, L.J.: I agree and have very little to add. I confess that, as a matter of first impression, I was attracted by the effect given to the proviso by the learned county court judge, and supported before us by counsel for the landlords. In legislation retrospectively enabling one party to a bargain to recover back part of the consideration he gave, although at the time he gave it the bargain was perfectly lawful, one would expect, in fairness to the other party, a provision to the effect that he, being deprived of part of the consideration agreed on, ought at his option to be able to relieve himself of the burden which

he undertook in return for the consideration in question. On those general grounds one might, *prima facie*, have expected the proviso to s. 2 (5) to have given a landlord a right of avoiding the bargain in every case in which a premium for the first time made unlawful by the Act of 1949 became recoverable by virtue of that Act. On reflection, however, one finds that the matter is not so simple as that. If the proviso was enacted in that general form, the result might well be that many an unfortunate tenant who had lawfully and properly paid a premium with a view to securing much needed accommodation would, by the passing of a retrospective enactment undoubtedly designed to protect him, find himself at risk of being evicted with the perhaps wholly inadequate consolation afforded by the right to recover his premium. I have made these prefatory observations because I think they do indicate that the questions of policy involved in the construction of this proviso are not so one-sided as they would at first sight appear to be. A further general consideration is that, as ASQUITH, L.J., has pointed out, the construction of the proviso adopted by the learned county court judge would give rise to extraordinary difficulties as regards the time within which the right of avoiding the agreement was to be exercisable, and as regards the effect of any creation of rights in third parties by way of sub-letting. In particular as regards time, the right would be one to which it would be difficult to put any exact term. It might be exercised, apparently, at a quite indefinite distance of time. There is, therefore, as it seems to me, to put it at the lowest, no general ground for preferring the construction placed on the proviso by the learned county court judge rather than the construction contended for by the tenant. Treating the matter, therefore, simply as a matter of the construction of sub-s. (5) and the proviso thereto, I find myself driven to the conclusion that the proviso does not extend to agreements under which the premium has been actually paid. ASQUITH, L.J., has pointed out the vital words:

“ . . . which, if paid in pursuance of the agreement, would be recoverable, wholly or in part, by virtue of the foregoing provisions of this sub-section.”

It seems to me that those words state as clearly as language can that the premium with which the proviso is dealing is a premium agreed to be paid and not in fact paid. I would add that I think this conclusion is reinforced when one compares the mode of expression used in the proviso with that used in the body of the sub-section. The body of the sub-section is expressed to deal with cases “ where, under an agreement made after Mar. 25, 1949, any premium has been paid,” and it makes any such premiums recoverable. It is dealing with premiums which have been paid. The proviso is framed in an entirely different way. It does not purport to deal with premiums which have been paid; it deals with the case where an agreement has been made since Mar. 25, 1949, and before the commencement of the Act, and the agreement includes provision for the payment of a premium. That seems to me to be a very significant change of language. In view of that change, I think it is really incredible that the proviso should in truth have been intended to refer to cases in which the premium has been paid. If that had been the intention, it could have been achieved with much greater economy of language. Read in conjunction with the body of the sub-section, the proviso makes it plain that cases, in which a premium has been paid having been dealt with in the body of the sub-section, the proviso deals with a special class of case, namely, the case in which an agreement has been made since Mar. 25, 1949, but before the commencement of the Act, and is still an agreement and nothing more. Where there is an agreement under which a premium payable, but not yet paid, would, if paid, be recoverable by virtue of the Act of 1949, the proviso confers the option on either party to avoid the agreement.

For these reasons, in addition to those given by ASQUITH, L.J., I agree that the appeal should be allowed on the first issue.

SIR RAYMOND EVERSHED, M.R.: I am of the same opinion and think that this appeal should be allowed.

The first point (upon which I think counsel for the tenant is entitled to succeed) is one of pure construction of the proviso to s. 2 (5) of the Landlord and Tenant (Rent Control) Act, 1949. Neither counsel for the tenant nor counsel for the landlords, to whom we are indebted for their careful argument, have found anything in the books which would help us by reference to any similar words in any similar statute. The grounds which have impelled me to a conclusion different from that of the learned county court judge have been fully stated by my brethren. I entirely agree with their reasoning and add only that the learned county court judge was affected, and not unnaturally, by what he felt to be a capricious result if the right of the landlord was to depend upon the accident whether a premium had, or had not, been paid. But it is to be remembered that in this branch of the law a substantial distinction has always been recognised between agreements which are purely executory and agreements which have been completed by the grant of a lease or a conveyance. Therefore, if there be any validity in the view that the distinction may work capriciously, it is, at any rate, a distinction which seems to a lawyer to be not unnatural. In my judgment, the appeal should be allowed with the result, as I follow it, that the landlord's counterclaim will stand dismissed.

Appeal allowed with costs; counterclaim dismissed. C

Solicitors: *Matthew Trackman & Co.* (for the tenant); *Arnold Lee & Co.* (for the landlords).

[*Reported by F. GUTTMAN, ESQ., Barrister-at-Law.*]

BISHOP v. CUNARD WHITE STAR, LTD. APPLEBY v. CUNARD WHITE STAR, LTD. THE QUEEN MARY.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Hodson, J.), March 7, 8, 17, 1950.] E

Negligence—Damages—Measure—Expectation of life—Pain and suffering—Effect of devaluation of pound—Deductions from basic sum—Pension—Fatal Accidents Acts, 1846 (c. 93) to 1908 (c. 7)—Law Reform (Miscellaneous Provisions) Act, 1934 (c. 41), s. 1 (1).

Claims for damages under the Fatal Accidents Acts, 1846 to 1908, and the Law Reform (Miscellaneous Provisions) Act, 1934, arising out of a collision during the war between a merchant ship and a warship in 1942 were referred to the admiralty registrar under R.S.C., Ord. 56. The first claim was made by the widow of B., a chief petty officer, aged thirty-nine, on behalf of her child and herself and as administratrix of her husband's estate; and the second was by A., father of a nineteen years old seaman, on his own behalf and as administrator of his son's estate. Objection was entered to the registrar's report on various points concerning the assessment of damages, and it was also contended for the plaintiffs that the discretion of the registrar could not be interfered with by the judge.

HELD: (i) the discretion was the discretion of the judge and not of the registrar, although the judge might properly rely on the skill and experience of the registrar. H

Evans v. Bartlam ([1937] 2 All E.R. 646), followed.

(ii) claims based on the expectation of life must be dealt with in the light of the judgment in *Benham v. Gambling* ([1941] 1 All E.R. 7), and where men in the prime of life were concerned the measure of damages did not vary with the number of years of the allotted span of life which might be said to be in front of each deceased person.

(iii) the devaluation of the pound could not be taken into account as the damages crystallized at the date of the collision.

(iv) no sum could be awarded for pain and suffering in the absence of clear evidence of reasonably prolonged suffering.

Rose v. Ford ([1937] 3 All E.R. 359), *applied*.

A (v) in assessing damages under the Fatal Accidents Acts, 1846 to 1908, the principle to be followed was that enunciated by LORD WRIGHT in *Davies v. Powell Duffryn Associated Collieries, Ltd.* (No. 2) ([1942] 1 All E.R. 657), and the number of years purchase on which the calculation was based must not be materially reduced by consideration of the hazards of a seaman's life in war, which were not conspicuously greater than the risks run by other persons on land.

B (vi) once the basic sum had been ascertained, the necessary deductions must be made from it, and the resulting amount must be apportioned among the family, taking the family as a unit, when claims were made in respect of more than one dependant.

Johnson v. Hill ([1945] 2 All E.R. 272), *followed*.

C (vii) deductions must be made from the starting sum in respect of any sum awarded under the Law Reform (Miscellaneous Provisions) Act, 1934, for loss of the expectation of life; for pain and suffering if there were evidence to show this; for loss of personal effects unless these consisted of articles of which a widow claimant had the use when her husband was at home and continued to enjoy after the death as before; and the rights of women and children to pensions must be taken into account. Sums paid or payable under insurance policies were not deductible by virtue of the Fatal Accidents (Damages) Act, 1908, s. 1. Normally deduction must be made in full if the family interest from stocks and shares and comparable income-producing investments had been accelerated by the death. Where the whole family income was derived from the husband's investments and the widow took the whole estate she had no claim under the Fatal Accidents Acts, 1846 to 1908. Deductions could not be calculated exactly because the starting sum varied in each case.

E (viii) although the damages had to be assessed at the time of the accident in 1942, where there had been delay, as here, and in the meantime pensions which were deductible had been paid, any increases in pension attributable to the higher cost of living since 1942 were not properly deductible pound for pound. In cases where the number of years purchase taken into account in arriving at the starting sum was greater than the number of years in which pension had been paid the amounts paid did not represent the limit of deduction as in such cases there was a reasonable expectation of the continuance of the pension for the unexpired period of the number of years taken.

G (ix) in arriving at the starting sum in the case of B. the registrar rightly took into account the civilian prospects of the deceased who, as a highly skilled craftsman, would, in the normal course, have had many years of remunerative work on discharge from the naval service.

H (x) in the case of A., the dependency was very limited and might never arise in view of the parents' present means, and the starting sum in his case would be reduced from £1,400 to £750.

[AS TO CIVIL RESPONSIBILITY UNDER THE FATAL ACCIDENTS ACTS, 1846 TO 1908, see HALSBURY, Vol. 23, pp. 691-700, paras. 977-988.]

Cases referred to:

(1) *Cooper v. Cooper*, [1936] 2 All E.R. 542 ; Digest Supp.

(2) *Evans v. Bartlam*, [1937] 2 All E.R. 646; [1937] A.C. 473; 106 L.J.K.B. 568; 157 L.T. 311; Digest Supp.

- (3) *Benham v. Gambling*, [1941] 1 All E.R. 7; [1941] A.C. 157; 110 L.J.K.B. 49; 164 L.T. 290; 2nd Digest Supp.
- (4) *Rose v. Ford*, [1937] 3 All E.R. 827; [1937] A.C. 826; 106 L.J.K.B. 576; 157 L.T. 174; *revsg.*, [1936] 1 K.B. 90; 105 L.J.K.B. 21; 154 L.T. 77; Digest Supp.
- (5) *Davies v. Powell Duffryn Associated Collieries, Ltd. (No. 2)*, [1942] 1 All E.R. 657; [1942] A.C. 601; 111 L.J.K.B. 418; 167 L.T. 74; 2nd Digest Supp.
- (6) *Johnson v. Hill*, [1945] 2 All E.R. 272; 173 L.T. 38; 2nd Digest Supp.
- (7) *Baker v. Dalglish Steam Shipping Co., Ltd.*, [1922] 1 K.B. 361; 91 L.J.K.B. 392; 36 Digest 140, 943.

MOTION of objection to the report of the Admiralty registrar.

Following on the collision at sea between the S.S. *Queen Mary* and H.M.S. *Curacoa* in 1942 in which many of the crew of the warship were drowned a large number of claims made by the dependants under the Fatal Accidents Acts, 1846 to 1908, and the Law Reform (Miscellaneous Provisions) Act, 1934, were referred to the Admiralty registrar under R.S.C., Ord. 56. Objection was taken to his report on various grounds in these two cases, which raised points applicable to many others, in order to obtain the ruling of the judge as a guide in further claims. The facts of the two cases considered are set out in the judgment of HODSON, J.

Glyn-Jones, K.C., and Vere Hunt for the plaintiffs.

Nelson, K.C., and Olson for the defendants.

Cur. adv. vult.

Mar. 17. **HODSON, J.**, read the following judgment. These two motions in objection to the registrar's report are brought before the court as raising questions of importance in a large number of claims for damages under the Fatal Accidents Acts, 1846 to 1908, and the Law Reform (Miscellaneous Provisions) Act, 1934. These claims arise from a collision between the defendants' vessel, the S.S. *Queen Mary*, and H.M.S. *Curacoa* on Oct. 2, 1942, in which unfortunately a large number of those on board the warship were drowned. Some of the points taken do not affect the result in the particular cases under consideration, but the court has been asked by the parties to give rulings, where possible, for the assistance of the registrar in the consideration of other claims where such points may affect the ultimate result. The first point taken on behalf of the plaintiffs, that the discretion is that of the registrar and not that of the judge, is not, I think, open to argument, in view of the approval of the decision of the Court of Appeal in *Cooper v. Cooper* (1) by LORD ATKIN in the House of Lords in *Evans v. Bartlam* (2) ([1937] 2 All E.R. 649). Although the discretion is the judge's discretion, he will, however, according to the established practice, not feel compelled to form an independent view on questions of quantum, but will rather rely upon the skill and experience of the registrar who has made his report.

I will deal first with the claim under the Law Reform (Miscellaneous Provisions) Act, 1934. The claims based on loss of expectation of life must be dealt with in the light of the judgment of the House of Lords contained in the opinion of VISCOUNT SIMON, L.C., in *Benham v. Gambling* (3), which may be said to have put a brake on a tendency to award high damages under this head by reducing the damages actually awarded from £1,200 to £200. In considering the age of the victim of the accident VISCOUNT SIMON, L.C., said ([1941] 1 All E.R. 12):

"... the thing to be valued is not the prospect of length of days, but the prospect of a predominantly happy life. The age of the individual may, in some cases, be a relevant factor—for example, in extreme old age the brevity of what life may be left may be relevant—but, as it seems to me,

arithmetical calculations are to be avoided, if only for the reason that it is of no assistance to know how many years may have been lost unless one knows how to put a value on the years. It would be fallacious to assume, for this purpose, that all human life is continuously an enjoyable thing, so that the shortening of it calls for compensation, to be paid to the deceased's estate, on a quantitative basis. The ups and downs of life, its pains and sorrows as well as its joys and pleasures—all that makes up 'life's fitful fever'—have to be allowed for in the estimate. In assessing damages for shortening of life, therefore, such damages should not be calculated solely, or even mainly, on the basis of the length of life which is lost."

In dealing with the particular case, he said (*ibid.*, 13):

"The main reason, I think, why the appropriate figure of damages should be reduced in the case of a very young child is that there is necessarily so much uncertainty about the child's future that no confident estimate of prospective happiness can be made. When an individual has reached an age to have settled prospects, having passed the risks and uncertainties of childhood, and having in some degree attained to an established character and to firmer hopes, his or her future becomes more definite, and the extent to which good fortune may probably attend him at any rate becomes less incalculable."

I think that the right conclusion to draw from this passage is that where men in the prime of life are concerned (as in all the claims arising from this accident) the measure of damages does not vary with the number of years of the allotted span which may be said to lie in front of the deceased persons. I was told that the registrar had expressed the contrary view and that this was reflected in the two cases before me, because C.P.O. Bishop was thirty-nine years of age when he died and Denis Appleby was nineteen and a half, and in the former case he awarded £350 and in the latter case £500. If, therefore, the registrar varied the amount simply because of the difference in age of the two men, I think that he was in error. It does not, of course, follow that the figure in each case must necessarily be the same, and I would not be prepared to say that either of these figures was wrong in itself, or, in particular, that either figure is too high in the light of the judgment of the House of Lords in *Benham v. Gambling* (3). I do not take into consideration the fall in the value of the pound which has occurred since the judgment was given. This, no doubt, would be material if the damages had to be assessed according to the now existing value of the pound, but, since the accident occurred in the year following the House of Lords judgment and thereunder must be approached from the point of view of the time of the accident, when the damage crystalized, this consideration does not materially affect the awards in these cases. In these two cases it makes no difference to the ultimate result whether I alter the figures awarded under this head or not, and I do not propose to make any variation.

I agree with the view taken by the registrar that there is no evidence in these cases to support a claim for damages under the head of pain and suffering. It would be difficult, if not impossible, to ascertain the circumstances in which these men met their death and the length of time that each survived the accident. In the absence of clear evidence of reasonably prolonged suffering there should be no award under this head. I think that this conclusion is consistent with the view taken by the Court of Appeal in *Rose v. Ford* (4), confirmed on this point by the House of Lords. In that case the plaintiff survived the accident for four days, during the greater part of which she was in a state of coma, and damages under this head were fixed at the sum of £20.

The next claim under the heading of the Law Reform (Miscellaneous Provisions) Act, 1934, is that for loss of personal property. The registrar has in each case slightly written down the amount claimed. This, I think, he was entitled

to do, in the light of his knowledge and experience, even though there was no cross-examination of either plaintiff on their affidavits, although it is right to say, as counsel for the plaintiffs contended, that there should not be anything in the nature of a flat deduction in all cases.

In assessing damages under the Fatal Accidents Acts, 1846 to 1908, it is convenient to start with a sum calculated in accordance with the principles enunciated by LORD WRIGHT in *Davies v. Powell Duffryn Associated Collieries, Ltd.* (5), where he said ([1942] 1 All E.R. 665):

"It is a hard matter of pounds, shillings and pence, subject to the element of reasonable future probabilities. The starting point is the amount of wages which the deceased was earning, the ascertainment of which to some extent may depend on the regularity of his employment. Then there is an estimate of how much was required or expended for his own personal and living expenses. The balance will give a datum or basic figure which will generally be turned into a lump sum by taking a certain number of years' purchase. That sum, however, has to be taxed down by having due regard to uncertainties, for instance, that the widow might have again married and thus ceased to be dependent, and other like matters of speculation and doubt."

The number of years purchase is left fluid, but I do not think that that number is to be materially reduced in these cases by consideration of the hazardous nature of the occupation of the deceased men. During the last great war the hazards of life at sea were not conspicuously greater than risks run by many other persons on shore. When the necessary deductions from the starting sum have been made, the resulting total should be apportioned amongst the family, taking the family as the unit, when claims are made in respect of more than one dependant. This practice is in accordance with the decision of the Court of Appeal in *Johnson v. Hill* (6), and should, as a matter of convenient practice, be followed in these cases.

Deductions have to be made in respect of sums awarded under the Law Reform (Miscellaneous Provisions) Act, 1934, for loss of expectation of life, for pain and suffering, and also for loss of personal effects, unless (for example) these consist of articles of which a widow claimant would have had the use when her husband was at home. In other words, personal effects are not automatically to be deducted pound for pound any more than the value of the deceased's estate should be so deducted. The estate may consist in the main of a house and furniture, of which the widow claimant continues to enjoy the use after the death as before, and no deduction will be made in this respect. Sums paid or payable under policies of insurance are excluded from account by the Fatal Accidents (Damages) Act, 1908. Where stocks and shares and comparable income-producing investments are concerned and the probable family interest is thereby accelerated, the deduction will normally be made in full. To take the extreme case where the whole family income is derived from the husband's investments, the widow who takes his whole estate on his death will have no claim under the Fatal Accidents Acts, 1846 to 1908. The starting sum will in each case be an inexact sum and exactly calculated deductions cannot normally be made. Damages for loss of expectation of life will be deducted pound for pound, but in their essence are themselves inexact sums. The rights of widows and children to pensions must be taken into account. In *Baker v. Dalgleish Steam Shipping Co., Ltd.* (7) the principle is stated shortly by SCRUTTON, L.J. ([1922] 1 K.B. 372):

"Just as in assessing the loss by the death the probability of voluntary contribution destroyed by the death of the contributor may be included to swell the claim, so the probability of voluntary contribution bestowed in consequence of the death may be used to reduce the claim by showing what loss the claimant has in fact sustained by the death."

When the assessment of damage, as here, has been delayed, it is impossible to shut one's eyes to what has actually happened by way of payment of pensions and other sums of a like nature, since, although the damage is to be assessed as at the time of the accident, what was then uncertainty has been turned into certainty, in so far as money has been received by claimants. The total payment received is again, however, not a matter of exact deduction, since pension rates have been raised since the time of the accident to meet the increased cost of living. Accordingly, the starting total being based on 1942 figures, increases attributable to the higher cost of living since that date are not properly deductible pound for pound. On the other hand, the amounts actually paid do not represent the limit of deduction in cases where the number of years purchase taken into account in arriving at the starting sum is greater than the number of years in respect of which pension has been paid. There is in these cases a reasonable expectation of the continuance of the pension for the unexpired period of the number of years taken. Pensions are subject to variation in the light of awards given, but the present practice is set out in a letter from the Treasury Solicitor, which was before the registrar. This, in the case of a widow, is to disregard the first ten per cent. of the award, or £50, whichever is the greater, and to convert the balance of the award into a notional annuity which is deducted from the pension, but so that in certain cases the minimum pension is fixed at 30s. a week and in the others at 20s. a week.

Applying these considerations to the two cases under review, I will first deal with the case of C.P.O. Bishop. I quote from the registrar's report.

"At the time of his death C.P.O. Bishop was thirty-nine years of age. He had joined the Navy on Jan. 24, 1920, intending to make it his career, and, had he survived, he would have become entitled to a pension in 1943. As a result of the death of her husband, the widow was compelled to work to supplement her pension, and her son left school earlier than he would otherwise have done, in the praiseworthy desire to ease the burden cast on his mother. The mother got work as a telephonist at £4 a week, and the son, at the age of fifteen and a half entered the bakery trade as a learner at £2 9s. 0d. a week, of which he contributed £1 a week until his marriage in May, 1949. The contribution of the deceased to his wife and son was about £6 a week, or, roughly, £300 a year. On retirement at the end of the war, the deceased, who was a highly skilled craftsman with a very creditable record in the Navy (apart from his technical efficiency he was mentioned in despatches), would certainly have got employment ashore with a high rate of pay in addition to his pension. He would have been only forty-two at the end of 1945, and, with his qualifications, would, in the normal course, have had many years of remunerative work before him. His income would have been such that his wife might look forward to receiving much more than £6 a week."

The registrar considered that an award might be based on fifteen years at £5 a week, that is to say, £1 a week less than the contribution he had made to the family. Counsel for the defendants conceded that, if I accepted the evidence of the widow that contribution had been made at the rate of £6 a week, it would be reasonable to take a number of years purchase (say twelve) of this figure. This number would lessen *pro tanto* the amount of anticipated pension to be taken into consideration, but would not materially affect the starting sum. Counsel for the plaintiff argued that the starting sum was itself too low. He contended that the approach based on the answer to the question: "What contribution did the deceased make?" is wrong, and submitted that a sum of money should be estimated which would enable the widow to maintain herself in that state of life to which she was used or which she might expect. He argued in this connection that the starting sum did not differentiate sufficiently the present case from the common one of a wage earner without any

reasonable prospect of improving his position. It appears, however, from the language of the report which I have read that the registrar took into account the civilian prospects of the deceased, and I think that this consideration is properly reflected in the starting sum of £3,750 reached by him. The prospect of higher wages on shore has to be discounted to some extent by the greater expense which has to be faced there as compared with the lesser expense incurred in a seafaring life. Moreover, high wages are in themselves discounted to a great extent by the incidence of income tax. I see no reason to disagree with the starting sum of £3,750. From this amount deductions have to be made in respect of pension. Although the figure of £713 representing pension actually paid, including, as it does, cost of living increases, is too large to be deducted in full, yet (taking twelve years purchase) payments of reasonably anticipated pension at 30s. a week, to be made in the four years still remaining, the £76 pension paid in respect of the son, and the school fees paid by the Ministry of Pensions, which I was informed amounted to £110 in all, should be taken into consideration. I, therefore, deduct £1,000 in this respect in place of the two sums of £713 and £76 deducted by the registrar. I agree with the deduction proposed of £85, the amount awarded as special damages, and of £350, the amount awarded in respect of loss of expectation of life under the Law Reform (Miscellaneous Provisions) Act, 1934. There remains the question of the deduction, if any, to be made in respect of the estate of the deceased, which was taken as £100. This matter has been clarified by a letter dated Feb. 21, 1950, written after the date of the report and attached to the record, which shows that the deceased's estate was of the value of £761. Since the estate consisted almost entirely of a freehold house, where he lived with his wife, and a benefit society death payment, excluded by the Fatal Accidents (Damages) Act, 1908, no deduction should be made under this head. I, therefore, substitute £2,315 for the £2,502 recommended by the learned registrar, to be apportioned between the widow and the infant son as follows: To the widow, £2,155: to the son, £160.

In the case of Denis Appleby, the defendants do not deny that the plaintiff is entitled to some damages under the Fatal Accidents Acts, 1846 to 1908, but contend that the dependency is very limited in his case and may never arise, having regard to the circumstances of the family, including the existence of another son, who is a potential contributor, and the fact that the two parents were in receipt of a pension adequate to their needs. On the other hand, it is contended that the question is one of mere quantum, that the deceased had made a high contribution to his parents, and that the amount awarded was fairly based on the prospects of the particular youth. The facts are summarised in the report of the registrar as follows:

"Denis Appleby, who was born on May 16, 1923, was serving as an ordinary seaman at 3s. 6d. per day on board H.M.S. Curacoa and lost his life as a result of the aforesaid collision on Oct. 2, 1942, and was thus at his death nineteen and a half years old. He had been educated at the Henry Mellish County Secondary School, Nottingham, and, in July, 1939, had passed his school certificate examination. Thereafter he entered into the employ of the Midland Bank as a clerk, and at the time of his call-up to the Navy was receiving £97 10s. 0d. per annum. He lived at home with his parents and out of his salary contributed £72 per annum to the household. Before being called up he had passed part of the Institute of Bankers examination. Had he survived he would now be receiving a salary of about £400 per annum. The plaintiff, the father of the deceased, had been in the employ of the Post Office at a gross salary of £525 a year until he retired on Dec. 21, 1946, on a pension of £270 per annum. This pension is his sole means of support; he has no naval pension in respect of the death of his son. The plaintiff is now 62 years old and his wife 67. At the time of the death of their son the plaintiff and his wife were not dependent upon

him, but they relied upon his assurance to help them financially in their old age."

This is, as the registrar found, a problem of difficulty, but I have come to the conclusion on consideration of these facts and estimates that the amount of estimated contribution is so much too high that the court should vary the figure recommended in the report. The registrar has not, I think, sufficiently taken into account the fact that, if the deceased man were living at home, he would be making part of his contribution in respect of his own keep. If, on the other hand, he were living away from home, even unmarried, his contribution would not be expected to be nearly as high as £150 a year out of his total anticipated income. I have come to the conclusion, particularly having regard to the limited nature of the dependency, that the starting sum of £1,400 in this case should be reduced to £750. From this sum of £750 must be deducted the sums of £500, £147 and £42 referred to in the report, making a total award under the Fatal Accidents Acts of £61. With the variations indicated, I confirm the reports in each case. The costs of the motions will be the plaintiffs' in each case.

Reports confirmed according to the judgment, with interest from the date of the registrar's award. Plaintiffs to have costs of the motions.

Solicitors: *Botterell & Roche* (for the plaintiffs); *Hill, Dickinson & Co.* (for the defendants).

[Reported by R. HENDRY WHITE, Esq., Barrister-at-Law.]

BLUSTON & BRAMLEY, LTD. v. LEIGH (EULER AND ANOTHER, THIRD PARTIES).

[KING'S BENCH DIVISION (Morris, J.), May 4, 1950.]

Company—Winding-up—Rights of execution creditor—Goods seized by sheriff, but execution not completed, before commencement of winding-up—Notice of meeting of creditors served on sheriff within fourteen days of sale of goods—Notice of meeting at which resolution for voluntary winding-up was to be proposed—Resolution passed for compulsory winding-up—Subsequent order for compulsory winding-up—Duties of sheriff—Companies Act, 1948 (c. 38), s. 325 (1), s. 326 (2).

The plaintiffs were judgment creditors of the debtor company for the sum of £215 12s., and on July 16, 1948, a sheriff executed a warrant under a writ of *fieri facias*, issued by the plaintiffs against the company. On July 28 a petition to wind-up the company was presented by another creditor of the company, but the sheriff received no notice of the petition until Sept. 1. On Aug. 7 he sold some of the goods which he had seized, realising about £500. On Aug. 19 he received a letter stating: "In reference to s. 326 (2) of the Companies Act, 1948, we enclose notice of meeting of creditors of the [debtor] company under s. 293 of the said Act." The notice, which was expressed to be sent pursuant to s. 293, stated that the meeting (which was to take place on Sept. 17) was to be held for the purposes mentioned in s. 294 and s. 295 of the Act. On Sept. 17 an extraordinary general meeting of the company was held and was adjourned until after the meeting of the creditors so as to ascertain their wishes. When the extraordinary general meeting of the company was resumed, a resolution was passed "that the company be . . . wound-up in compulsory liquidation, and that the directors shall take every action possible to expedite the hearing of the petition in compulsory liquidation issued

against the company." On Oct. 18 an order for the winding-up of the company was made on the petition of July 28, and in January, 1949, the sheriff paid to the liquidator sums recovered from the company as a result of several executions. In an action by the plaintiffs against the sheriff to recover part of the proceeds of the executions as representing the amount of their judgment debt and costs, the sheriff contended that, under s. 326 (2) of the Companies Act, 1948, it was his duty to hand over to the liquidator the money which he had received, and he brought in the liquidator and the company as third parties. The plaintiffs contended that the requirements of s. 326 (2) had not been satisfied, but the liquidator contended that, if s. 326 (2) did not apply, the sheriff was entitled to hand the money over to him under s. 325 (1).

HELD: (i) in view of the references to s. 293, the notice served on the sheriff on Aug. 19, together with the covering letter, contained a sufficient notice of the fact that a meeting had been called at which a resolution for the voluntary winding-up of the company was to be proposed, within s. 326 (2) of the Act of 1948, but the sub-section required (a) that the resolution which was subsequently passed should be a resolution for voluntary winding-up and not a resolution for compulsory winding-up, and (b) that, where there had been a notice of a petition, it should be followed by an order for winding-up, and, where there had been a notice of a meeting, it should be followed by a resolution for voluntary winding-up. Therefore, as the meeting which had been called to pass a resolution for voluntary winding-up had passed a resolution for compulsory winding-up, the requirements of the sub-section had not been complied with and the sheriff was not authorised to pay the money to the liquidator under s. 326 (2).

(ii) as the execution had not been completed at the commencement of the winding-up on July 28 (when the petition was presented) under s. 325 (1), the plaintiffs were not entitled to retain the benefit of the execution as against the liquidator; as the proceeds of the execution were still in the hands of the sheriff on Oct. 18, when the winding-up order was made, the effect of s. 325 (1) was to divest the plaintiffs of their right to claim from the sheriff the benefit of the execution and to superimpose statutory provisions on the duties laid on the sheriff by the writ which was directed to him; and, accordingly, under s. 325 (1) he was entitled to hand over the money to the liquidator.

[AS TO EFFECT OF WINDING-UP ON RIGHTS OF EXECUTION CREDITORS, see HALSBURY, Vol. 5 (1949 Edn.), pp. 778-780, paras. 1278-1280; and FOR CASES, see DIGEST, Vol. 10, pp. 964-967, Nos. 6616-6640.

FOR THE COMPANIES ACT, 1948, s. 325 and s. 326, see HALSBURY'S STATUTES, Second Edn., Vol. 3, pp. 707, 708.]

Cases referred to:

- (1) *Bower v. Hett*, [1895] 2 Q.B. 337; 64 L.J.Q.B. 772; 73 L.T. 176; 5 Digest 816, 6937.
- (2) *Morland v. Pellatt*, (1829), 8 B. & C. 722; 3 Man. & Ry. K.B. 411; 7 L.J.O.S.K.B. 54; 108 E.R. 1211; 21 Digest 508, 833.
- (3) *Re Greer*, [1895] 2 Ch. 217; 64 L.J.Ch. 620; 59 J.P. 441; *sub nom.*, *Re Grier*, 72 L.T. 865; 21 Digest 619, 2069.
- (4) *Latter v. Jukes and Page*, [1927] 1 K.B. 17; 96 L.J.K.B. 137; 136 L.T. 177; Digest Supp.

ACTION for money had and received.

The plaintiffs, who were judgment and execution creditors of a limited company, claimed payment of sums realised on the levy of the execution by the defendant, the sheriff. The sheriff said that he had paid over the proceeds

of the execution to the liquidator of the debtor company in accordance with the requirements of the Companies Act, 1948, s. 326 (2), and he brought in the liquidator and the company as third parties. For the third parties it was contended that, even if s. 326 (2) of the Act did not apply, under s. 325 (1) the plaintiffs were not entitled to claim the benefit of the execution, as it had not been completed before the commencement of the winding-up. The plaintiffs contended (i) that s. 326 (2) did not apply, as the requirements of the subsection had not been satisfied, and (ii) that s. 325 did not affect the duties of the sheriff, but dealt merely with the position of execution creditors as against the liquidator of the company. The facts appear in the judgment.

Aronson, K.C., and Panto for the plaintiffs.

Boileau for the sheriff.

Pennyquick, K.C., and J. H. A. Sparrow for the third parties.

MORRIS, J.: The plaintiff company, Bluston and Bramley, Ltd., claim the sum of £215 12s. from the defendant as money had and received. The defendant was at all material times the sheriff of the county of Leicester. The plaintiffs claim that the sheriff received money which he was obliged to pay over to them in their capacity as judgment creditors and execution creditors.

The parties have agreed on a statement of facts, related to the appropriate dates. On July 9, 1948, the plaintiffs obtained judgment against Fred. J. Bailey (Furniture), Ltd., for £215 12s., including costs. Three days later the plaintiffs issued a writ of *fiat facias*, and on July 16 the sheriff entered into possession and executed the warrant, selling at a later date certain goods which he received. On July 28 J. Goldberg (Furniture), Ltd., presented a petition to wind-up the debtor company on the ground that it was insolvent and unable to pay its debts. On Aug. 7 the sheriff sold by auction certain effects of the debtor company, realising just under £500. On Aug. 19 a notice was served on the sheriff of a meeting of creditors of the debtor company under the Companies Act, 1948, s. 293. The meeting was convened for Sept. 17, 1948. On Sept. 1 a notice was served on the sheriff that a petition to wind-up the company had been filed on July 28. On Sept. 17 there was an extraordinary general meeting of the members of the debtor company which, after a general report, was adjourned until half an hour after the conclusion of the meeting of creditors to be held at eleven o'clock, for the wishes of the creditors to be ascertained so that effect might be given to them. The meeting of creditors was informed of the position in regard to the petition for compulsory liquidation, and a resolution was passed. The extraordinary general meeting of the company was resumed an hour later, at twelve o'clock, and a special resolution was passed in these terms:

"That the company cannot, by reason of its liabilities, continue its business, and that it is advisable to wind-up and that the company be therefore wound-up in compulsory liquidation, and that the directors shall take every action possible to expedite the hearing of the petition in compulsory liquidation issued against the company and the appointment of a provisional liquidator therein."

On Oct. 18, an order was made in the Chancery Division of the High Court to wind-up the company on the petition presented by J. Goldberg (Furniture), Ltd., on July 28.

On Jan. 4, 1949, the sheriff paid to the liquidator of the company a sum of over £1,233, which represented the sums recovered by the sheriff as a result of several executions. The writ in this action was issued on Feb. 16, 1949, and was served on Mar. 16, 1949. The writ is indorsed as a claim for money had and received, and in the statement of claim it is pleaded that the sheriff, by his officer, seized and sold goods of the debtor company and realised the sum of £215 12s., and that he had not brought the money into court, as required

by the writ of *fieri facias*, nor had he paid the money or any part thereof to the plaintiffs. The sheriff says that he acted properly when he handed over the money which he had received to the liquidator of the company. He has issued a third party notice against the liquidator and the company in liquidation, and he claims that, if he is held liable in the action to the plaintiffs, he is entitled to relief as against the liquidator and the company, and he claims certain declarations. The case has proceeded so far only in regard to the position as between the plaintiffs and the sheriff, but, pursuant to the order which was made in the third party proceedings, I invited counsel for the third parties to address me with regard to that part of the litigation.

Much of the argument has been directed to a consideration of the words of the Companies Act, 1948, s. 326 (2), which reads:

"Subject to the provisions of sub-s. (3) of this section, where under an execution in respect of a judgment for a sum exceeding £20 the goods of a company are sold or money is paid in order to avoid sale, the sheriff shall deduct the costs of the execution from the proceeds of the sale or the money paid and retain the balance for fourteen days, and if within that time notice is served on him of a petition for the winding-up of the company having been presented or of a meeting having been called at which there is to be proposed a resolution for the voluntary winding-up of the company and an order is made or a resolution is passed, as the case may be, for the winding-up of the company, the sheriff shall pay the balance to the liquidator, who shall be entitled to retain it as against the execution creditor."

Counsel for the plaintiffs submits that that sub-section has not been complied with, and, therefore, the sheriff was not justified or authorised in paying the balance to the liquidator. Counsel contends (i) that, within the fourteen days, there was no notice of a petition for the winding-up of the company; (ii) that there was no notice "of a meeting having been called at which there is to be proposed a resolution for the voluntary winding-up of the company," within the sub-section, and (iii) that, if there was a notice of a meeting, it was not followed by a resolution for winding-up, and that the words in the sub-section, "and an order is made or a resolution is passed, as the case may be," mean that, if a notice of a meeting is served, then there must also follow a resolution at such a meeting. He contends that the sub-section is not satisfied if there is a notice of a meeting, and that notice is followed, not by a resolution at a meeting, but by an order for compulsory winding-up. Therefore, he submits, the sheriff does not bring himself within the wording of s. 326 (2), and, accordingly, he does not justify his action in handing over to the liquidator.

In *Bower v. Hett* (1), LORD RUSSELL OF KILLOWEN, C.J., said ([1895] 2 Q.B. 56):

"In some cases the judges have said that the moment the sheriff is paid the amount of the judgment debt he becomes a debtor to the execution creditor. For instance, in *Morland v. Pellatt* (2), LITLEDAL, J., said in the course of the argument, 'When the sheriff received the money, he became liable to an action, for money had and received, by the plaintiff in that suit.' That is a statement to the effect that when once the money was paid, a right of action was vested in the judgment creditor."

It was not submitted, either by counsel for the sheriff or by counsel for the third parties, that that statement was other than an appropriate statement of the position. If, therefore, the sheriff was not right in handing over to the liquidator, the form of action here adopted, *viz.*, a claim for money had and received, appears to be justified.

Counsel for the sheriff has taken three points. He submits (i) that, within fourteen days of the date when the goods were taken in execution, notice was

served on him "of a meeting having been called at which there is to be proposed a resolution for the voluntary winding-up of the company," within s. 326 (2); (ii) that a resolution was passed; and (iii) that, whether or not a resolution was passed, there was an order for compulsory winding-up, and the words, "as the case may be," mean no more than that, if either an order is made or a resolution is passed, then the section is to apply—in other words, that the phrase, "as the case may be," merely means "in the events that happened."

These submissions of counsel for the sheriff were adopted by counsel for the third parties, who also made a further submission, based on s. 325 (1) of the Act, which reads:

"Where a creditor has issued execution against the goods or lands of a company or has attached any debt due to the company, and the company is subsequently wound-up, he shall not be entitled to retain the benefit of the execution or attachment against the liquidator in the winding-up of the company unless he has completed the execution or attachment before the commencement of the winding-up: Provided that . . . (c) the rights conferred by this sub-section on the liquidator may be set aside by the court in favour of the creditor to such extent and subject to such terms as the court may think fit."

There having been an order for the compulsory winding-up of the company on Oct. 18, the commencement of the winding-up was on July 28, the date on which the petition was presented. The plaintiffs had not completed execution before July 28, and, therefore (counsel for the third parties submits), under s. 325 the plaintiffs are not entitled to retain the benefit of the execution as against the liquidator. Counsel contends that, if the proceeds of execution were still in the hands of the sheriff on Oct. 18, the sheriff was obliged by operation of law to account to the liquidator, as the effect of s. 325 (1) is that the right which previously vested in the plaintiffs, as execution creditors, became divested, and the sheriff's duty then was to account to the liquidator, and not to the execution creditors. Counsel for the third parties referred to *BUCKLEY ON THE COMPANIES ACTS*, 12th ed., p. 665, where a note to s. 326 (2) is in these words:

"The execution creditor's right to the fruits of the execution is not contingent. It is vested, but liable to be divested by the liquidation."

The authority cited by the learned editor in support of that note is *Re Greer* (3), in which *CHITTY, J.*, said ([1895] 2 Ch. 221):

"The result of the authorities, apart from that enactment [the Bankruptcy Act, 1890] is that the sheriff holds the money to the use of the judgment creditor, and is liable to be sued in an action for money had and received. For that proposition it is sufficient to cite the case of *Morland v. Pellatt* (2). By the enactment referred to the sheriff is directed to retain the money for fourteen days; and in the event of bankruptcy supervening the execution creditor loses his right to the money. The effect is to place a temporary embargo or stop on the money. If more technical language is requisite, I say the execution creditor's right to the money is vested, but liable to be divested. His right to the money is not a contingent right. In this case no bankruptcy supervened. The previous bankruptcy of the execution creditor Fanshawe had been annulled."

Counsel for the third parties concedes, that, if s. 326 (2) does not apply to the facts of the case, between Aug. 21 (*i.e.*, after fourteen days from Aug. 7, when the sheriff sold some of the effects taken in execution from the debtor company) and Oct. 18 (when the compulsory winding-up order was made), the sheriff would have been obliged to account to the plaintiffs for the sum of

£215 12s., but he submits that, after Oct. 18, the right which had been vested in the plaintiffs was divested, and, thereafter, it was the duty of the sheriff to pay the money to the liquidator. Counsel for the plaintiffs, on the other hand, contends that s. 325 does not deal with the duties of the sheriff, but that the following section, s. 326, does so, and s. 325 (1) merely says that a creditor shall not be entitled to retain the benefit of the execution against the liquidator. Therefore, he submits, the sheriff is liable in this action to account to the plaintiffs. Section 325 (1), he says, would apply only after the sheriff had accounted to the plaintiffs, and, under proviso (c) to the sub-section, the plaintiffs could apply to the court to set aside the rights conferred on the liquidator.

In my judgment, the effect of s. 325 (1) is to negative the title of the plaintiffs to this money and to superimpose statutory provisions on the duties laid on the sheriff by the writ which was directed to him. Assuming for this part of the case that s. 326 (2) does not apply, the title of the plaintiffs was divested on Oct. 18 by operation of law, and, as a result, any rights which were vested in them until Oct. 18 to claim from the sheriff the benefit of the execution were also divested by the operation of s. 325 (1). It follows, therefore, that the sheriff was entitled to hand over the money to the liquidator.

As I have formed that view, it would be sufficient if I did not proceed to deal with the arguments presented by counsel for the sheriff, but I think it right that I should state my views on the three points which he submitted, as they have been fully dealt with. The first point is whether, within the fourteen days, there was a notice to the sheriff "of a meeting having been called at which there [was] to be proposed a resolution for the voluntary winding-up of the company." The notice that the sheriff received was as follows. On Aug. 19, he received a letter, dated Aug. 18, and addressed to the sheriff's officer, which begins:

"Dear Sir, *Fred J. Bailey (Furniture), Ltd.*: In reference to s. 326 (2) of the Companies Act, 1948, we enclose notice of meeting of creditors of the above company under s. 293 of the said Act."

It is to be seen that the letter begins by making a reference to s. 326 (2). The enclosure is headed:

"Companies Act, 1948, Creditors' voluntary winding-up: Notice of first meeting of creditors—*Fred J. Bailey (Furniture), Ltd.* Notice is hereby given pursuant to s. 293 of the Companies Act, 1948, that a meeting of the creditors of the above-named company will be held at the company's registered offices . . . for the purposes mentioned in s. 294 and s. 295 of the said Act."

The company's address is given, with a statement of the time and date of the meeting. Four sections of the Act have, therefore, been referred to, s. 326 (2) and ss. 293, 294 and 295. Section 293 (1) of the Act is in these terms:

"The company shall cause a meeting of the creditors of the company to be summoned for the day, or the day next following the day, on which there is to be held the meeting at which the resolution for voluntary winding-up is to be proposed, and shall cause the notices of the said meeting of creditors to be sent by post to the creditors simultaneously with the sending of the notices of the said meeting of the company."

In my judgment, the actual notice served, together with the letter, contained a sufficient notice of the fact that a meeting had been convened at which a resolution was to be proposed for the voluntary winding-up of the company. Therefore, I think that the first submission of counsel for the sheriff is correct.

His next submission was that a resolution was passed, within the meaning of the words in s. 326 (2):

" . . . and an order is made or a resolution is passed, as the case may be, for the winding-up of the company . . . "

It seems to me that that must mean a resolution for the voluntary winding-up of the company. I have already referred to the resolution of the company which was passed on Sept. 17. Counsel for the sheriff referred to s. 278 (1) which begins:

A "A company may be wound up voluntarily . . . (c) if the company resolves by extraordinary resolution to the effect that it cannot by reason of its liabilities continue its business, and that it is advisable to wind-up."

In my judgment, it cannot be said that the resolution which was passed on Sept. 17 was a resolution for the voluntary winding-up of the company, and I do not consider that the second submission of counsel for the sheriff is correct.

B The third point which he submitted, and which, if it were correct, would be sufficient for him if he is right on the first point, although he is wrong on the second point, is that the phrase, "as the case may be," merely means "in the events which happened." The construction of these words is, in my judgment, by no means easy, but I must endeavour to give the reasonable and fair meaning to them in their context, irrespective of what might be the result, and I have come to the conclusion that the argument of counsel for the sheriff, attractive though it was, does not prevail. It seems to me that no meaning is given to the words, "as the case may be," if his submission is correct. The result may be a little strange. There was, in fact, a petition, and there was, in fact, a meeting "at which there [was] to be proposed a resolution for the voluntary winding-up of the company." Notice was given of the meeting, but notice was not given of the petition, and it was the petition which became the precursor of what later happened, *viz.*, the making of a compulsory winding-up order. It would, therefore, seem that the spirit of s. 326 (2) was fulfilled, when there was notice of the meeting and when afterwards an order for compulsory liquidation was made, but, with some reluctance, I have come to the conclusion that the words, "as the case may be," in s. 326 (2) do not have the meaning ascribed to them by counsel for the sheriff, and that the sub-section contemplates that, where there has been a notice of a petition, it should be followed by an order, and, where there has been notice of a meeting it should be followed by a resolution for voluntary winding-up. As a result of these conclusions, it would appear that the effect of s. 326 (2) is somewhat different from what was possibly intended, particularly in view of some of the observations made in the Court of Appeal by LORD HANWORTH, M.R. ([1927] 1 K.B. 29) and by SCRUTTON, L.J. (*ibid.*, 31) in *Latter v. Jukes and Page* (4), but these are words in a statute which I must construe, and I have felt obliged to give them the meaning that I have stated. For these reasons, I do not consider that the submission of counsel for the sheriff on the third point is correct, but, for the reasons which I have already stated, under s. 325 (1) of the Act the sheriff was, in my judgment, authorised to hand over the money to the liquidator, and, therefore, the claim in this action fails.

Judgment for the defendant with costs against the plaintiffs. Judgment for the third parties with costs against the defendant, but defendant to recover from the plaintiffs costs of third parties in excess of his own costs.

H Solicitors: Ronald Fletcher & Co. (for the plaintiffs); Field, Roscoe & Co., agents for Freer, Bouskell & Co., Leicester (for the sheriff); Lucien Fior (for the third parties).

[Reported by F. A. AMIES, ESQ., Barrister-at-Law.]

Re COHEN (A BANKRUPT). *Ex parte* THE BANKRUPT v.
INLAND REVENUE COMMISSIONERS AND ANOTHER.

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Asquith and Jenkins, L.J.J.),
April 28, May 2, 3, 1950.]

*Bankruptcy—Rescission of receiving order—Application for rescission after expiration
of time allowed for appeal—Circumstances in which application entertained—
Bankruptcy Act, 1914 (c. 59), s. 108 (1).*

The bankrupt, a French national domiciled in France, came to England in 1940 and remained here until 1949. During that period he carried on businesses in England and incurred a considerable liability for income tax. In March, 1949, when he was carrying on business in this country and was being pressed for payment of taxes, he left England and went to his home in France. On Oct. 3, 1949, in proceedings before the registrar, as a result of which an order of adjudication and a receiving order were made, it was alleged by the petitioning creditors, the Inland Revenue Commissioners, that the bankrupt departed out of England with the intent to defeat or delay his creditors, within the meaning of the Bankruptcy Act, 1914, s. 1 (1) (d). Affidavit evidence was admitted at the hearing which was clearly hearsay, and on Nov. 17, 1949, application was made under s. 108 (1) of the Act of 1914 to have the receiving order rescinded. It was conceded that, in reaching its decision on the application, the court was not bound exclusively by the material which was properly before it on Oct. 3, 1949.

HELD: although the jurisdiction of the court under s. 108 (1) to rescind, review or vary its orders was not limited in point of time, nevertheless, if the application under s. 108 (1) was in substance to be regarded as an appeal against the original order and was preferred at a date when, if it had been an appeal under s. 108 (2), it would have been out of time, the court would not exercise its jurisdiction unless it was satisfied that there were special circumstances in the case which would make it proper to hear it, treating it as an appeal out of time. Even assuming in favour of the bankrupt that the court ought to exercise its jurisdiction in the present case, although it might well be that the fact that a foreigner had left England would not by itself be sufficient to raise the inference that he intended to defeat or delay his creditors, the evidence properly before the court in October, 1949, coupled with the additional evidence adduced, left no doubt that the bankrupt had that intention in March, 1949, and, therefore, the application ought to be dismissed.

Per SIR RAYMOND EVERSLED, M.R.: There is no special rule which entitles a petitioning creditor to depart, in seeking to establish his case, in any way from the ordinary rules of evidence. Unless the rules of evidence are properly adhered to, the whole justification for the use of affidavit evidence, instead of oral evidence, is destroyed at a blow.

[AS TO ABSENCE OF DEBTOR FROM COUNTRY, see HALSBURY, Hailsham Edn., Vol. 2, pp. 27-30, paras. 37-40; and FOR CASES, see DIGEST., Vol. 4 pp. 71-74, Nos. 606-633.]

Cases referred to:

- (1) *Ex parte Brandon, Re Trench*, (1884), 25 Ch.D. 500; 53 L.J.Ch. 576; 50 L.T. 41; 4 Digest 74, 632.
- (2) *Ex parte Goater, Re Finney*, (1874), 30 L.T. 620; 4 Digest 72, 611.
- (3) *Ex parte Brown, Re Jeavons*, (1874), 9 Ch. App. 304; 43 L.J.Bey. 105; 30 L.T. 108; 4 Digest 538, 4955.
- (4) *Ex parte May, Re May*, (1884), 12 Q.B.D. 497; 50 L.T. 744; 4 Digest 538, 4947.
- (5) *Ex parte Ritso, Re Ritso*, (1883), 22 Ch.D. 529; 52 L.J.Ch. 535; 48 L.T. 376; 4 Digest 538, 4956.

APPEAL by the bankrupt from an order of Mr. Registrar CUNLIFFE, dated Jan. 31, 1950, refusing an application made under the Bankruptcy Act, 1914, s. 108 (1), to rescind an adjudication and receiving order made on Oct. 3, 1949.

Aronson, K.C., and *Muir Hunter* for the bankrupt.

Pennyquick, K.C., and *A. F. M. Berkeley* for the Inland Revenue Commissioners and the Official Receiver.

- A SIR RAYMOND EVERSLED, M.R.:** If this case is not in other respects of any great public interest, it has, at any rate, served usefully to ventilate one matter which is not without importance. In the course of the case, our attention has been drawn to the form of the affidavit supporting the petition, sometimes called, and, I think, unfortunately called, the common form affidavit, and also to the further affidavits sworn on behalf of the Inland Revenue Commissioners, who were the petitioning creditors, which consisted, in truth, of statements almost entirely of a hearsay character and not admissible in evidence. As regards the form of affidavit in support of the petition, it appears that steps have now been taken which will avoid the use in inappropriate cases of the present form, which I think is enshrined as a statutory form annexed and appended to the Bankruptcy Rules, 1915. Counsel for the petitioning creditors has not contended that the way in which the evidence was presented when the matter originally came before the court for adjudication, that is, by the recital of hearsay statements, was justifiable. There is no special rule which entitles a petitioning creditor to depart, in seeking to establish his case, in any way from the ordinary rules of evidence. One can see that there is a temptation, to save trouble or voluminous documentation, to use a form which the rules of evidence do not justify, but I think it is desirable that the court should state quite plainly that the rules of evidence must be properly observed. To depart from them may result in a serious injustice being done to some individual who might suffer adjudication, or the making of a receiving order, on material which turns out afterwards to be quite incorrect, and which should never have been accepted in the first instance. I venture to add this. It is suggested that insistence on oral evidence is, in fact, sometimes a troublesome matter which adds to the burden of costs in litigation, and that there should be much greater facilities for proving the facts in a case by affidavit evidence—the existing rules permit it to a degree which is not, I think, always appreciated—but, unless the rules of evidence are properly adhered to, the whole justification for the use of affidavit evidence, instead of oral evidence, is destroyed at a blow.
- F** Affidavit evidence can only be entitled to the same weight as oral evidence if those who swear the affidavits realise that the obligation of the oath is as serious when making an affidavit as it is when making statements in the witness box.

- I turn to the subject-matter of this appeal. The bankrupt appears to be a French national domiciled in France. He came to this country in 1940 to escape the tyranny which was then afflicting his native country, and he remained in this country until the events to which I shall presently allude in the summer of 1949. During that period he engaged himself in a number of businesses. We have been supplied by counsel with a list of the companies with which he associated himself, the greater number of which appear to be at the moment in liquidation. It is the unfortunate fact that this debtor is not the first, and probably will not be the last, of the persons who, having sought asylum in this country, have not thereafter scrupled to take advantage of the protection they had received in spoiling the Egyptians. During the period of a somewhat varied business career, the bankrupt paid nothing, or substantially nothing, in respect of the taxes which his business operations rendered him liable to pay, and by the summer of 1949 the amount owing, as the commissioners allege, amounted to something over £5,000. That is the debt which is alleged to be due to the petitioning creditors.

The act of bankruptcy which is relied on is that referred to in the Bankruptcy Act, 1914, s. 1 (1) (d), that with intent to defeat or delay his creditors he departed out of England. It is not in doubt that he did depart out of England. According to the evidence before the court, he departed out of England on May 5, 1949, but, in fact, he departed at the end of the previous March. The discrepancy is the natural result of the care he took both by himself and his agents to conceal the truth as to his whereabouts during the intervening month of April. Having departed, he went to his Mediterranean home, which boasts no less a name than the Chateau des Fayeres, at Cannes, and it is his case that this castle in France is, and always was, his one and only real home. It has been said, accordingly, that the court cannot properly infer that a national of another country, who does no more than leave these shores and return to his home, did so with intent to defeat or delay the creditors whom he left behind in England. Junior counsel for the bankrupt has warned me that anything I may say on this topic may be cited hereafter in other cases in these courts, and, noting that warning, I shall abstain from attempting to lay down any principle or make any further statement of what I think is the principle beyond what is contained in the cases which have already come before the courts. That is because, in the events which have happened, it is unnecessary to consider or to express a concluded view in this case on the question whether, when this matter was before the registrar on Oct. 3, 1949, and the debtor was adjudicated a bankrupt, there was sufficient material from which the court could infer a departure with intent to defeat and delay his creditors. A B C

One of the illustrations which counsel for the bankrupt cited of the right view to be taken when a foreign national departs to his foreign home was *Ex p. Brandon, Re Trench* (1) in this court. That was a case where the debtor was an ex-Indian Army general, who had married a lady having French property and had lived with his wife for many years in France, that being for the period in question his one and only home. Some years before, however, he had engaged in some unhappy enterprise in the publication of musical works, and the operations of that business had left him indebted to, among others, a gentleman whom, on a visit to London, he happened to meet on Putney Bridge. According to the evidence, he said he hoped to be able to pay this debt, and would call on the creditor, but he did not do so and returned to his French home. In those circumstances, the question before the court was whether the inference could properly be drawn that, when, following this interview on Putney Bridge, he returned home to France, whence he had shortly before come, and remained there, he did so with intent to delay and defeat his creditors. On those facts, it is not surprising that this court thought the material fell short of that which enabled the inference of intending to defeat and delay creditors to be drawn. I need not read more than a sentence or two from the judgment of LORD SELBORNE, L.C., who presided in this court. He said (25 Ch.D. 503): D E F

"But, if that conversation [on Putney Bridge] was an honest one—and there is nothing to lead to a contrary conclusion—I think the proper inference to be drawn from it is that he really thought that when he was at home at his residence in France with his wife and family, at the place where the people were living who were in the habit of giving him credit, it would be more easy for him to settle with his English creditors than if he were in England. And I cannot leave out of consideration the fact that France is a civilised country, in which creditors can sue their debtors. It does not appear that the petitioning creditors have been in any way baffled by the debtor in the pursuit of their remedies against him there. These are all the facts, and they amount to this, that the debtor stays at home, his home being in a foreign country. Can we, upon the principle that a man must be taken to intend the natural consequence of his acts, say that he remained out of England with intent to defeat or delay his creditors? If a G H

debtor had left this country in order to place himself beyond the reach of its laws, the presumption that by so doing he intended to defeat or delay his creditors might arise; but the present case is entirely different and I think that such an intention ought not to be presumed."

A I should observe that there the emphasis lay more on remaining out of England than on leaving England, but, for present purposes, that distinction need not be regarded as material. I emphasise the sentence in which LORD SELBORNE said that there was nothing to prevent the creditors in that case suing their debtor in France. Counsel for the Inland Revenue Commissioners has pointed out that here the claim of the petitioning creditors is for income tax, and, as is well known, it is not the practice of civilised countries, such as France and England, to enforce the revenue laws of the other of them.

B An instance of the inference to be drawn the other way is to be found in *Ex p. Goater, Re Finney* (2), decided some ten years before the case to which I have just referred. That was a case of an Englishman with his home in England who had been in business as a coal merchant. The occasion for his leaving this country and going abroad was ill-health, as was the case with the bankrupt here. Both went abroad after consulting doctors who gave the not
C unnatural advice: "If you are worried and tired, there is nothing like a holiday in the south of France." The debtor in *Ex p. Goater* (2) was carrying on business, as was the bankrupt in the present case, until the point of departure, a matter quite different from the facts in *Brandon's* case (1). Having paid certain creditors, Mr. Finney (the debtor) departed to the south of France leaving the remaining creditors unpaid. MELLISH, L.J., said (30 L.T. 621):

D "It had been the law for a great many years, that, in determining the question of intent, it must be inferred that a man intends the necessary consequences of his own acts. The debtor in the present case must have known perfectly well that the necessary consequence of his departing from England would be to defeat or delay the petitioning creditor and the banking company. His departure would render it impossible for them to issue
E debtors' summonses, or to adopt the summary process under the Bills of Exchange Act."

When the two cases are compared it is not difficult to see why the decision went one way in *Brandon's* case (1), and the other way in *Goater's* case (2). It is plain that the question whether the inference can, in any particular set
F of circumstances, be properly drawn that the departure was intended to defeat or delay creditors or not must depend on the facts of the particular case. Though it may well be true, as counsel for the bankrupt have observed, that the mere fact, without more, that a foreigner happens to have left England and gone home abroad is not sufficient to raise the inference, in few cases are the facts ever likely to be confined to that one single circumstance.

G In the present case the first matter is that the bankrupt had gone suddenly to France. Secondly, he went at a time when he was financially embarrassed to a serious extent. Next there was properly before the court the affidavit of a consular clerk, Mr. Pitti-Ferrandi, of Nice, who gave an account, in reference to his attempts to serve the bankrupt with the petition, of the visits he paid to the Chateau des Fayeres. Without going into that affidavit in detail, it is
H plain that this chateau, which is said to be the bankrupt's home, was not a place at which it was at all easy to find him. An individual appeared who stated, according to the affidavit, and, apparently, stated untruly, if the affidavit is accepted, that he was not the bankrupt but the bankrupt's brother. That leads at once to the inference that there was—and I borrow the adjective employed by junior counsel for the bankrupt—something surreptitious about the conduct of the bankrupt at or shortly after the time of his departure.

I have already referred to the fact that the petitioning creditors' debt was

one not enforceable in the French courts. When all these matters are considered together, I am far from saying that there was not material on which the court could properly infer, as it did infer on Oct. 3, 1949, that the bankrupt did depart from these shores with intent to delay or defeat his creditors. But, as I have indicated, it is not necessary to stop there. This application is made under the Bankruptcy Act, 1914, s. 108 (1), which provides that the court having jurisdiction in bankruptcy under the Act "may review, rescind or vary any order made by it under its bankruptcy jurisdiction." The language of that sub-section, which does not appear for the first time in the Act of 1914, contains no limit as to time—and in that regard it is contrasted with sub-s. (2) as to appeals, when read in conjunction with sub-s. (3) and the Bankruptcy Rules, 1915. The effect, I think, of the decisions on sub-s. (1) and its predecessor—*Ex p. Brown, Re Jeavons* (3), *Ex p. May* (4) and *Ex p. Ritso* (5) were the three cited to us by counsel for the bankrupt—may fairly be stated in this way. Though the jurisdiction of the court to rescind, review or vary its orders is not limited in point of time, nevertheless, if the application under sub-s. (1) is in substance to be regarded as an appeal against the original order and is preferred at a date when, if it had been an appeal under sub-s. (2), it would have been out of time, this court will not exercise its jurisdiction, unless it is satisfied that there are special circumstances in the case which would make it proper to hear it, treating it as an appeal out of time.

There are several special circumstances on which counsel for the bankrupt relied in support of the view that the delay between the date when an appeal could have been brought against the order sought to be reviewed—that is twenty-one days after the order was made, namely, Oct. 24, 1949—and the date, namely, Nov. 17, when the application was first made, can be properly excused. Counsel referred to the fact that the bankrupt went abroad on the advice of his doctor, from which we should infer that he was in a poor state of health, worried and anxious, and, therefore, that it would not be just to expect him to apply his mind with particular despatch to these affairs which were the subject of the application to the court. Then it was said his home was in France and he might not have readily available the provisions of the Bankruptcy Act, 1914, or the rules made thereunder, or find at the Chateau des Fayeres, at Cannes, anyone who could advise him as to the procedure adopted in bankruptcy matters in London. It was said he left "persons in charge"—those are the words—of this business at 14 Half Moon Street, namely, a brother, or a *soi-disant* brother at any rate, a lady called Pauline Llewellyn, who, according to what she told Mr. Wilson, intended to follow him to France, and one Knight, who had appeared or had acted for the debtor in reference to his tax troubles. As I shall show presently, whatever the extent of supervision of any or all these persons over the property and business of the bankrupt at 14, Half Moon Street, they certainly did nothing to dispel any suspicions anyone might have had that the bankrupt's departure to France was not entirely attributable to the state of his health and the advice of his doctor. It was said that the brother was given a power of attorney which would have enabled him to pay the debts. If that is so, he did not do so. But it is true that these persons were at some time, at any rate, to be found at 14, Half Moon Street. Finally, it is said, a member of the staff, namely, Miss Pauline Llewellyn, when asked on May 5 where her master was, gave a truthful answer, and told her interlocutor that he had gone to the Chateau des Fayeres in France.

Speaking for myself, I very gravely doubt whether all those matters, when added together, in the circumstances of this case, amount to special circumstances. On the other hand, where the debtor is a foreigner, I think the court will always be disposed to extend a certain latitude to him so that he should not feel under any sense of grievance or be said to suffer any injustice by being made to adhere to the requirements of the law. It is unnecessary to express any view on that,

and I certainly do not desire it to be suggested that I am laying down that the circumstances, such as I have tabulated, when found in conjunction in another case, may or may not be special circumstances in that case.

Assuming in the bankrupt's favour that the court ought to entertain the matter and exercise its jurisdiction, it is conceded that the court is not now bound, in arriving at its decision, exclusively by the material which was properly before the court founded on properly admissible evidence on Oct. 3, 1949, but that the court can look at all the material which is now before it in reaching a conclusion whether the intent ought properly to be inferred.

I have said enough to show that there is at least a case for saying, on the facts which I have mentioned, that on Oct. 3, 1949, the inference required by sub-s. (1) (d) might properly be drawn. But in the interim there has been brought out one other matter of such a character as to cast almost a blinding light on the earlier affairs and the earlier acts of the debtor to which I have already alluded. Briefly, but sufficiently, put, this further material consists of correspondence exhibited to an affidavit by Mr. E. R. Trafford, the collector of taxes, and covering a period from Mar. 11, 1949, to May 3, 1949. [His LORDSHIP considered the correspondence which had taken place between the collector of taxes, on the one hand, and the bankrupt and Miss Llewellyn, on the other hand, and continued:] These letters, not only when added to what had gone before, but on their own account, more than amply justify the inference that the bankrupt had departed with intent to delay and defeat his creditors. That they were intended to deceive seems to me too plain for argument. If that is so, the question arises: Why were they intended to deceive, and what is the point of it? To that question, it seems to me only one answer is possible. Junior counsel for the bankrupt suggested that the question what was the intention ought to be determined by reference to matters of fact proved at the time of departure, and that it was not legitimate, by looking at evidence later made available, to reflect back, so to speak, on the previous material, but this correspondence which I have been reading followed immediately the actual departure and preceded the statement on May 5 that Miss Llewellyn first made that the bankrupt had departed. It was, in other words, contemporary correspondence. In any case, it must be plain that the later events may serve to give a true interpretation to what may have appeared earlier as equivocal conduct.

However that may be, when this material is added to the remainder of the matters to which I have already referred, I am left in no doubt whatever that the intent of the bankrupt, or the dominant intent—because I give him the credit of being quite ready to believe that he was far from well and that a stay in the salubrious air of the Mediterranean would do him good—was to defeat and delay his creditors, and the petitioning creditors in particular. For these reasons, I think that the order made by Mr. Registrar CUNLIFFE was right, and I would dismiss the appeal.

ASQUITH, L.J.: I agree. Even if on Oct. 3, 1949, there was not enough admissible evidence to support the receiving order made on that date—a point on which I express no opinion—it was, in my view, open to the registrar, in deciding whether or not to rescind that order, to take into account the additional evidence which came into the picture after Oct. 3. Once this additional evidence (and in particular the damning letters which my Lord read out) was let in, it seems to me that there were very solid grounds for refusing to rescind the order and that the registrar's decision was plainly right. I agree that the appeal should be dismissed.

JENKINS, L.J.: I also agree, and I have nothing to add.

Appeal dismissed.

Solicitors: *Theodore Goddard & Co.* (for the bankrupt); *Solicitor of Inland Revenue.*
[Reported by F. GUTTMAN, ESQ., Barrister-at-Law.]

R. v. SOUTH GREENHOE JUSTICES. *Ex parte* DIRECTOR
OF PUBLIC PROSECUTIONS.

[KING'S BENCH DIVISION (Lord Goddard, C.J., Humphreys, Byrne, Morris and Finnemore, JJ.), May 3, 1950.]

Justices—Sentence—Committal to quarter sessions—Case tried summarily on application of prosecution—Committal a nullity—Refusal of adjudication by quarter sessions—Power of justices to conclude hearing and pass sentence—Criminal Justice Act, 1948 (c. 58), s. 28 (1), s. 29 (1).

By the Criminal Justice Act, 1948, s. 29 “(1) Where, under sub-s. (2) of s. 28 of this Act or s. 24 of the Criminal Justice Act, 1925, a person who is not less than seventeen years of age is tried summarily by a court of summary jurisdiction for an indictable offence, and is convicted by that court of that offence, then if, on obtaining information as to his character and antecedents, the court is of opinion that they are such that greater punishment should be inflicted in respect of the offence than that court has power to inflict, the court may, in lieu of dealing with him in any manner in which the court has power to deal with him, commit him in custody to quarter sessions for sentence in accordance with the following provisions of this section.”

The respondent was charged before a court of summary jurisdiction with seven offences under the Bankruptcy Act, 1914, and the justices, on the application of the prosecution, decided to try the offences summarily under s. 28 (1) of the Criminal Justice Act, 1948. After conviction the respondent asked that six other similar offences should be taken into consideration, and the justices, purporting to act under s. 29 (1) of the Act, decided to commit him to quarter sessions for sentence. Quarter sessions took the view that the justices had no power to commit the respondent for sentence and declined to adjudicate. Subsequently, other summonses were issued against him in respect of the same offences of which he had already been found guilty ordering him to attend before the justices “to answer the said information and be sentenced for the said offence in respect of which you were convicted by the court.”

HELD: as the justices had tried the respondent summarily under s. 28 (1) and had not proceeded under s. 28 (2), his committal under s. 29 (1) was a nullity; there had been no final adjudication on the matter; and the justices had power to require the attendance of the respondent and to pass sentence on him.

[FOR THE PROVISIONS OF THE CRIMINAL JUSTICE ACT, 1948, s. 28 and s 29, see HALSBURY'S STATUTES, Second Edn., Vol. 14, pp. 1,011-1,014.]

Cases referred to:

- (1) *R. v. Sheridan*, [1936] 2 All E.R. 883; [1937] 1 K.B. 223; 106 L.J.K.B. 6; 155 L.T. 207; 100 J.P. 319; Digest Supp.
- (2) *R. v. Grant*, [1936] 2 All E.R. 1156; 106 L.J.K.B. 9; 155 L.T. 209; 100 J.P. 324; Digest Supp.
- (3) *R. v. Bodmin JJ., Ex parte McEwen*, [1947] 1 All E.R. 109; [1947] K.B. 321; [1947] L.J.R. 338; 111 J.P. 47; 2nd Digest Supp.
- (4) *R. v. Willesden JJ., Ex parte Utley*, [1947] 2 All E.R. 838; [1948] 1 K.B. 397; [1948] L.J.R. 394; 112 J.P. 97; 2nd Digest Supp.
- (5) *R. v. Kenworthy*, (1823), 1 B. & C. 711; 107 E.R. 261; 16 Digest 432, 2928.
- (6) *Dublin (Dean and Chapter) v. R.*, (1724), 1 Bro. Parl. Cas. 73; 1 E.R. 425; 16 Digest 346, 1730.
- (7) *Pender v. Herle*, (1725), 3 Bro. Parl. Cas. 505; 1 E.R. 1462; 16 Digest 347, 1733.

MOTION for an order of *mandamus*.

After hearing charges under the Bankruptcy Act, 1914, against the respondent, Leonard Pocock, the justices for the South Greenhoe petty sessional division of Norfolk found him guilty of seven offences. The respondent then asked that six similar offences should be taken into consideration, whereupon the justices decided to commit him to quarter sessions for sentence under the Criminal Justice Act, 1948, s. 29 (1). Quarter sessions declined to adjudicate on the ground that the committal by the justices was bad, the justices having agreed, on the application of the prosecution, to deal with the charges against the respondent summarily, and, therefore, were bound to do so under the provisions of s. 28 (1). The respondent was then summoned to appear before the justices for sentence, but, on the submission of the respondent's solicitor that they had no power to sentence the respondent, the justices declined to act, and the present application was made by the Crown for an order of *mandamus* addressed to the justices directing them to conclude the proceedings and proceed to judgment.

The Attorney-General (Sir Hartley Shawcross, K.C.) and Harold Brown for the Crown.

Christmas Humphreys for the justices.

Widgery for the respondent.

LORD GODDARD, C.J.: The Attorney-General moves for an order of *mandamus* directed to the justices for the petty sessional division of South Greenhoe in the county of Norfolk

" . . . to hear and determine according to law the charges against one Leonard Pocock, set out or referred to in the statement and affidavit hereinafter mentioned; alternatively to direct the said justices to impose a sentence upon the said Leonard Pocock in respect of the offences of which they have convicted him . . . "

Before dealing with the facts of the case I desire to make a few general observations upon s. 28 and s. 29 of the Criminal Justice Act, 1948, because it is by reason of those sections that the questions which fall for determination arise. First, it is convenient to state the various offences in respect of which justices sitting in petty sessions have power to adjudicate. I omit mention of cases where justices are sitting as examining justices for cases triable only on indictment. In respect of other cases there are, first, those which by statute are made summary offences only. In those the justices must adjudicate themselves; no other court has power to adjudicate. Secondly, there are cases which by statute can be dealt with either summarily or on indictment. Thirdly, there are cases, generally referred to as cases under s. 17 of the Summary Jurisdiction Act, 1879, which are *prima facie* summary cases, but in which, as the sentence which may be imposed exceeds three months, the defendant has the right to claim to be tried by jury. Fourthly, and most important, are the indictable cases set out in the schedule to the Criminal Justice Act, 1925. If the defendant consents and the prosecution raises no objection, or if, although the prosecution raises objection, the justices so determine, those cases can be dealt with as summary offences.

It was in respect of the last named class of offences that difficulties arose in courts of summary jurisdiction. Before the Criminal Justice Act, 1948, in *R. v. Sheridan* (1) and *R. v. Grant* (2) justices had agreed to deal summarily with indictable offences, and, having announced their intention of convicting, they heard evidence of the character of the offender and came to the conclusion that he ought to receive a more severe sentence than they had power to give. Thereupon they committed him to quarter sessions for trial. When the offender appeared for trial at quarter sessions, objection was taken that he had been already convicted, and he entered a plea of *autrefois convict*. It was held by the Court of Criminal Appeal that that was a good plea in bar, that he had

already been convicted, and that quarter sessions therefore had no power to try him again. In an endeavour to remove that difficulty, s. 28 (2) of the Act of 1948 deals with those cases to which I have just referred—indictable cases which may be dealt with summarily with the consent of the accused. By s. 29, it is provided:

“(1) Where, under s. 28 (2) of this Act or s. 24 of the Criminal Justice Act, 1925, a person who is not less than seventeen years of age is tried summarily by a court of summary jurisdiction for an indictable offence, and is convicted by that court of that offence, then if, on obtaining information as to his character and antecedents, the court is of opinion that they are such that greater punishment should be inflicted in respect of the offence than that court has power to inflict, the court may, in lieu of dealing with him in any manner in which the court has power to deal with him, commit him in custody to quarter sessions for sentence in accordance with the following provisions of this section.”

That removed the difficulty which had arisen in *R. v. Sheridan* (1) and *R. v. Grant* (2), for it gave the justices power to hear the case and to decide whether or not to convict, and, if they so decide, it gives them power, after hearing the prisoner's antecedents, to send him forward for sentence. That power only exists where the case falls within s. 28 (2) which provides:

“Where the court has begun, in accordance with the last foregoing sub-section, to hear a case as if the offence were punishable on conviction on indictment only, then if at any time during the hearing it appears to the court, having regard to any representations made in the presence of the accused by or on behalf of the prosecutor, or made by or on behalf of the accused, and to the nature of the case, that it is proper to do so, the court may then determine (subject to the following provisions of this section) to try the case summarily.”

Section 28 (1) provides :

“Subject to the provisions of this section, where a person who is not less than fourteen years of age is charged before a court of summary jurisdiction with an offence which, by virtue of any enactment, is punishable either on summary conviction or on conviction on indictment, then if application in that behalf is made by the prosecutor before the charge has been entered upon, the court may then determine to try the case summarily; but if the court does not so determine it shall proceed to hear the case as if the offence were punishable on conviction on indictment only.”

That deals with a variety of offences. A common one is driving to the danger of the public, which may be dealt with either summarily or on indictment, and (as in the case with which we are concerned today) certain offences under the Bankruptcy Act, 1914. If the justices proceed under s. 28 (1) to deal with those offences as summary offences, s. 29 (1) has no application. That sub-section relates only to offences which are indictable and can only be dealt with summarily with the consent of the accused.

In the present case seven charges of offences under the Bankruptcy Act, 1914, were preferred against the respondent. The court was invited by counsel for the Board of Trade to deal with the case summarily. It turned out that there were six other cases against the respondent which, after the justices had announced their decision to convict on the seven, he desired to be taken into consideration. There were, therefore, altogether thirteen cases. We have not heard much about the nature of those cases, but I desire to say what has been said before in this court, more especially in *R. v. Bodmin Justices* (3), *Ex parte McEwen* that the fact that justices have power to deal with cases is no reason why they necessarily should deal with them. When a case is of a serious charac-

ter—and surely a case of a man committing thirteen bankruptcy offences is one of a serious character—that case ought to go for trial. It is not merely a matter of what the sentence may be. It may be that when the case does go for trial, the court of trial will think it necessary only to impose a nominal sentence or even to bind over the offender. That is not the point. Serious cases ought to be dealt with by a superior court, and if the justices had been asked to send the present case for trial in the first instance, there is no reason to suppose that they would not have done so and this trouble would never have arisen. They were, however, asked by counsel representing the Board of Trade, to whom the administration of the Bankruptcy Acts is entrusted, to deal with the case summarily, and it is, therefore, not surprising that they consented to do so.

On hearing that there were no fewer than thirteen charges against the respondent the justices took the view that the sentence which they could give him was inadequate. Thereupon, no one taking any objection, they decided to commit the respondent to quarter sessions under s. 29 to be sentenced. Again the justices were not corrected in that view, and, they being lay justices, I am not going to blame them, but it was remarkable that their clerk did not point out to them that, if they did send him to quarter sessions for sentence, they must, under the terms of the section, send him forward in custody. They allowed him bail, and that, again, was wrong.

When the case came before the quarter sessions counsel for the prosecution pointed out that there had been a complete misconception and there was no power to send the respondent to quarter sessions for sentence because the offence was one covered by s. 28 (1) and not by s. 28 (2). Accordingly, quarter sessions properly said they could not deal with the matter. The respondent having been bailed to appear, and having appeared, at quarter sessions, that court discharged his bail. Further summonses were then issued against him at the instance of the Director of Public Prosecutions in the following terms:

“You are therefore hereby summoned to appear before the court of summary jurisdiction . . . on Monday, February 27, 1950, . . . to answer the said information, and be sentenced for the said offence in respect of which you were convicted by the said court on December 5, 1949.”

On the return day of that summons the respondents' solicitor appeared before the justices and took the objection that they had no power to hear the case because they had already done so. He said that the respondent would not come into court, and, if he did, he would plead *autrefois convict*, and he also told the justices that, if they proceeded to deal with the respondent, they would render themselves liable to civil proceedings for false imprisonment. One is not altogether surprised, therefore, that the justices said: “We will not do anything unless we are ordered so to do by the High Court.” The question now arises whether the justices on that day could not lawfully have sentenced the prisoner.

The first point made by the Attorney-General is that the decision of the justices to send the respondent to quarter sessions for sentence was a mere nullity, and that, therefore, the proceedings had never been concluded. Counsel for the respondent submitted that the decision of the justices was a judgment, and that, therefore, the justices, having convicted and having proceeded to judgment, were *functi officio* and no further proceedings could be taken. He likened the case to one (which has so often happened) where justices have imposed a penalty which they had no power to impose. In such cases it has always been held that the conviction is bad on its face. It records a penalty for a crime which the crime does not carry, and this court has always quashed the conviction. In *R. v. Willesden Justices, Ex parte Utley* (4) the justices imposed a fine of £15 although the utmost penalty that they could impose was a fine of £5, and this court quashed the conviction when it was brought up on *certiorari*. The first question is: Is this decision of the justices

a judgment? In my opinion, it is not. The effect of s. 29 (1) of the Criminal Justice Act, 1948, is that, if the justices, for reasons therein given, have come to the conclusion that their powers are not sufficient, they may abstain from pronouncing judgment and send the case to quarter sessions for quarter sessions to pass judgment. The case is not disposed of. By virtue of this section it has become a sort of composite case in which power is given to one court to convict and to another court to give judgment, and until the judgment is given, the hearing of the case is not complete. It is the judgment which is given by quarter sessions which finally determines the case. It seems to me that, if we were to hold that an order by justices sending a case to quarter sessions for sentence were a judgment, we should be going very near to holding that a committal for trial in an indictable case is a judgment. It cannot be said that it is a judgment. If in an indictable case a committal for trial were a final judgment, then, when justices refuse to send a case for trial, that would equally be a judgment, whereas everybody knows that it is not. If justices sitting as examining justices taking depositions come to the conclusion that a *prima facie* case is not disclosed and discharge the defendant it is always open to the prosecution, if further evidence comes to their hand, to take subsequent proceedings and to go on with the case. There is no authority, as far as this court is aware, which lays down that a committal for trial is anything but a step in a proceeding. I cannot see how it can be said that a committal by justices to quarter sessions so that they may pass judgment in lieu of the judgment which the justices might have passed can be said to be a judgment. The words of s. 29 (1) are:

“ . . . in lieu of dealing with him in any manner in which the court has power to deal with him . . . ”

The court has received assistance from the old case of *R. v. Kenworthy* (5). There the record of a trial for perjury at Chester Summer Assizes recited (1 B. & C. 711):

“ . . . it is therefore ordered, that he the said Lawrence Kenworthy be transported . . . ”

It was brought up on error, and there was nothing in the record to show that it had been adjudged. ABBOTT, C.J. (afterwards LORD TENTERDEN) in the course of the argument said (*ibid.*, 712):

“ Perhaps no judgment at all has been given; and if so, there cannot be any reversal.”

I observe that counsel for the accused, in arguing, said (*ibid.*, 712):

“ In 4 Inst., p. 70, there is this passage: ‘ This conclusion followeth, that the King hath committed and distributed all his whole power of judicature to several Courts of Justice, and therefore the judgment must be, “ *ideo consideratum est per Curiam* ” ’ ”.

There are other authorities which may be found which show that the test of judgment is whether, in the formal record of the court, those words “ *ideo consideratum est* ” appear. It is for that reason that it has always been held that error did not lie to reverse the decision of a court given on an application for one of the prerogative writs because, said the court, there is no “ *ideo consideratum est* ” in the order of the court: see *Dublin (Dean and Chapter) v. R.* (6), and *Pender v. Herle* (7). In other words, it had never been adjudged.

In *R. v. Kenworthy* (5) ABBOTT, C.J., giving judgment, said (1 B. & C. 713):

“ By the Act in question, two things are required to be done by the Court before which the party is tried: an order for transportation is to be made, and thereupon judgment is to be given. Now, here, the Court made an order not followed up by a judgment. There is no doubt that, at common law, where the punishment is not discretionary, the record of an Inferior Court

may be removed into this Court, and we may pronounce judgment; but in this instance we cannot do so. Inasmuch, therefore, as no judgment has been entered below, and this Court has no power to supply the deficiency, the proper course appears to be for us now to order the Court below to proceed to give judgment on the conviction."

A *procedendo* was awarded. That seems to me to show what is necessary in finding that there is judgment. It must be something which puts an end to the case. It must be a final adjudication, and here there has been no final adjudication. Therefore, in my opinion, the justices were not *functi officio*.

Then comes the question what ought to be done. The committal to quarter sessions for sentence was a nullity, and so the case had never been finally determined. It seems to me, therefore, that the case was really in the same position as it would have been if the court, instead of having committed the respondent to quarter sessions, had given no decision, except that they convicted, and had then adjourned the case without giving judgment. The justices must, therefore, finish the case, and all that is necessary is that notice should be given to the respondent that on such and such a day they will proceed further to hear the case. I think that notice can be given quite informally. The summons which was served on the respondent required him to appear and "answer the information." I think it would have been better if those words had not been included, but it does not matter what the form of the notice was which was given him to appear. The case had not been finished. It had to be finished, and if the respondent had been told that the case would be finished on a certain day and that he was to appear and he did not appear, I think that, under the Summary Jurisdiction Act, 1848, the justices could have sentenced him in his absence and then issued their warrant to have him conveyed to prison in accordance with the sentence. At any rate, they could have issued a warrant against him for not appearing in accordance with the Summary Jurisdiction Act, 1848, s. 13. I think, therefore, that on the day in question the justices had not only the power but also the duty to pass sentence on the respondent that these proceedings might be brought to an end by a judgment of the court. As they did not do it, the proceedings were not brought to an end. I think, therefore, the order of *mandamus* should go directing the justices not to hear and determine, but "to impose a sentence upon the said Leonard Pocock in respect of the offences of which they have convicted him."

F HUMPHREYS, J.: I agree. It is now admitted that the procedure of the justices on the first occasion when the matter was before them was an error of such a character that it was a nullity, as they had no more power to order the respondent to appear before quarter sessions on bail to receive sentence than they had to order him to be executed. Their only power to order him to appear before quarter sessions was that given by s. 29 (1) of the Criminal Justice Act, 1948, which provides in terms the particular cases where they may take that course, and this was not one of them. Therefore, quarter sessions properly held that they had no power to deal with the matter. Quarter sessions having so decided, what power, if any, had the justices to continue the hearing? It is said, on the one hand, that they had no power because they had adjudicated—they had heard the informations and had convicted. The answer seems to me to be that a court of summary jurisdiction does not complete the hearing of an information merely by convicting because that leaves in the air a most important part of a case, *viz.*, the sentence of the court following on that conviction. The duty of the justices was to hear and determine the informations which had been laid against the respondent and not to leave the case until they had done so. They had not completed the hearing by merely convicting the respondent. There was something further they had to do, and, in my view, it is quite wrong to say that they gave a judgment of any sort in the

matter. I think that the distinction between judgment and order, which my Lord has dealt with in his judgment, is conclusive as showing that the justices here did not give any judgment on the finding of guilt which they had recorded. That being so, when the matter came back to them, their duty was to complete the adjudication on the informations. There is nothing else I desire to say upon that matter.

The question has been argued what is to happen if the respondent does not come before the justices. The course taken in this case was to serve what were thought to be further summonses upon the respondent. The word "summons" has received a technical meaning as it is used in the Summary Jurisdiction Act, 1848, and I think (and, I think, my Lord is of the same opinion) that it would have been better that the word "summons" should have been omitted so as to make it clear that the justices were not purporting to issue fresh summonses in regard to these matters. They were merely telling a man in regard to whose case it now appeared that no finality had been arrived at, and which was, therefore, *sub judice*, that he must attend the court so that he might be heard and the court might finally adjudicate on the matter. In my view, a simple note telling him to appear and attend on the court was all that was required, and I think the notice should have informed him that on that day the justices would proceed to hear him and consider the appropriate sentence to be passed. In point of fact, the respondent, did attend. He attended in person so far as the door of the court was concerned, but he did not go inside. He attended by his solicitor, and I have no doubt that, if the justices had decided to go on with the case and pass sentence, his solicitor would have called him in. If the respondent should be unwise enough to pay no attention to a notice to attend next time, I have no doubt that there is ample power both in this court and in the justices to compel him. The justices would then be in the position that they had been ordered by this court to hear a matter which necessitates the appearance of the accused person, or, at all events, make very desirable the attendance of the accused person, and, if the accused person does not attend, I have no doubt whatever that there is ample power in the justices to bring him there. That position has not arisen because, as I said, I do not think that the respondent has ever refused to attend, and I do not suppose he would be foolish enough to refuse to attend on the justices when he gets the notice which I assume he will get. I agree that the order of *mandamus* should go in the form which my Lord has proposed.

BYRNE, J.: I agree.

MORRIS, J.: I also agree.

FINNEMORE, J.: I agree.

Order of mandamus directing the justices to pass sentence in respect of the offences of which they convicted.

Solicitors: *Director of Public Prosecutions* (for the Crown); *Treasury Solicitor* (for the justices); *Metcalf, Copeman & Pettefar* (for the respondent).

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

DEMETRIOU v. DEMETRIOU.

[COURT OF APPEAL (Asquith and Jenkins, L.JJ.), May 5, 1950.]

Divorce—Practice—Second petition—Petition for divorce on the ground of cruelty—Leave to file second petition on the ground of desertion—First petition still on file.

On May 26, 1949, a wife brought a petition for divorce solely on the ground of her husband's cruelty. The parties having separated at the end of July, 1946, the wife was unable to rely on the separation as desertion by the husband because a period of at least three years immediately preceding the presentation of her petition had not then elapsed. On Nov. 22, 1949, the husband filed his answer, alleging cruelty and desertion by the wife, who thereupon applied for leave to file a second petition on the ground of her husband's desertion while her first petition was still on the file.

HELD: (i) although there was no statutory provision providing in terms that a second petition could not be presented while a first petition was still on the file, it was contrary to the long-established practice of the court to allow two petitions by the same party in respect of the same marriage to be on the file at the same time.

Dictum of SIR BOYD MERRIMAN, P., in H. v. H. ([1938] 3 All E.R. 418), approved.

[AS TO PETITIONS ON RECORD, see HALSBURY, Hailsham Edn., Vol. 10, p. 695, para. 1034; and FOR CASES, see DIGEST, Vol. 27, pp. 427, 428, Nos. 4348-4355.]

Cases referred to:

- (1) *Spawforth v. Spawforth*, [1946] 1 All E.R. 379; [1946] P. 131; 115 L.J.P. 38; 174 L.T. 260; 2nd Digest Supp.
- (2) *H. v. H.*, [1938] 3 All E.R. 415; 159 L.T. 525; Digest Supp.
- (3) *Onslow v. Onslow, Jones & Campbell*, (1889), 60 L.T. 680; 27 Digest 427, 4352.

APPEAL by the wife from a decision of WILLMER, J., dated Mar. 16, 1950, dismissing her appeal from an order of Mr. Registrar COMPTON MILLAR refusing leave to present a petition for divorce on the ground of desertion while a former petition for divorce on the ground of cruelty was still on the file. The facts appear in the judgment of ASQUITH, L.J.

S. Lincoln for the wife.

T. Dewar for the husband.

ASQUITH, L.J.: By a petition dated May 26, 1949, the wife asked for a decree of dissolution of her marriage solely on the ground of her husband's cruelty. Desertion was not alleged, and could not be alleged, since the husband had not left the wife for a period of at least three years immediately preceding the presentation of the petition. The separation between husband and wife took place at the end of July, 1946, and the petition was lodged on May 26, 1949, a period of less than three years afterwards. If the wife had been well advised, she would have waited until August, 1949, when she could have alleged desertion, but, having filed the petition in May, she did so prematurely as far as desertion was concerned.

The husband, in his answer, alleged both cruelty and desertion by the wife, the desertion being for a period of at least three years immediately preceding the presentation of the answer, and he prayed the court to dismiss the wife's petition and grant him a decree. He relied on a separation which he dated at about the same time as that pleaded by the wife in her second petition, but, as his answer was filed on Nov. 22, 1949, he might establish, if he could show that the separation amounted to desertion by the wife, that the wife deserted



him for a period of at least three years immediately preceding the presentation of the answer.

The wife, being unable, in May, 1949, to allege that three years had elapsed before the presentation of her petition, and knowing that that could not be remedied by a supplemental petition (see *Spawforth v. Spawforth* (1)), sought to present a second petition. She appeals now against the refusal of the registrar and the judge to permit her to do so.

The ground of the learned judge's refusal is not stated, but one may assume that it must be that there was already a petition on the file. There is no statutory provision, nor rule among the Matrimonial Causes Rules, 1947, which provides that this cannot be done, but there is a very emphatic statement by SIR BOYD MERRIMAN, P., in *H. v. H.* (2). In that case, the facts of which bear little resemblance to those of the present case, the PRESIDENT made this general observation ([1938] 3 All E.R. 418):

"In fact, the old petition was still on the file when this new petition was filed on Jan. 1, and, in accordance with what is acknowledged to be the established practice of the court, dating, it is said, back to the days of the old ecclesiastical courts—at any rate, established by authority and practice for fifty years—it is impossible to have two petitions on the file in respect of the same marriage at the same time, and *a fortiori* when the two petitions both deal with the same subject-matter."

This statement may well be *obiter*, but reported cases are exceedingly rare, and such as exist support the statement of SIR BOYD MERRIMAN. Text books lay down the rule and cite in support *Onslow v. Onslow, Jones and Campbell* (3). In that case (60 L.T. 681) the following passage occurs:

"During the hearing, however, it appeared that the petitioner had, some years before, instituted divorce proceedings against his wife, charging her with adultery with a man named Clark, who was made a co-respondent in that suit. That case was not heard, owing, it was said, to some mistake as to the date, and it was called on in due course, and was struck out. No application had ever been made to reinstate it in the list, or to have it dismissed, and it still remained on the files of the court. Counsel thereupon asked that that suit be now dismissed. BUTT, J., doubted the power of the court to do that. Steps must be taken in the proper way—by summons—to get rid of the first suit. Until that was done no decree could be pronounced in the present suit. This unhappy petitioner had been so bandied about that, solely on his account, and in order to save him further expense in the matter, the court would consent to hear the evidence now. It must, however, be understood that steps should be at once taken on behalf of the petitioner to have the former suit called on and dismissed. Until that had been done the decree would be suspended."

Counsel for the husband led us through a labyrinth of rules going back to 1865 or earlier. He conscientiously explored the whole subject, but for the most part he drew a series of blanks. Rules or statutory provisions referred to other rules which, when examined, were silent on the crucial point. As SIR BOYD MERRIMAN said, there is a long standing practice, fortified by *Onslow v. Onslow* (3), that a second petition cannot be presented while a first is still on the file. I do not see why in the present case the enforcement of this rule should cause great hardship. On the trial of the first petition and the answer, if the wife can show that the separation in the summer of 1946 amounted to a desertion by the husband, she can defeat his claim, and although she herself cannot get a decree for desertion she can, if and when the first petition has been disposed of in her favour, file a second petition and allege desertion as a ground for the granting of a decree to herself. For these reasons the appeal should be dismissed.

JENKINS, L.J.: I agree. The court is being asked to make a departure from a long-established practice, and applications of this sort are necessarily viewed with a critical eye. If one finds a practice for which it is difficult to account and which has no positive warrant in any statute or rule, one would be disposed to try to find a way out of the difficulty in a case in which adherence to the practice might mean a denial of justice. I agree that in the present case there is no real ground for supposing that any hardship will result if the petitioner is refused leave to file a second petition. All the issues are before the court in the existing proceedings. Should the matter be decided on the issue of cruelty one way or the other, then *cadit quaestio*. Should it be found that the wife has deserted the husband, then again *cadit quaestio*. On the other hand, should the wife's defence to the husband's plea of desertion succeed, then it is reasonably plain that she could file her further petition which the husband would then hardly be able to oppose.

It may well be that there is good reason behind this practice, especially when one applies it to the ground for dissolution of marriage consisting of three years' desertion preceding the date of the petition. If a general practice grew up under which a second petition could be filed while the first was still pending, the effect might well be to abridge the statutory period now required to make desertion a sufficient cause. A wife might, for example, before the expiration of the three years file a petition making out, perhaps, a flimsy case of cruelty, and, on the eve of the hearing of that petition, the three years may have possibly run out. Under the practice we are asked to introduce it would then be open to her to file a further petition alleging desertion and consolidate it with the old one on the ground that the two matters should be heard together. Though technically the second petition would be a separate and independent proceeding, in substance the result would be very much the same as if the petitioner were allowed in a supplemental petition to allege and rely on desertion which had not lasted for the full three years at the date of the presentation of the original petition. In view of the long-established practice, and of the fact that adherence to it here will not, as far as I can see, work any hardship on a petitioner, I agree that the appeal should be dismissed.

Appeal dismissed. No order as to costs.

Solicitors: *William P. Webb & Co.* (for the wife); *J. A. H. Powell, Law Society's Services Divorce Department* (for the husband).

[*Reported by F. GUTTMAN, Esq., Barrister-at-Law.*]

Reversed. C.A. post p. 1191.

JAWORSKI v. INSTITUTION OF POLISH ENGINEERS IN GREAT BRITAIN, LTD.

[KING'S BENCH DIVISION (Finnemore, J.), May 4, 5, 1950.]

Income Tax—Deduction of tax—Agreement to pay remuneration without deduction of tax—Validity—Income Tax Act, 1918 (c. 40), All Schedules Rules, r. 23 (2).

Under a service agreement, evidenced in writing, an employee of an association was entitled to receive his monthly salary "without any deductions and taxes, which will be borne by the association." The employers deducted income tax from his salary in order to account for it to the Inland Revenue. In an action by the employee to recover the amounts deducted, on the ground that the deductions were contrary to the terms of his service agreement,

HELD: on construction, the agreement was one to pay sums of money in full without allowing any deductions for income tax; r. 23 (2) of the

All Schedules Rules under the Income Tax Act, 1918, applied to an agreement for the payment of a monthly salary; and, therefore, the agreement was void and could not be enforced against the employers.

[AS TO AGREEMENTS FOR MAKING ANNUAL PAYMENTS WITHOUT DEDUCTION OF TAX, see HALSBURY, Hailsham Edn., Vol. 17, p. 258.

FOR THE INCOME TAX ACT, 1918, All Schedules Rules, r. 23, see HALSBURY'S STATUTES, Second Edn., Vol. 12, p. 192.]

Cases referred to:

- (1) *Re Saunders*, [1898] 1 Ch. 17; 67 L.J.Ch. 55; 77 L.T. 450; 21 Digest 105, 775.
- (2) *Re Liverpool School for Indigent Blind*, [1898] 2 Ch. 669; *sub nom. Lund v. Liverpool School for Indigent Blind*, 67 L.J.Ch. 680; 79 L.T. 68; 62 J.P. 728; 28 Digest 88, 515.
- (3) *Re Jones' Settlement*, [1918] 2 Ch. 54; 87 L.J.Ch. 454; 119 L.T. 114; 28 Digest 66, 343.
- (4) *Hartland v. Diggins*, [1926] A.C. 289; 134 L.T. 492; 28 Digest 88, 506.

ACTION for repayment of sums deducted from monthly salary for income tax.

In January, 1943, the plaintiff, a Polish subject, entered the employment of the defendants, a body not normally working for profit, who were concerned with placing Polish engineers in the most suitable posts available, having regard to the war effort. The plaintiff agreed with the treasurer of the defendants that he should be paid wages or salary without any deductions for income tax, that agreement being evidenced by a letter dated Jan. 8, 1943, by the plaintiff to the defendants which contained the following passage:

"My remuneration will amount during the initial period, which I treat as a trial period, to £20 net per month, payable in advance, later increased to £25 net per month, without any deductions and taxes, which will be borne by the association."

In May, 1946, the defendants deducted tax from the plaintiff's salary which then amounted to £36 a month. The plaintiff having brought this action to recover the sums so deducted as being in breach of the agreement, the defendants contended that the agreement was unenforceable since it was void under r. 23 (2) of the All Schedules Rules of the Income Tax Act, 1918.

H. B. Grant for the plaintiff.

Stogdon for the defendants.

FINNEMORE, J., stated the facts; held that, if the agreement of Jan. 8 were valid, it provided for payment of remuneration without deduction of income tax; and continued: The second point taken is that such an agreement as that of Jan. 8 is not permissible in this country so that it cannot be enforced and is void. It is agreed that it must be construed according to English law. English law, argued counsel for the defendants, does not allow a person subject to liability for income tax to shift that liability to somebody else. An agreement, therefore, with a person to make, free of tax, a payment which is subject to the Income Tax Acts, cannot be enforced. It is, of course, possible to make an arrangement that such a sum should be paid by way of salary, or under deed, or under an order of the court, as will produce a certain sum after deduction of tax. The position then is that a gross sum will be payable and tax must be paid thereon which reduces it to the smaller sum. It is argued by counsel for the plaintiff that that, in effect, is what the present agreement did. It was, it is said, really an agreement, not for £25 or £20 net per month without deduction of tax, but for such a sum as after payment of tax would leave in the plaintiff's hands the sum of £20, or £25, or, at the material time, the sum of £36.

That, however, can be done only in quite plain terms. If the agreement is for a net sum, that cannot be construed as meaning a gross sum which

deductions will reduce to the net sum. One authority for that is *Re Saunders* (1). There it was held that a provision for a net sum of £2,000 meant what it said and not some sum which, after various transactions, would leave a sum of £2,000. This agreement does not mean: "I am to be paid £x salary, 'x' meaning a sum which after income tax has been paid will leave me with £20 or £25 in my pocket." It is a plain agreement for the payment of sums of money net without any deductions for income tax.

A It is plain that it falls within r. 23 of the All Schedules Rules of the Income Tax Act, 1918, which provides:

"(1) A person who refuses to allow a deduction of tax authorised by this Act to be made out of any payment, shall forfeit the sum of fifty pounds. (2) Every agreement for payment of interest, rent, or other annual payment in full without allowing any such deduction shall be void."

B It is said that under that rule this agreement is made void and cannot be enforced by the plaintiff. In support of that point, counsel for the defendants referred to *Re Liverpool School for Indigent Blind* (2) a case in some ways not dissimilar from the present. An Act of Parliament set up a school for the blind and provided for a salary to the chaplain without any deductions for taxes or otherwise howsoever. The chaplain paid income tax on his £500, but under the Income Tax Act, 1842, it became the duty of the wardens to deduct income tax from the amounts which they paid. It was held that, notwithstanding that the Act of Parliament said "without any deduction for tax or otherwise howsoever," the wardens were bound to make the deduction.

C The next point is whether or not this rule applies to a salary. I think it does. D On that *Re Janes' Settlement* (3) is in point. The headnote says ([1918] 2 Ch. 54):

"A fixed weekly payment made payable on a fixed day every week for a period possibly exceeding a year is an 'annual sum' within the Income Tax Act, 1842, s. 102, and the Income Tax Act, 1853, s. 40, so that the person liable to make the payment is entitled to deduct income tax."

E That matter is further dealt with in SIMON'S INCOME TAX, vol. 2, p. 352, para. 486, where it is stated:

"... the expression 'agreement' has been widely interpreted by the courts to include transactions in the nature of settlements... marriage settlements, voluntary agreements for separation between husband and wife, agreements relating to payment of salaries [and *Re Liverpool School for Indigent Blind* (2) is cited], voluntary agreements giving effect to orders by a divorce court or compromises in a probate action."

I think it is right to say that this rule does apply, despite the argument of counsel for the plaintiff, to the payment of salary and, therefore, to this case.

G The final argument of counsel for the plaintiff was based on *Hartland v. Diggins* (4). In that case, which went to the House of Lords, the employers voluntarily paid income tax on the salary of an employee, the tax amounting to £80 5s. There was no agreement to do it, either oral or in writing, but, in fact, the employers did it. Those facts being known, the employee was assessed on a sum of £580 5s., that is to say, on a salary of £500 and on £80 5s. It was held that that was a proper assessment since the payment of the £80 5s., which was, in effect, his tax, must be considered as part of the emolument or salary which he received from his employers and must be included for tax purposes. H Counsel for the plaintiff relied on that case, pointing out that it was not said there that, if the employers and the employee had agreed to do what was done, the agreement would have been void. I cannot accept that it is to be implied from that case that, if the parties had agreed that the employers should pay the £80 tax, the employee could have insisted on it. The rule, as I understand it, says plainly that he could not and that the agreement would have been void.

Counsel for the plaintiff argued one other point, that the words "which will be borne" take the present agreement out of the mischief of the rule, since all that the State is concerned with is the payment of the income tax, and, so long as it is agreed that the association will pay it, that is good enough. I do not think that is right in principle. Indeed, one can see how that view, if accepted, would defeat, at all events one very obvious purpose for which this rule exists, and that is that the person assessed cannot shift the liability to somebody else. I have come to the conclusion that this was an agreement to pay a net sum free of tax. As such, it was an agreement which was void within the meaning of r. 23 (2) and cannot be enforced by the plaintiff against the defendants. Therefore, his claim for repayment of income tax properly deducted by the defendants cannot succeed.

Judgment for the defendants.

Solicitors: *H. H. Wells & Sons* (for the plaintiff); *Gaunt, Foster & Hill* (for the defendants).

[Reported by F. A. AMIES, ESQ., Barrister-at-Law.]

TURBURVILLE AND ANOTHER v. WESTHAM CORPORATION.

[COURT OF APPEAL (Lord Oaksey, Singleton, L.J., and Wynn-Parry, J.), April 21, 24, 28, 1950.]

Education—Remuneration of teachers—Augmentation of war service pay—New Burnham scales of salary introduced in 1945—Right of teachers on war service to increased scales.

Public Authority—Limitation of action—"Public duty or authority"—Agreement to augment teachers' war service pay—Limitation Act, 1939 (c. 21), s. 21 (1)—Local Government Staffs (War Service) Act, 1939 (c. 94), s. 1 (1).

By a resolution, dated May 23, 1939, notice of which was given to their employees, a local education authority decided to give leave of absence to their employees who joined the forces with their approval and to augment the pay and allowances receivable from the government by those employees "to such a sum as together will equal the amount of the salary . . . received by them at the date of their being called up for training or service, with such increments, if any, of their grades which they would have received but for such leave of absence," but excluding "any bonus owing to the increased cost of living . . . granted by the council" after an employee had been called up. The plaintiffs, two qualified assistant teachers employed by the council, were called up for service with the forces in 1940. Until Mar. 31, 1945, they received from the council the sums to which they were entitled under the resolution. By the Remuneration of Teachers Order, 1945, the Minister of Education directed local education authorities to pay to teachers, as from Apr. 1, 1945, the scales of pay contained in the report of the Burnham Committee for 1945, whereby the scales of salary for qualified assistant teachers were increased, the minimum salary being £300 a year with annual increments of £15. The council did not augment the war service pay of teachers on the basis of the new scales, but on Sept. 7, 1945, and Oct. 26, 1945, they wrote to one of the plaintiffs informing him that, as soon as they had reached a decision on the applicability of the new scales to him, they would make the necessary adjustments in their payments. On Feb. 25, 1946, the council informed the plaintiffs that they could not augment their service pay to bring it up to the new rates, and on

Jan. 23, 1947, the plaintiffs commenced an action against the council claiming the balance of the salaries and increments which, they alleged, were due to them. The council pleaded, *inter alia*, the Limitation Act, 1939, s. 21 (1).

A HELD: (i) "increments" in the resolution of May 23, 1939, was not confined to the annual increments provided for in the scales of salaries in force before 1945, but included the increments of salary provided by the Order of 1945, and, therefore, the plaintiffs were entitled to have their service pay and allowances augmented to the figure of the salaries provided by the Order.

B (ii) the fact that the Burnham Committee, in recommending the increased scale, might have taken into account the increased cost of living was neither relevant nor proved, and, therefore, the increased scale was not a "bonus owing to the increased cost of living," within the resolution of May 23, 1939.

C (iii) in making the payments which they decided to make by the resolution of May 23, 1939, the council were not acting "in pursuance, or execution, or intended execution of any Act of Parliament, or of any public duty or authority," within the Limitation Act, 1939, s. 21 (1), but were merely giving effect to a private arrangement with the plaintiffs which, but for the Local Government Staffs (War Service) Act, 1939, s. 1, they would not have had power to do, and, therefore, the action was not barred under s. 21 (1).

Bradford Corpn. v. Myers ([1916] 1 A.C. 242), *applied*.

Griffiths v. Smith, ([1941] 1 All E.R. 66), *distinguished*.

D (iv) in any event, as the action was commenced within twelve months of Feb. 25, 1946, when the council informed the plaintiffs of their decision not to augment the plaintiffs' war service pay in accordance with the new scales, the council were not entitled to plead the Limitation Act, 1939, s. 21 (1), and the plaintiffs were entitled to the sums claimed by them.

E [AS TO STATUTORY PROTECTION OF PUBLIC AUTHORITIES IN RESPECT OF CONTRACTS, see HALSBURY, Hailsham Edn., Vol. 26, p. 294, para. 612, and 1950 Supplement; and FOR CASES, see DIGEST, Vol. 38, pp. 108-110, Nos. 778-784.]

Cases referred to:

F (1) *Griffiths v. Smith*, [1941] 1 All E.R. 66; [1941] A.C. 170; 110 L.J.K.B. 156; 164 L.T. 386; 105 J.P. 63; 2nd Digest Supp.

(2) *Bradford Corpn. v. Myers*, [1916] 1 A.C. 242; 85 L.J.K.B. 146; 114 L.T. 83; 80 J.P. 121; 38 Digest 110, 784.

(3) *Sharphington v. Fulham Guardians*, [1904] 2 Ch. 449; 73 L.J.Ch. 777; 91 L.T. 739; 68 J.P. 510; 38 Digest 109, 783.

G APPEAL by the defendants, West Ham Corporation, from an order of BYRNE, J., dated Jan. 17, 1950, in an action by two assistant teachers, employed by the defendants, claiming balance of salaries and increments alleged to be due to them from the defendants. The defendants had agreed to grant leave of absence to their employees who were called up for service with the forces during the recent war and to augment their war service pay to the amount of salary and increments (but excluding cost of living bonus) which they would have received but for their leave of absence. By the Remuneration of Teachers Order, 1945, an increased scale of salaries for teachers came into force as from Apr. 1, 1945. On Feb. 25, 1946, the defendants informed the plaintiffs that their war service pay would not be augmented in accordance with the new scale of pay and the plaintiffs commenced the action on Jan. 23, 1947. It was contended by the defendants that the new scale was not applicable to the plaintiffs because (a) it was not an "increment," and (b) it included cost of living bonus. They further pleaded the Limitation Act, 1939, s. 21 (1).

BYRNE, J., held that the plaintiffs were entitled to the increased scale and that the Limitation Act did not apply. The facts appear in the judgments of LORD OAKSEY and SINGLETON, L.J.

Harold Williams, K.C., and *Squibb* for the defendants.

Gardiner, K.C., and *Douglas Lowe* for the plaintiffs.

Cur. adv. vult.

Apr. 28. The following judgments were read.

LORD OAKSEY: This is an appeal by the West Ham Corporation from a judgment of BYRNE, J., sitting without a jury. The defendants are the local education authority for the borough, and the action out of which the appeal arises was brought against them by two assistant teachers in their schools, for sums of money alleged to be due to them as augmentation of their pay while they were called up for service during the recent war.

On May 23, 1939, the defendants passed a resolution, notice of which was given to their employees, including the plaintiffs. Clause (c) of the resolution [which dealt with "Council employees called up for training or enlisting for service" with H.M. forces] provided:

"... that all such employees as aforesaid have their pay and any other allowances receivable by them or their families from time to time from government or other sources in respect of such training or service augmented by the council to such a sum as together will equal the amount of the salary or wages received by them at the date of their being called up for training or service, with such increments, if any, of their grades which they would have received but for such leave of absence, subject to the usual deductions in respect of superannuation."

Clause (g) is:

"... that in the event of any bonus owing to the increased cost of living being granted by the council after any of the employees referred to in the foregoing paragraphs have been called up for training or service, such bonus is not to be considered as salary or wages, and shall not be payable to employees so granted leave of absence."

On Sept. 5, 1939, the Local Government Staffs (War Service) Act, 1939, was passed, s. 1 of which provides:

"(1) Where a person serving in any capacity specified in the first column of the schedule to this Act (hereafter in this section referred to as 'his civil capacity') ceases so to serve in order to undertake war service, the appropriate authority shall have power to make to or in respect of him such payments as are hereafter in this section provided. (2) While any such person is engaged in war service, the appropriate authority may pay to him, or to or for the benefit of his wife or other dependants nominated by him, a sum which shall not exceed the remuneration which he would have received if he had continued to serve in his civil capacity, after deducting therefrom the amount of his war service pay."

In cl. 4 of the schedule, "Employee of a local authority otherwise than in war service" is given as one of the civil capacities.

The plaintiffs were called up for service in 1940 and served throughout the war, receiving from the defendants such sums as they were entitled to under cl. (c) of the resolution of May 23, 1939, but not receiving a war allowance which was paid to teachers and other employees who were not called up. In August, 1945, the Burnham Committee reported to the Minister of Education that, in regard to the scales of salary for qualified assistant teachers, a class of teacher to which the plaintiffs belonged, the scale of minimum salary should be £300 per annum with annual increments of £15, and also, by para. 16, it was provided:

"No teacher in service on Mar. 31, 1945, shall receive by reason of the operation of these scales a smaller rate of salary than he/she would have been eligible to receive under the operation of the Burnham Reports as in force on that date. (b) For the purpose of this section the rate of salary shall be computed by adding together (i) scale salary, (ii) war allowance, and (iii) while the teacher remains in the same post, any allowance paid to the teacher on Mar. 31, 1945, under previous Burnham Reports."

The Minister of Education gave effect to this report by the Remuneration of Teachers Order, 1945 (S.R. & O., 1945, No. 1317), and, as from Apr. 1, 1945, this scale of salary has been paid to all teachers not in the forces, but not to the plaintiffs in this case, nor to other teachers in the forces. On Feb. 17, 1945, in anticipation of the new Burnham scales, the defendants asked for the advice of the Burnham Committee whether they ought to augment the salaries of teachers on war service on the basis of the new scales without regard to a war bonus, and on Sept. 7, 1945, and again on Oct. 26, 1945, they wrote to one of the plaintiffs that, as soon as a decision had been reached as to the applicability of the new scales, they would make the necessary adjustment in their payments to him. The matter was taken up by the general secretary of the National Union of Teachers in January, 1946, and it was not until Feb. 25, 1946, that the plaintiffs were informed that the defendants had decided

"... that they were unable to depart from the system of augmentation of war service pay of teachers to the level of the basic scales operative prior to the adoption of the new consolidated Burnham scales."

The present action was begun on Jan 23, 1947. In these circumstances four questions have been raised and argued: (i) Do the words, "increments, if any, of their grades which they would have received but for such leave of absence," in cl. (c) of the resolution of May 23, 1939, refer only to the annual increments provided for in the scales of salary then in force, or do they refer also to increments provided for by the scale of salaries introduced as from Apr. 1, 1945? (ii) Should any deduction be made in respect of war allowances on the ground that the scale introduced on Apr. 1, 1945, must be taken to have included a bonus owing to the increased cost of living within the meaning of cl. (g) of the notice? (iii) Does the action fall within s. 21 (1) of the Limitation Act, 1939, which is as follows:

"No action shall be brought against any person for any act done in pursuance, or execution, or intended execution of any Act of Parliament, or of any public duty or authority, or in respect of any neglect or default in the execution of any such Act, duty or authority, unless it is commenced before the expiration of one year from the date on which the cause of action accrued."

I do not think I need set out the proviso. (iv) Is the action barred in the circumstances of these cases?

In my opinion, the scale introduced on Apr. 1, 1945, was an increment within the meaning of cl. (c) of the resolution of May 23, 1939, and the plaintiffs were entitled to be paid accordingly. The word "increments" in cl. (c) is not qualified in any way, and, undoubtedly, the plaintiffs would have received the scale obtaining for their grade of teacher after Apr. 1, 1945, but for their leave of absence. That scale was not, in my opinion, a "bonus owing to the increased cost of living ... granted by the council," within the meaning of cl. (g) of the notice, and the fact that the Burnham Committee, in recommending it, may have taken into account the increased cost of living is neither relevant nor proved, nor is the fact that para. 16 of the Burnham Report uses war allowance as a factor in calculating the minimum salary which any teacher shall receive.

I turn, therefore, to the much discussed question of the construction of s. 21 (1)

of the Limitation Act, 1939. Counsel for the defendants does not contend that the neglect complained of was in the execution of the Local Government Staffs (War Service) Act, 1939, which, he concedes, alone made the payments *intra vires*, but he says that it was in the execution of the Education Act, 1921, which, by s. 148 (1), empowers the local education authority to appoint and pay teachers. I confess that I think counsel was bound to concede that the payment of teachers while on war service was *ultra vires* under the Education Act, and only became *intra vires* by virtue of the Local Government Staffs (War Service) Act, 1939. It may, however, be said that the payments were made in execution of that Act, or come within the words used by VISCOUNT MAUGHAM ([1941] 1 All E.R. 76) in *Griffiths v. Smith* (1):

"It is sufficient to establish that the act was in substance done in the course of exercising for the benefit of the public an authority or a power conferred on the public authority not being a mere incidental power, such as a power to carry on a trade. The words in the section are 'public duty or authority,' and the latter word must be taken to have its ordinary meaning of legal power or right, and does not imply a positive obligation."

So here it may be said that the act of agreeing to pay and of paying, or neglecting to pay, was, in substance, done in the course of exercising for the benefit of the public an authority or a power, though not a duty or positive obligation, conferred on the public authority by the Local Government Staffs (War Service) Act, 1939, and that this was not merely an incidental power, such as a power to carry on trade.

The real question seems to me to be whether the payment was made "for the benefit of the public." It was made by the defendants to all their employees equally, but it was not made on the condition that the employees should return to the service of the defendants after their war service. It appears to me, therefore, that it may more properly be said to have been made for the benefit of the employees, though it may have had an indirect bearing on the morale of the employees who were not called up and on other members of the public. In *Griffiths v. Smith* (1) the school premises were being used for a purpose which the trial judge had expressly found was a school purpose, and VISCOUNT MAUGHAM said that this finding was crucial. In the present case there is no such finding, nor, in my opinion, could there have been, for the payments were to be made to employees who were no longer employed in the work of the defendants, and who might never again be so employed. It is to be observed that LORD PORTER expressed the view ([1941] 1 All E.R. 91), with which I agree, that, in order that the act done should be held to be done in the exercise of a public duty, there must be a correlative public right. In *Griffiths v. Smith* (1), there was, in a sense, a correlative right on the part of the parent to be present in the school as an invitee, though the right was not one of positive obligation. Here, however, the teacher had no correlative right to the augmented payments, which were entirely in the discretion of the defendants, and there is no finding that the payment was made in the interests of the school as such, as there was in *Griffiths v. Smith* (1). On the whole, therefore, though not without hesitation, I come to the conclusion that the section is not applicable to the present case.

On the last question, I am of opinion that in any event the defendants cannot succeed, in view of the correspondence, which shows that they led the plaintiffs to believe that the question whether these payments were going to be made was under consideration until February, 1946, and that, in such circumstances, the defendants cannot be heard to say that there was a cause of action before that date.

SINGLETON, L.J.: The plaintiffs' claim is based on para. (c) of the resolution of the defendants, dated May 23, 1939, and published by them on June 1. That resolution dealt with:

“Council employees called up for training or enlisting for service with H.M. naval, military, air or territorial forces.”

[His LORDSHIP read para. (c) of the resolution, and continued:] The word “increments,” as used in that paragraph, is not a term of art. It bears no direct relation to the “annual increments” mentioned in the report of the Burnham Committee in 1938 [which contained the scales of pay in force in 1939]. The resolution of the defendants was dealing not with teachers only, but with the defendants’ employees generally. The word “increment” means an increase or an addition to something. The result of the resolution was that the defendants undertook to make up the amount of government pay and allowances to the amount of the salary or wages which the employee was receiving at the date of his being called up for service, *plus* any increase which might be granted to those of the grade which the employee occupied, and which he would have received had he not been given leave of absence to undertake service with His Majesty’s Forces. There were increases after each of the plaintiffs joined the forces, and those were allowed in the calculation of the amounts due to them until Mar. 31, 1945. As from that date, teachers employed by the defendants were paid on a higher scale, as recommended by the report of the Burnham Committee in 1945. It is not disputed that, had each of the plaintiffs remained throughout as a teacher, he would at the material time have been entitled to be paid on the higher scale. To my mind, this was an increase in pay and it is covered by the words “increments . . . of their grades” in para. (c) of the resolution of May 23, 1939.

The plaintiffs are, therefore, entitled to succeed in their claim, subject to para. (g) of the resolution, on which the defendants rely. The plea at the end of para. 10 of the amended defence is that the 1945 scales of payment to teachers include war bonus, and that, under para. (g) of the resolution,

“ . . . such bonus is not to be considered as salary or wages, and shall not be payable to employees so granted leave of absence.”

This is in the nature of an exception from the promise made to, or the contract made with, an employee who joined the forces. If the defendants can establish it, they are entitled to relief to the extent to which they show that the increment or increase is a “bonus owing to the increased cost of living . . . granted by the council” after the employee was called up. The proof of that is clearly on the defendants. There is no evidence to show the way in which the Burnham Committee arrived at their conclusions in 1945 or what caused the Board of Education to accept their recommendations. No doubt the committee had in mind the increased cost of living when they reported in 1945, but it seems to me to be impossible to say positively that any part of the increased scale of pay was a “bonus owing to the increased cost of living . . . granted by the council,” within para. (g) of the resolution. The increase in the scale of pay was made to teachers generally after the report of the Burnham Committee in 1945.

I now come to the plea in the amended defence to the effect that the defendants rely on s. 21 of the Limitation Act, 1939. There was some uncertainty in the minds of the defendants as to the effect of the 1945 scale of pay, and on Feb. 17, 1945, they wrote to the secretary of the Burnham Committee a letter inquiring the position. In one paragraph of the letter they say:

“Although the proposed new scales of teachers’ salaries are consolidated and war bonus is not identified as such, the opinion is held that some amount due to increased cost of living was in the minds of the Burnham Committee in formulating the scales, and this gives rise to the point on which the council desire to be informed, which is—are they expected to augment salaries on the basis of the new scales without regard to a war bonus aspect? This would act, it is feared, to the prejudice or unfairly as compared with other employees of the council whose bonus has not been

consolidated . . . Therefore, an answer is desired to the questions: Are the council compelled to use the new scales of salaries in connection with augmentation? If so, what amount in the new salaries scales can be regarded as covering the increased cost of living?"

So far as the documents show, no answer was received to that communication, but on May 30, 1945, the defendants issued a notice, which is headed: "To teachers serving in His Majesty's Forces," and that includes the plaintiffs, who still were. At the foot of the document (which was to contain details of the amount to be credited to the teacher), there is a memorandum in these terms:

"The question of the augmentation of your salary to the new Burnham scale is under consideration by the appropriate committee of the council, and up to the moment no decision has been given. In the meantime, payment is being made to all West Ham teachers upon the basis of their March, 1945, salary—subject to any necessary adjustment in due course."

There was further correspondence lasting for some months, and it was not until Jan. 31, 1946, that the defendants arrived at a decision. In a letter of that date, addressed to the general secretary of the National Union of Teachers, they wrote:

"Having carefully considered the matter from all aspects, and also had in mind that the teachers returning from service will be coming back to positions carrying consolidated rates of pay under the new Burnham scales, the committee reported that they were unable to recommend the council to depart from the system of augmentation operative prior to the new consolidated rates being adopted, which is governed by their resolutions dealing with the augmentation of service pay. The report of the committee was submitted to and adopted by the council at their last meeting."

In May, 1946, the defendants received a deputation from the local executive of the National Union of Teachers, and there is further correspondence, but ultimately on Dec. 7, 1946, the claim of the plaintiffs was rejected. The defendants, indeed, wrote a letter which contained this paragraph:

"The committee deplore the further revival of this claim which they cannot regard as being well-founded either in law or equity, and they must reject it."

The writ was issued on Jan. 23, 1947, and I think that it is a matter for regret that a plea under the Limitation Act, 1939, is raised in view of this correspondence and of the negotiations which had taken place owing to the effort of the teachers and the National Union of Teachers to avoid litigation, because people are apt to look on matters of this kind in 1947 in a somewhat different way from that in which they approached them in the middle of 1939. The disposition generally for some years, I think, has been, as far as possible, to negotiate on matters to avoid litigation. The effect of this plea will be somewhat different. One cannot imagine that the National Union of Teachers will be slow to issue a writ in the future, if they have a dispute, as they may well have, with local authorities.

That which has to be decided in the first place is: What is the effect of this correspondence? The defendants say that the question is under consideration by them. The result of their deliberations is shown by the letter of Jan. 31, 1946, to the National Union of Teachers—that was the awaited communication. The action was commenced within one year from that date. The answer to the question depends on the construction of the memorandum of May 30, 1945. That contains a promise that any necessary adjustment will be made in due course. Does it mean: "If you do not take any steps to enforce your rights meanwhile, we will make any necessary adjustment, and in the meantime time shall not run"? No steps were taken by the plaintiffs' advisers until the defendants had signified their decision not to make any adjustment. It is claimed on behalf of the plaintiffs that time does not run until the defendants indicate

their decision to them. Certainly, a strong case is made that the defendants ought not to be allowed to take advantage of the plaintiffs' forbearance, in view of the correspondence, and, particularly, in view of the document of May 30, 1945. I prefer, however, to base my opinion on the applicability of s. 21 (1) of the Limitation Act, 1939, on another ground.

A The plea under the statute is in general terms. In the course of the reply of counsel for the defendants I asked him to specify the part of s. 21 (1) under which he claimed that the case fell, and he answered that the defendants' case was that the failure to pay was neglect or default by the defendants in the execution of their duty under the Education Act, 1921. Under s. 148 (1) of that Act, the local education authority is empowered to appoint teachers and to assign salaries or remuneration to them. The claim of the plaintiffs is not in relation to any duty under that section. No complaint is made by the plaintiffs B that the defendants failed in any duty arising under the Education Act. It is said that they owe money by reason of a contract made with, or a promise made to, certain teachers at a time of national emergency. The defendants, like other councils, had issued circulars in the early part of 1939. A question arose whether they had power to make payments of the kind that they were offering to make, and, it may be, in some cases, making. To set this question at C rest, the Local Government Staffs (War Service) Act, 1939, was passed on Sept. 5, 1939. The schedule to that Act embraces a variety of employees of local authorities and others, and it includes teachers. Each of the plaintiffs was, in fact, called up for military service or joined the forces after the passing of this Act. No doubt, it was praiseworthy for local authorities to encourage their employees to join the forces in time of national emergency. I cannot see D that in agreeing to pay them the amounts set out in para. (c) of the resolution of May 23, 1939, they were thereby undertaking a "public duty," within the meaning of s. 21 (1) of the Limitation Act, 1939. They were not bound to make such an agreement with their teachers or with any other employees. They entered into a contract voluntarily, and, when they made payments under such a contract, they did so in pursuance of the contract, and not in the execution E of any public duty. The subsequent failure to pay amounts due is not neglect or default in the execution of a public duty, for there was no such public duty, and, if it should be argued—and it was not—that it was neglect or default in the execution of any public authority, the same reasoning applies. There was authority given by the Local Government Staffs (War Service) Act, 1939, to make the payments, but the authority so given was not a public authority. F It was no more than an authorisation to the appropriate authorities to make payments, without which authorisation the payments might not have been within the power of the appropriate authority. In other words, it was enabling the defendants to do what they had promised by their circulars.

G The principle underlying a plea under the statute is set out in HALSBURY'S LAWS OF ENGLAND, Hailsham edn., vol. 26, p. 294, para. 612, in this way:

"The performance, or breach, of a contract which a public authority has the power, but not the duty, to make, is not within the protection."

H That, in essence, was the submission of counsel for the plaintiffs in the course of his further reply. Counsel for the defendants did not deal very fully with this part of the case when opening the appeal, but in his reply he cited to the court *Griffiths v. Smith* (1). The words of VISCOUNT MAUGHAM ([1941] 1 All E.R. 76), which have been read by my Lord, provide the strongest argument for the defendants. It is important to notice what kind of case was then under consideration. The action was against the managers of a school and arose out of a defect in the school building, a floor of which collapsed, as the result of which serious injuries were caused to the plaintiff, who was attending, on invitation, an exhibition of work of the pupils, of whom her son was one. VISCOUNT SIMON, L.C., said ([1941] 1 All E.R. 72):

"It is true that St. Clement's school could have been carried on without arranging to hold this display, but that is not the true test. The real question is whether the managers, in authorising the issue of invitations to the display on the school premises after school hours, should be regarded as exercising their function of managing the school. To apply the distinction indicated by SIR WILFRID GREENE, M.R., was the managers' action 'something incidental to, and part of the process of carrying on' their statutory duty? Both the trial judge and the Court of Appeal took the view that in this matter the managers were doing an act which formed part of the operation of carrying on a public elementary school. As SIR WILFRID GREENE, M.R., observed, a gathering such as this is a very familiar type of gathering in schools of all sorts. TUCKER, J., reached his conclusion in a passage ([1938] 3 All E.R. 538) which I must quote: 'In my view, the managers had a material interest in inviting the plaintiff to the premises, in the sense that it was in the interests of the prosperity and success of the school to enlist the support and co-operation of the parents of the pupils in the work done at the school. The display in question consisted entirely of an exhibition of the work done by the pupils and of the singing of songs which they had learnt at the school. I accordingly hold that the plaintiff was an invitee and not a mere licensee. I am further of opinion that on the occasion in question the school was being used as a public elementary school, and not for some extraneous purposes unconnected with its functions as a school.'"

VISCOUNT MAUGHAM said ([1941] 1 All E.R. 74):

"I have nothing to add to what my noble and learned friend VISCOUNT SIMON, L.C., has already said as regards the occasion itself. It was in fact an exhibition of work done by the pupils and a performance of songs which they had learnt at the school. It was held by TUCKER, J., that this was a use for the purposes of a public elementary school. The Court of Appeal agreed with this crucial finding of fact, and I do not think any of your Lordships felt any doubt that that finding was justified."

In another passage in his opinion VISCOUNT MAUGHAM again considered the importance of what the features of that case were, and he referred to the decision of the House of Lords in *Bradford Corp'n. v. Myers* (2). I do not wish to read again the words of VISCOUNT MAUGHAM (*ibid.*, 76), which have been read by my Lord. I do not regard them as covering this case or the principle stated in the *Bradford Corp'n.* case (2). In *Griffiths v. Smith* (1), LORD WRIGHT said ([1941] 1 All E.R. 82) that *Bradford Corp'n. v. Myers* (2) showed

"... that the thing done is not necessarily done in execution of a public duty or authority by a statutory corporation merely because it is *intra vires*."

Without reading them, I draw attention to the words of LORD PORTER in the same case (*ibid.*, 91).

I think it is desirable that I should refer to *Bradford Corp'n. v. Myers* (2), as the decision in that case seems to me really to be nearer the present case than is the decision in *Griffiths v. Smith* (1), having regard to the facts of the different cases. In the *Bradford Corp'n.* case (2):

"The defendants, a municipal corporation, were authorised by Act of Parliament to carry on the undertaking of a gas company and were bound to supply gas to the inhabitants of the district, and they were also empowered to sell the coke produced in the manufacture of the gas. The defendants contracted to sell and deliver a ton of coke to the plaintiff, and by the negligence of their agent the coke was shot through the plaintiff's shop window. More than six months afterwards the plaintiff commenced an

action of negligence against the defendants. The defendants pleaded s. 1 of the Public Authorities Protection Act, 1893, as a bar to the action: *Held*, that the act complained of was not an act done in the direct execution of a statute, or in the discharge of a public duty or the exercise of a public authority, and that the Public Authorities Protection Act, 1893, afforded no defence to the action."

A LORD BUCKMASTER, L.C., said ([1916] 1 A.C. 246):

"The difficulty cannot, I think, be resolved by the simple distinction between questions of tort arising out of contract and questions of tort arising independently of contract; but the fact that actions on contract made by the local authorities have been held to be outside the statute shows that the courts have considered the words of the Act to need careful and strict scrutiny. This, indeed, is apparent both from the purpose and the language of the statute. Its effect is to limit, as against the general public and in favour of certain persons, the period for bringing actions already fixed by existing statutes, and at the same time to penalise all persons who bring such actions and fail, by making them pay solicitor and client instead of party and party costs . . . In other words, it is not because the act out of which an action arises is within their power that a public authority enjoy the benefit of the statute. It is because the act is one which is either an act in the direct execution of a statute, or in the discharge of a public duty, or the exercise of a public authority. I regard these latter words as meaning a duty owed to all the public alike or an authority exercised impartially with regard to all the public. It assumes that there are duties and authorities which are not public, and that in the exercise or discharge of such duties or authorities this protection does not apply. This distinction is well illustrated by the present case. It may be conceded that the local authority were bound properly to dispose of their residual products; but there was no obligation upon them to dispose by sale, though this was the most obvious and ordinary way. Still less was there any duty to dispose of them to the respondent. No member of the public could have complained if the respondent had not been supplied; nor had any member of the public the right to require the local authority to contract with him."

With that speech of LORD BUCKMASTER, L.C., LORD DUNEDIN was in complete agreement. VISCOUNT HALDANE used these words (*ibid.*, 252):

F "My Lords, I think that FARWELL, J., was right [in his decision in *Sharlington v. Fulham Guardians* (3)]. For it seems to me that the language of s. 1 [of the Act of 1893] does not extend to an act which is done merely incidentally and in the sense that it is the direct result, not of the public duty or authority as such, but of some contract which it may be that such duty or authority put it into the power of a public body to make, but which it need not have made at all."

G The neglect or default of the defendants in the present case was not in regard to a public duty, nor in regard to a public authority. It arose out of a failure to fulfil a promise or to carry out the terms of a contract. In making that promise, or in entering into the contract, the defendants were not carrying out any duty under the Education Act, 1921. They were doing something voluntarily, because H they thought it the right thing to do. They were in no sense bound to do it, there was no obligation on them to pass the resolution of May 23, 1939, or to publish it. It was open to them to withdraw it at any time except as to persons who had acted on it, and, if they had done so, they could not have been properly charged with neglect of any public duty. In my view, this case is covered by the decision of the House of Lords in *Bradford Corp'n. v. Myers* (2), and s. 21 (1) of the Limitation Act, 1939, does not apply. This appeal, in my opinion, should be dismissed.

WYNN-PARRY, J.: I agree. On the question of construction, I would observe that, according to the OXFORD DICTIONARY, the word "increment" is a word of wide meaning. It does not import of itself the limitation that it is referable only to a payment that is annual. In order that it should, in a particular case, bear such a limited meaning, a proper context must be provided. There is nothing on the face of the resolution of May 23, 1939, which provides such a context. It is true that, so far as concerns the rate of payment of certificated assistant teachers, they are entitled to a minimum payment and an annual increment thereon with the limitation of a maximum. On the other hand, the resolution in question extends to all employees of the defendants. *Prima facie*, the word "increment" should be given the same meaning to whatever class of employee it is applied. It is not shown by the evidence that all classes of employees were employed on the terms that they should be entitled to annual increments, in which case it might be said that the necessary context had been provided for limiting the meaning of increment in the resolution. Many of the employees may well have been employed on different bases. Thus, it follows that the circumstance that the members of a particular class of employees, the assistant certificated teachers, were entitled to annual increments does not provide a sufficient context, even in the case of this class, to limit in the resolution the wide meaning of the word "increment."

I do not desire to add anything to what has been said by the other members of the court on the contention put forward by the defendants under para. (g) of the resolution. As regards the applicability of s. 21 (1) of the Limitation Act, 1939, I agree that the original contracts between the defendants and the respective plaintiffs were made by the defendants in the direct execution of their public duty under the Education Act, 1921, s. 148 (1), and that s. 21 (1) of the Act of 1939 would apply to those contracts. I further agree that the effect of the resolution was to add to the contractual terms between the defendants and the respective plaintiffs. I do not agree, however, with counsel for the defendants that the result follows for which he contends, *viz.*, that those terms are to be read into, or with, the original contracts so that it can be said of them that, just as s. 21 (1) of the Limitation Act, 1939, applies to the original contracts, so it must apply to the added terms. Such a result would be plainly contrary to the facts. Unlike the original contracts, the added terms were not brought into existence under or pursuant to the Education Act, 1921. Indeed, they could not be justified under that Act. They were brought into existence by virtue of the Local Government Staffs (War Service) Act, 1939, s. 1, and the applicability or otherwise of s. 21 (1) of the Limitation Act, 1939, must be tested by reference to that Act. The effect of the Local Government Staffs (War Service) Act, 1939, s. 1, was to do no more than authorise the defendants, if they should think fit, to arrange with the plaintiffs, either as a voluntary act or as a contract, to make the payments mentioned in the section. If and so far as the defendants exercised that authority in any case, they did not do so, in my view, in pursuance or execution of any Act of Parliament or of any public duty or authority. All they did was to enter into a private arrangement with the plaintiffs, which, but for the statutory authority in question, they could not have done.

In *Griffiths v. Smith* (1) VISCOUNT MAUGHAM said ([1941] 1 All E.R. 76):

"It is sufficient to establish that the act was in substance done in the course of exercising for the benefit of the public an authority or a power conferred on the public authority not being a mere incidental power, such as a power to carry on a trade."

From this, I think, it must follow that, for an authority to be a "public authority," within s. 21 (1) of the Limitation Act, 1939, it must be an authority exercised or capable of being exercised for the benefit of the public. Undoubtedly, s. 1 of the Local Government Staffs (War Service) Act, 1939, gives the defendants

an authority, but, in my view, it was no more than a power to do that which otherwise they could not have done (but which they, and probably other councils, had attempted to do), namely, to make payments for the benefit of individual employees, in any case where they thought fit to do so. Thus, although the authority is given to public authorities, it is not a "public authority," within s. 21 (1) of the Limitation Act, 1939. Therefore, that section does not apply in the present case.

A Lastly, I agree that, even had our conclusion on this point been otherwise, the defendants by their conduct are not entitled to rely on s. 21 (1) in this case. In my view, the effect of the correspondence which was read to us was clearly to establish an agreement between the parties that the plaintiffs should hold their hands until the defendants had finally determined their attitude. The
B defendants' final determination was not communicated to the plaintiffs until Feb. 25, 1946, less than a year before the issue of the writ on Jan. 23, 1947.

Appeal dismissed with costs.

Solicitors: *G. E. Smith* (for the defendants); *Kenneth Wormald* (for the plaintiffs).

[*Reported by F. GUTTMAN, Esq., Barrister-at-Law.*]

C

D **WESTMINSTER CITY COUNCIL v. HASTE.**

[CHANCERY DIVISION (Danckwerts, J.), May 9, 1950.]

Company—Receiver—Preferential payments—Rates—Failure to pay out of assets coming to receiver's hands—Subsequent loss of assets—Liability of receiver—Companies Act, 1929 (c. 23), s. 78 (1).

E A company owed £63 9s. 8d. for rates in respect of its occupation of premises from Oct. 2, 1939, to Nov. 28, 1939. On May 16, 1940, a receiver of the assets of the company was appointed by the holders of a debenture secured by a floating charge. On June 24, 1940, an order was made for the winding-up of the company, and the appointment of the receiver on behalf of the debenture-holders was authorised by an order made on
F Sept. 30, 1940. On July 9, 1940, the rating authority made a formal demand for payment of the amount due to them. The receiver continued to carry on the business of the company, and until 1945 the receipts were less than the expenditure. In November, 1945, however, the receiver had £91 in hand, but he failed to make any payment to the rating authority, notwithstanding their repeated demands. From 1947 onwards the business
G was run at a loss, and the receiver eventually informed the rating authority that he had no assets out of which to pay them. In an action by the authority claiming damages against the receiver, it was contended by the authority that the receiver had committed a breach of his statutory duty under the Companies Act, 1929, s. 78 (1), and s. 264 (1) (a), by paying away the assets of the company in the course of his trading without making provision for their preferential claim.
H

HELD: s. 78 (1) of the Act of 1929 was not merely a negative provision whereby the receiver was under no duty to make preferential payments so long as he did not pay the debenture-holders, but it required the receiver to pay the preferential creditors out of any assets coming to his hands, and, therefore, as the receiver had assets in 1945 out of which he could have paid the authority, but had not done so, he was liable to them in tort.

Woods v. Winkill ([1913] 2 Ch. 303), *considered*.

[AS TO PAYMENT OF PREFERENTIAL DEBTS BY RECEIVER, see HALSBURY, Vol. 5, 1949 Edn., pp. 579, 580, para. 918; and FOR CASES, see DIGEST, Vol. 10, p. 793, No. 4982, and Supplements.]

Case referred to:

- (1) *Woods v. Winskill*, [1913] 2 Ch. 303; 82 L.J.Ch. 447; 109 L.T. 399; 10 Digest 793, 4982.

ACTION by the Westminster City Council claiming damages from the defendant for breach of his statutory duty to them as receiver of the assets of the London Piano and Radio Co., Ltd.

The company owed the sum of £63 9s. 8d. to the plaintiffs in respect of the general rate, on account of its occupation of certain premises from Oct. 2, 1939, to Nov. 28, 1939. In May, 1940, the defendant was appointed receiver of the company by the holders of a debenture secured by a floating charge, his appointment being subsequently authorised by an order of the court. In June, 1940, an order was made for the winding-up of the company, but the defendant continued to carry on the business of the company. On July 9, 1940, the plaintiffs made a formal demand for payment of their claim, and repeated their demand from time to time. Although the defendant had £91 in hand in 1945, he failed to make any payment to the plaintiffs, and, finally, he informed them that he had no assets out of which to pay. The plaintiffs contended that the defendant had committed a breach of his duty to them under s. 78 (1) and s. 264 (1) (a) of the Companies Act, 1929, and was, therefore, liable to them in damages.

J. A. Wolfe for the plaintiffs.

Aronson, K.C., and *Wigan* for the defendant.

DANCKWERTS, J.: In this case I have to decide rather a curious point arising under the Companies Acts in regard to payments which are to be made by a receiver appointed out of court by debenture-holders. The company concerned is London Piano and Radio Co., Ltd., which occupied at one time certain premises in Oxford Street, London, and carries on business trading in pianos and radio-sets, and, more particularly, carrying out repairs to pianos and radio sets. The plaintiffs are the Westminster City Council, who have a claim for £63 9s. 8d. for rates. On May 16, 1940, the defendant, George Henry Haste, was appointed by debenture-holders to be receiver of the assets of the company, and he took possession. There was a defect in his appointment in that no leave had been obtained for the appointment under the Courts Emergency Powers Act, 1939, but an order was subsequently made on Sept. 30, 1940, authorising the appointment, and he was re-appointed as receiver on Nov. 9, 1940, but he acted as receiver as from May 16, 1940. Meanwhile, on June 11, 1940, a petition for the winding-up of the company had been presented, and a winding-up order was made on June 24, 1940. On July 9, 1940, a formal demand for payment of the rates of £63 9s. 8d. was made by the plaintiffs, and that demand was repeated from time to time. Sometimes no reply was given, but on two occasions a reply was made. Finally, the defendant replied that he had no assets out of which to pay, and the writ claiming damages in this action was issued on Nov. 5, 1948. The contention is that the plaintiffs' claim for rates was a preferential debt under the Companies Acts, and that the defendant has committed a tort by paying away assets of the company in payments to trading and ordinary creditors without making provision for the plaintiffs' preferential claim.

The relevant sections for the purpose of this action are s. 78 (1) of the Companies Act, 1929, which is now replaced by s. 94 (1) of the Companies Act, 1948, and s. 264 (1) (a) of the Act of 1929, now replaced by s. 319 (1) (a) of the present Act, without any substantial change. The provisions of s. 78 (1) of the earlier Act and s. 94 (1) of the present Act are as follows:

A "Where, in the case of a company registered in England, either a receiver is appointed on behalf of the holders of any debentures of the company secured by a floating charge, or possession is taken by or on behalf of those debenture holders of any property comprised in or subject to the charge, then, if the company is not at the time in course of being wound-up, the debts which in every winding-up are under the provisions of Part V of this Act relating to preferential payments to be paid in priority to all other debts, shall be paid out of any assets coming to the hands of the receiver or other person taking possession as aforesaid in priority to any claim for principal or interest in respect of the debentures."

B Section 264 (1) of the Act of 1929, which corresponds to s. 319 (1) of the Act of 1948 (except that the later Act omits the reference to "parochial rates"), provides:

C "In a winding-up there shall be paid in priority to all other debts (a) All parochial or other local rates due from the company at the relevant date, and having become due and payable within twelve months next before that date . . ."

D It appears, from accounts which have been proved by a certified copy in accordance with the provisions of the Companies Acts, and from the evidence of the receiver, that the business of the company has been carried on by the receiver for some ten years after the date of his appointment and the date when the company went into liquidation, and that, while the receipts were rather less than the expenditure in the earlier years, at the end of the period from May 16, 1945, to Nov. 15, 1945, the receipts exceeded the outgoings, and the receiver had, according to the accounts, the sum of £91 in hand on Nov. 15, 1945. At the end of the next six monthly period he had £60 in hand, and on May 15, 1947, he had about £5. Since then there has been a slight loss. The business of the company is still being carried on. It was clear from the evidence E which he gave before me that, in some respects, the receiver misunderstood his position and did not understand his duties. He talked of the "old company," and spoke as though he, as receiver, created some entity, which was a different company from the company which carried on business before his appointment. In regard to that, he was plainly mistaken. There was one company, and one F company only, and the business which the receiver has been and is carrying on is the business of the company, and nothing else, even though the company is in liquidation. Therefore, all he meant when he said that sort of thing was to indicate that he regarded the moneys which he acquired as receiver in 1945 as moneys produced by the efforts of his own management rather than by the efforts of those who previously managed the company before the period of his appointment. That may well have led him to take the wrong view of his G duties in regard to payments which he ought to make in regard to the company's creditors. There is a further point in the present case which is due to the long period of time which has elapsed since the company went into liquidation and the receiver was appointed, *viz.*, a question under the Limitation Act, 1939. In regard to any assets of the company which were in existence when the receiver was appointed, and the payments which may or may not have been H made out of those assets, and, indeed, as regards any assets in the hands of the receiver until Nov. 5, 1942 (*i.e.*, six years before the issue of the writ in this action), the claim of the plaintiffs for breach of the defendants' duty would appear to be barred, by s. 2 (1) (a) of the Limitation Act, 1939, as being based on an action for tort. Therefore, the plaintiffs' claim is really based on the fact that at some date subsequent to Nov. 5, 1942, the receiver had in his hands assets of the company out of which he was bound to pay the plaintiff's preferential claim.

The only authority which appears to touch the point is *Wood v. Winskill* (1), a decision of ASTBURY, J., in which there was a claim for £234 under the Workmen's Compensation Act, 1906, before the receiver was appointed. Under s. 5 (3) of the Act of 1906 and the provisions of the Companies (Consolidation) Act, 1908, this was a preferential claim to the extent of £100 on a winding-up of the company. The company's assets, when the receiver took possession, were £61. The receiver continued to carry on the business of the company, and the assets which he took over on his appointment were all expended in one way and another. The company was wound-up, without the plaintiff's claim having been met, and she brought an action against the receiver complaining that he had applied the company's assets in payment of ordinary creditors without providing for her preferential claim, and she claimed damages accordingly. It should be noticed that this case depended on s. 107 (1) of the Companies (Consolidation) Act, 1908, which differed in respect of one word from the provisions of s. 78 (1) of the Act of 1929, and s. 94 (1) of the Act of 1948. The difference is this. In the reference to the preferential payments which are to be made by the receiver, the words in s. 107 (1) of the Act of 1908 are:

" . . . shall be paid forthwith out of any assets coming to the hands of the receiver or other person taking possession as aforesaid in priority to any claim for principal or interest in respect of the debentures."

The word "forthwith" which appeared in that section did not appear in the corresponding section of the Acts of 1929 and 1948. Counsel for the defendant contends that the omission of the word "forthwith" is important, and, indeed, decisive, in regard to the plaintiffs' claim in the present case. In the course of the argument in *Woods v. Winskill* (1), counsel for the plaintiff said:

"Section 107 requires that the plaintiff's preferential claim 'shall be paid forthwith out of any assets coming to the hands of the receiver'."

Thereupon ASTBURY, J., observed:

"The section goes on 'in priority to any claim for principal or interest in respect of the debentures'. Does it do more than give you priority over the debentures?"

The reply to that question was:

"That construction gives no meaning to the word 'forthwith'."

Counsel for the defendant, in his argument in that case, said:

"[Section 107] merely supplements s. 209 and gives preferential debts as against assets in the hands of a receiver the same priority that they would have in a winding-up."

ASTBURY, J., observed:

"That construction gives no meaning to 'forthwith' out of 'any' assets."

It would thus appear that, in the course of the argument, the learned judge was giving some importance to the presence of the word "forthwith." In his judgment, however, he made no reference to it. He concluded his judgment with the following observations ([1913] 2 Ch. 311):

"Two views have been contended for before me as to the true construction of s. 107. (1) That a receiver and manager with notice of a preferential claim is liable for damages in tort for exhausting the then assets of the company in making payments to ordinary creditors, without first applying the same or a sufficient part thereof in satisfying such preferential claim. (2) That his only obligation thereunder is to avoid applying such assets, after notice, in actual payment of principal or interest to debenture-holders

before satisfying thereout the preferential claim. There does not appear to be any direct authority on this point, but in my judgment the former is the correct view."

He then assessed the damages. The learned judge held, therefore, that, under the section as it stood in the Act of 1908, there was not merely a negative obligation on the part of the receiver not to pay the debenture-holders before paying preferential creditors, but there was an obligation on him to pay the preferential creditors out of the assets on the date when he took over, and, if he did not make that payment, but applied those assets towards other liabilities, he became liable in damages. Of course, as it was correctly pointed out, ASTBURY, J., was dealing only with the assets which the receiver took over, and not with moneys which might subsequently come to the hands of the receiver in the course of his management of the company. To that extent, therefore, *Woods v. Winskill* (1) gives no assistance in regard to the present case.

There are, therefore, two points which make this case different from *Woods v. Winskill* (1)—(i) the fact that the plaintiffs base their claim on the acquisition of later assets by the receiver, as their claim to be paid out of the assets which were in existence when he was appointed is barred by the Limitation Act, 1939, s. 2 (1) (a); and (ii) the omission of the word "forthwith." As regards the point whether any obligation is imposed on the receiver to pay, it seems to me, that the decision of ASTBURY, J., is of some assistance in this respect. He held that there was an obligation imposed on the receiver to pay preferential claims before making payments to ordinary creditors, and that the receiver was liable if the preferential claims were not paid. He does not seem to me to have placed very much reliance, as far as his judgment shows, on the existence of the word "forthwith" in s. 107 (1) of the Act of 1908, and I do not think that the omission of this word from s. 78 (1) of the Act of 1929 makes any substantial difference to the provisions of the section. There is a direction that the preferential payments which, under a later section of the Act, are:

"... to be paid in priority to all other debts, shall be paid out of any assets coming to the hands of the receiver ... in priority to any claim for principal or interest in respect of the debentures."

To my mind, that is not merely a negative provision to the effect that the receiver is protected if he does not pay the debenture-holders. It is a provision which requires him to pay the preferential creditors out of any assets coming to his hands. Therefore, it seems to me that, if he has had any assets out of which this payment could have been made, he is under a liability in tort to the plaintiffs. In 1945 he had in his hands the sum of £91, which was more than sufficient to make the payment of £63 9s. 8d. to the plaintiffs. He did not make that payment, but went on trading, incurred subsequent liabilities, and, therefore, paid away the moneys in the course of his trading. It seems to me that he committed a tort when he did that, and, therefore, the plaintiffs' claim succeeds. There must be judgment for the plaintiffs for the amount claimed by them, and costs.

Judgment for the plaintiffs with costs.

Solicitors: *Allen & Son* (for the plaintiffs); *Hamblins, Grammer & Hamlin* (for the defendant).

[Reported by R. D. H. OSBORNE, Esq., Barrister-at-Law.]

Re ST. SAVIOUR'S, WALTHAMSTOW.

[CONSISTORY COURT OF THE DIOCESE OF CHELMSFORD (Linton Thorp, K.C., sitting as Chancellor), May 9, 1950.]

Ecclesiastical Law—Ornaments—Crucifix and candlesticks—Position of crucifix—Number of candlesticks—Legality of six candlesticks on the Holy Table or retable.

The use of any candlesticks on the Holy Table, if likely to be the subject of ceremonial use, is unlawful. One candlestick ought to be, and two, but not more, may lawfully be, on the Holy Table. Two candlesticks may be placed either on the Holy Table or on a retable behind the Holy Table, but the use of six candlesticks either on the Holy Table or on a retable is unlawful.

Re St. Saviour's, Hampstead ([1932] P. 134), followed.

Re Church of the Holy Trinity, Woolwich ([1949] P. 369), not followed.

Having regard to the fact that for many years there was a mosaic picture of the crucifixion on the east wall of a church immediately behind the Holy Table, and an assurance having been given that there was no risk of a crucifix being the object of superstitious use, a faculty for its installation in the church would be granted, such crucifix to be on the High Table or retable at the option of the incumbent.

[AS TO THE USE OF LIGHTED CANDLES ON HOLY TABLE, see HALSBURY, Hailsham Edn., Vol. 11, p. 802, para. 1463; and FOR CASES, see DIGEST, Vol. 19, pp. 439, 440, Nos. 2810-2818.]

Cases referred to :

- (1) *Re Church of the Holy Trinity, Woolwich*, [1949] P. 369.
- (2) *Re St. Saviour's, Hampstead*, [1932] P. 134; Digest Supp.
- (3) *Read v. Lincoln (Bp.)*, [1892] A.C. 644; 62 L.J.P.C. 1; 67 L.T. 128; 56 J.P. 725; *affg.*, [1891] P. 9; 64 L.T. 149; 19 Digest 315, 1146.
- (4) *Ridsdale v. Clifton*, (1877), 2 P.D. 276; 46 L.J.P.C. 27; 36 L.T. 865; 42 J.P. 148; 19 Digest 314, 1145.
- (5) *Martin v. Mackonochie*, (1868), L.R. 2 P.C. 365; 38 L.J.Ecl. 1; 19 L.T. 503; 33 J.P. 35; 16 E.R. 603; 19 Digest 450, 2948.
- (6) *Capel St. Mary, Suffolk (Rector and Churchwardens) v. Packard*, [1927] P. 289; Digest Supp.

PETITION for the grant of a faculty.

On Mar. 28, 1950, at a sitting of a consistory court for the diocese of Chelmsford, Mr. LINTON THORP, K.C., the chancellor, heard the petition of the Reverend C. W. Nye, the incumbent, and Mr. W. H. Phillips and Mr. F. J. Darby, the churchwardens, of St. Saviour's Church, Walthamstow, for the grant of a faculty for the re-furnishing of the church with an altar table, a crucifix and six candlesticks, a communion rail, a sedilia, clergy and choir stalls, and a pulpit.

Wigglesworth for the petitioners.

The petition was unopposed.

LINTON THORP, K.C.: The incumbent and the churchwardens of St. Saviour's Church, Walthamstow, petition for the grant of a faculty for the re-furnishing of that church with the following articles, *viz.*:—(a) an altar table, (b) a crucifix and six candlesticks, (c) a communion rail, (d) a sedilia, (e) clergy and choir stalls, and (f) a pulpit, at a total estimated cost of £1,105. The church in question was built in 1874. It had on the east wall a representation of the crucifixion of our Lord done in mosaic work. Immediately in front of that was a retable on which were a small cross on a pedestal in the centre and six candlesticks, three on each side of the cross. There were two mosaics on each side of the centre mosaic, and evidence, which I accept, was given that as from 1886 onwards there were always six candlesticks on the retable in the position

described. On June 6, 1945, the church was partly destroyed by fire, only the south aisle and a chapel therein escaping. The desire of the petitioners is to restore the church, so far as practicable, to its former state.

In the chapel there is a statue of the Virgin Mary, flanked on either side by two angels, and another statue of the Virgin Mary is immediately outside the chapel, for which there seems to be no record of any faculty having been granted.

- A Reservation of the sacrament is practised in the chapel and there is a sanctus bell, used at the time of the consecration. There are pictures in the church representing the fourteen stations of the cross in the positions usually found in Roman Catholic churches, differing only in that the pictures are not built into or affixed to the walls. Evidence was given that on every Friday in Lent a procession was made round the inside of the church and a short service with an address held at each of the fourteen stations of the cross. It is not known if any faculty had been granted for these stations and the sanctus bell, but, as the diocese of Chelmsford only came into being in 1914, it is possible that some faculties were granted by the consistory court which then had jurisdiction in Walthamstow. The legality of some, at least, of the ornaments in use in this church at the moment may have to be considered at some future date and is
- C not now before the court in these proceedings. They are only recounted to give a general idea of the form of service in this church and to approach the subject-matter of the petition with a knowledge of what use is being made of some ornaments in the church to estimate what use may perhaps be made *in futuro* of the ornaments sought to be installed.

- D On Jan. 31, 1950, the proposed new altar was dedicated by the LORD BISHOP OF CHELMSFORD, as were also the six candlesticks and the crucifix, all of which were on the altar for the purpose of being dedicated only. On a previous date *interim* permission to place the crucifix and two only of the candlesticks on the Holy Table at the dedication ceremony had been given, yet all six candlesticks were, without further reference to this court, placed on the Holy Table, four being removed after the dedication.

- E There are no difficulties in connection with (a) the Holy Table, (c) the communion rail, (d) the sedilia, (e) the clergy and choir stalls, and (f) the pulpit. Accordingly, a faculty is decreed for these ornaments to be placed in the church as prayed. In regard to (b) the crucifix and the six candlesticks, the position is by no means so simple. Three questions emerge, *viz.*:—(i) Should a faculty issue for the crucifix? (ii) Should a faculty issue for the six candlesticks or only
- F for two? (iii) Should the crucifix and candlesticks be placed on the Holy Table or on a retable. In so far as the crucifix is concerned, the court will grant a faculty for its installation in the church having regard to the fact that for many years there was a mosaic picture of the crucifixion on the east wall of the church immediately behind the Holy Table and, the mosaic having been damaged beyond repair, the petitioners seek to have the crucifix in its stead so as to
- G represent so far as possible today some continuity in the appearance of the church. An assurance was given that there was no risk of the crucifix being the object of superstitious use, that there is a crucifix over the pulpit, that a crucifix forms part of a war memorial in the church, and that no difficulty has been encountered in regard to them. The position to be occupied by the crucifix and the candlesticks will be defined later in this judgment.

- H On the question whether the two or the six candlesticks should be authorised, it is not possible, in my view, to reconcile the recent decision of the Chancellor of Southwark (E. GARTH MOORE) in *Re Church of the Holy Trinity, Woolwich* (1), and that of the then Chancellor of London (F. H. L. ERRINGTON) in *Re St. Saviour's, Hampstead* (2). Consequently, I find myself obliged to disagree with one of those decisions. This court is not bound by either of those decisions and so an attempt has been made to review, as far as possible, the position of lights on an altar or Holy Table, historically and juridicially, so that I may

come to my own decision on the question, particularly as counsel for the petitioners argued that more is known now in regard to the law, use, and custom of lights than was known until comparatively recently. He based his argument on a book called "THE SHAPE OF THE LITURGY," by Dom Gregory Dix and relied on the view of their Lordships in the Privy Council in *Read v. Lincoln (Bp.)* (3) ([1892] A.C. 666) that it would be a matter for grave consideration how far new materials were available since the earlier decisions on the subject. In that case the Privy Council, when considering *Ridsdale v. Clifton* (4), explained, however, that that view was limited to an examination of the law on the subject and pointed out (*ibid.*, 654):

"... the importance of establishing and maintaining a clear and unvarying interpretation of rules the stringency and effect of which ought to be easily ascertained and understood by every clerk before his admission to holy orders."

Such clear and unvarying rules could not be effective were individual chancellors to interpret the law from year to year as fresh historical facts are brought to light by research and study.

If the view of Dom Gregory Dix be correct, and it is certainly fortified by the fruits of considerable study and research, precedents are available for any number of lights on a Holy Table from one to twenty, excepting only seven and nineteen for which no precedent has so far been found. The impression gathered from his book is that the bulk of the precedents cited is to be found in cathedrals or collegiate churches, and not in parish churches such as St. Saviour's, Walthamstow. Similarly, in *Re Church of the Holy Trinity, Woolwich* (1) references are made to the King's College Chapel, Cambridge, and the reconstructed Guards Chapel, London, both of which are, of course, peculiars. In *Martin v. Mackonochie* (5) it is stated (L.R. 2 P.C. 387):

"There is a clear and obvious distinction between the presence in the church of things inert and unused, and the active use of the same things as a part of the administration of a sacrament or of a ceremony."

The same case is an authority for the proposition that the lighting of candles for the purpose of giving light is lawful, but the use of candles or any other lights for ceremonial or superstitious purposes in any part of the church is forbidden. That decision was prior to *Read v. Lincoln (Bp.)* (3) and the advice of the Privy Council in that case so far as candles on the Holy High Table were concerned in no way differed from the decision in *Martin v. Mackonochie* (5), but proceeded solely on the fact that the then Lord Bishop of Lincoln had not committed any ecclesiastical offence by taking part in the celebration of divine service in a church in which unlawful ornaments were present and that His Lordship by merely taking such part did not necessarily use them as a matter of ceremony.

In 1222 a constitution of a council at Oxford, apparently under Archbishop Stephen Langton, provided as follows :

"*Tempore quo missarum solemnia peraguntur, accendentur duae candela, vel ad minus una cum lampade.*"

One light at least being necessary to signify that "*Christus est splendor lucis aeternae.*" A constitution of the council at Oxford under Walter, Archbishop of Canterbury, in 1322, obviously copying that previous constitution, enacted:

"... *tempore, quo missarum solemnia peraguntur, accendentur duae candela, vel ad minus una.*"

The injunctions of Edward VI, issued in 1547, although not having the force of a statute, prescribed in terms:

“ . . . but only two lights on the high altar before the sacrament, which for the signification that Christ is the very true light of the world, they shall suffer to remain still.”

Lynwood also states in his *PROVINCIALE*, p. 236: “*candela . . . ardens significat ipsum Christum qui est splendor lucis aeternae.*” According to a manuscript at Canterbury in Archbishop Parker’s *INVENTORY OF ARTICLES LEFT FOR*
A *CANTERBURY CATHEDRAL* there appear “(ii) candlesticks copper and gilt,” the figure “(vi)” having originally been in the draft inventory and struck out and the “(ii)” substituted. An interesting analogy, albeit remote, to this case. Between 1559 and 1603 two lights were by virtue of the present rubric continued in all Queen Elizabeth’s chapels throughout her reign and also between 1550 and 1595 in Lord Burleigh’s chapel. Doubtless these also were peculiars,
B but it is highly doubtful if either Her late Majesty Queen Elizabeth or Lord Burleigh would have countenanced any ornament calculated to be the subject of superstitious use.

In *Re St. Saviour’s, Hampstead* (2) Mr. CHANCELLOR ERRINGTON, probably having some, if not all, of these matters in mind, took the view ([1932] P. 140) that at least one light should be on the Holy Table to signify that our Lord was indeed the very True Light of the world, a view which has of course been expressed in many cases prior and subsequent to that decision. In *Martin v. Mackonochie* (5), their Lordships of the Privy Council clearly held (L.R. 2 P.C. 389) that the two constitutions of 1222 and 1322 must be taken to have been repealed by the Act of Uniformity, 1558-9, s. 4, and that the effect of that statute was to declare illegal the use of any lighted candles at all if it were a ceremonial act
D and was forbidden by that Act and our present Prayer Book. If viewed, however, as mere ornaments and no more, then it must be observed that the judgment of the Privy Council in *Martin v. Mackonochie* (5), when dealing with the argument of the respondent’s counsel that there was nothing in the Prayer Book of the second year of EDWARD VI making it unlawful to continue the use of lighted candles, stated (*ibid.*, 391):

“All this may be conceded, but it is in reality beside the question. The rubric of our Prayer Book might have said: Those ornaments shall be retained which were lawful, or which were in use in the second year of Edward VI, and the argument as to actual use at the time, and as to the weight of the injunction of 1547, might in that case have been material. But the rubric, speaking in 1661, more than a hundred years subsequently,
F has, for reasons which it is not the province of a judicial tribunal to criticise, defined the class of ornaments to be retained by a reference, not to what was in use *de facto*, or to what was lawful in 1549, but to what was in the church by authority of Parliament in that year; and in the Parliamentary authority which this committee has held, and which their Lordships hold, to be indicated by these words, the ornaments in question are not found
G to be included. Their Lordships have not referred to the usage as to lights during the last three hundred years, but they are of opinion that the very general disuse of lights after the Reformation (whatever exceptional cases to the contrary might be produced), contrasted with their normal and prescribed use previously, affords a very strong contemporaneous and continuous exposition of the law upon the subject.”

H The cases cited by Dom Gregory Dix may well be regarded as exceptional, and some of them are prior to the Reformation. In the result the Privy Council found the charge as to lights had been sustained. That charge was simply and unequivocally:

“ . . . using lighted candles on the communion table during the celebration of the Holy Communion, when such candles are not wanted for the purpose of giving light.”

This case was not cited, apparently, to the courts which decided *Re St. Saviour's, Hampstead* (2), and *Capel St. Mary, Suffolk (Rector and Churchwardens) v. Packard* (6), in the former of which Mr. CHANCELLOR ERRINGTON confirmed the placing of two candlesticks on the retable and did not require the removal of the other four candlesticks from the church on an undertaking as to their use. In the latter case the then Dean of the Arches (SIR LEWIS DIBDIN) did not require counsel for the respondent to address him as to the retention of two candlesticks, it having been pointed out that counsel for the appellants did not attempt to argue that six candlesticks on the retable could be retained. The result was that the learned Dean of the Arches limited the order for the removal of the six candlesticks to the removal of four only so that it might remain possible to have two lights on the Holy Table at Holy Communion for the signification that Christ is the very true light of the world. In *CRIPPS ON CHURCH AND CLERGY*, 8th ed., p. 230, the editor, Mr. Chancellor MacMorran, K.C., states:

"The old English use in parish churches being to place not more than two, and at least one light on the Holy Table in service time, this was retained at the Reformation. Consequently the use of six lights is unlawful."

He cites the above two last mentioned cases as authorities for that proposition. Immediately above that proposition the learned editor states, however, on the authority of *Martin v. Mackonochie* (5), that the placing of two lighted candles on the Holy Table during the celebration of Holy Communion, when such candles were not wanted for the purpose of giving light, had been held by the Privy Council to be unlawful whether as a ceremony, as an ornament, or as subsidiary to the service, a finding dissented from by the Archbishop of Canterbury in *Read v. Lincoln (Bp.)* (3) ([1891] P. 88). In *Re Church of the Holy Trinity, Woolwich* (1) the Chancellor of Southwark (E. GARTH MOORE) expressed his view ([1949] P. 371) that no rule of law or usage could be laid down with regard to the number of lights on the altar. He ignored with considerable doubt in his mind the decision of the late Chancellor of London (F. H. L. ERRINGTON) in *Re St. Saviour's, Hampstead* (2) and considered that in *Capel St. Mary, Suffolk (Rector and Churchwardens) v. Packard* (6) the question was not argued and, therefore, had been allowed to go by default. With great respect I do not think that the latter case should be regarded as having gone by default *simpliciter*. Doubtless the learned Dean of the Arches (SIR LEWIS DIBDIN) would *ex proprio motu* have considered whether the six lights or only two of them should be allowed to remain before making his final order. Further, I do not take the view that it was held in *Read v. Lincoln (Bp.)* (3) that two lights were lawful, as in the Privy Council, at any rate, the *ratio decidendi* of the case was that the Lord Bishop of Lincoln had not been guilty of any ecclesiastical offence merely because His Lordship took part in a ceremony in a church where there were two lights on the altar. In the result, the Chancellor of Southwark (E. GARTH MOORE) granted the faculty for six candlesticks subject to the direction that not more than two lights should be on the altar at the same time, leaving the petitioners to approach the bishop and discuss the number with him, thus, it would seem, leaving the decision as to the number of lights at any given moment to the directions of the ordinary—and holding that the question of more than two lights was a matter of good order and was the primary concern of the diocesan and not of the chancellor. It was also stated that a further order would be granted if the bishop permitted six or four lights. In effect, the learned chancellor really did not in terms decide the issue before him, but left it to the diocesan to decide, a procedure for which I can find no authority and which seems to conflict in principle with the *ratio decidendi* in *Read v. Lincoln (Bp.)* (3), where LORD HALSBURY, L.C., delivering the judgment of the Privy Council, pointed out ([1892] A.C. 668, 669)

A that the only alternative open to a clergyman in the circumstances of such a case, whatever his own views, and whatever his rank in the church, would be to refuse to join in the administration of the sacrament of the Lord's Supper to the congregation, because there was a light burning when no light was necessary. This course would be in keeping with the action of Bishop Ridley on Apr. 12, 1550, in declining to enter St. Paul's Cathedral, London, until the "Lytte of the Aulter" was extinguished, although it seems possible, if not probable, that such light was not on the altar, but was suspended before it.

Considering the above decisions and also the texts and engravings indicating usage as to lights set forth in the appendix to *Read v. Lincoln (Bp.)* (3), I feel compelled to hold that the use of more than two lights on the Holy Table or on a retable is unlawful and, accordingly, the faculty prayed for in the petition to place six on the Holy Table must be refused. In coming to this conclusion it must be conceded that the evidence as to the stations of the cross, the sanctus bell, the statutes of the Virgin Mary, and the services on the Fridays in Lent before the stations of the cross have led the court to apprehend with some anxiety the possibility of a ceremonial user being made of these candlesticks. During the argument the possibility of the six candlesticks and the crucifix being put on a retable, as was the case before the fire in this church, was adumbrated, and the court was informed that the retable formerly in use in this church, although damaged, was capable of repair. Indeed, counsel for the petitioners opened this case as one in which it was sought so far as possible to restore the church to its former state, which connoted, not the placing of the crucifix and candlesticks on the Holy Table, for which permission is now sought in the petition, but the placing of them on the old repaired or a new retable. It is clear that the advice of their Lordships in *Martin v. Mackonochie* (5) drew no distinction between the Holy Table and a retable or ledge of wood placed on the Holy Table. If I may say so, the use of a retable as opposed to the Holy Table does seem somewhat of a distinction without much difference in that in many instances it is not possible a few paces away to see if the articles be, in fact, on a retable or on the Holy Table, and it savours of seeking to obey the letter of the law and ignore the spirit of it.

Considering the cases referred to and the law, I have reached the conclusion that the use of any candlesticks at all on the Holy Table, if likely to be the subject of ceremonial use, is illegal; that one candlestick ought to be, and two, but not more, may lawfully, be on the Holy Table provided they are not used in any ceremonial way, but merely to signify, that our Lord is indeed the very True Light of the world; that two candlesticks may be placed for that purpose either on the Holy Table or on a retable or ledge behind the Holy Table; but that the use of six candlesticks either on the Holy Table or on a retable is not lawful.

Solicitors: *Trollope & Winckworth* (for the petitioners).

[Reported by R. HENDRY WHITE, ESQ., Barrister-at-Law.]

HOLMES v. ASHFORD AND OTHERS.

[COURT OF APPEAL (Tucker, Somervell and Singleton, L.JJ.), May 8, 9, 1950.]

Negligence—Dangerous goods—Liability of manufacturer—Hair dye—Warning given by manufacturers to hairdresser—Character of preparation not brought to knowledge of customer—Failure of hairdresser to take precautions—Injury to customer.

A
A hairdresser treated the plaintiff's hair with a dye, and as a result the plaintiff contracted dermatitis. The dye had been delivered to the hairdresser in labelled bottles together with a small brochure of instructions. Both the labels and the brochure contained a warning that the dye might be dangerous to certain skins, and a recommendation that a test should be made before it was used. The hairdresser had read the labels and the brochure and was aware of the danger, but he made no test and did not warn the plaintiff. The plaintiff claimed damages against the hairdresser and the manufacturers, and was awarded judgment against both. On appeal by the manufacturers,

B
C
D
HELD: a manufacturer who puts a dangerous article on the market must take reasonable steps to prevent any person coming into contact with it from being injured, but it is not necessary in every case that precautions should be taken to insure that the ultimate recipient of the article is warned of the danger; in the present case the manufacturers had given the hairdresser a warning which was sufficient to intimate to him the potential danger of the dye, and it was not necessary that they should have warned the plaintiff; and, therefore, they had discharged the duty which was on them.

Dictum of SCRUTTON, L.J., in Hodge & Sons v. Anglo-American Oil Co. (1922) (12 Ll.L. Rep. 188), applied.

[AS TO DUTY TO WARN IMPOSED ON VENDOR OF DANGEROUS GOODS, see HALSBURY, Hailsham Edn., Vol. 23, pp. 631, paras. 886, 887; and FOR CASES, see DIGEST, Vol. 36, pp. 56-58, Nos. 353-364.]

E
Cases referred to:

- (1) *Anglo-Celtic Shipping Co., Ltd. v. Elliott and Jeffery*, (1926), 42 T.L.R. 297; 36 Digest 57, 363.
- (2) *Burfitt v. Kille (A. & E.)*, [1939] 2 All E.R. 372; [1939] 2 K.B. 743; 108 L.J.K.B. 669; 160 L.T. 481; Digest Supp.
- (3) *Farrant v. Barnes*, (1862), 11 C.B.N.S. 553; 31 L.J.C.P. 137; 142 E.R. 912; 8 Digest 135, 894.
- (4) *Levy v. Langridge*, (1838), 4 M. & W. 337; 150 E.R. 1458; *sub nom., Levi v. Langridge*, 7 L.J.Ex. 387; 39 Digest 458, 852.
- (5) *Hodge & Sons v. Anglo-American Oil Co.*, (1922), 12 Ll.L. Rep. 183; Digest Supp.

G
APPEAL by the second defendants, the manufacturers of a hair dye, from an order of CROOM-JOHNSON, J., made on Feb. 16, 1950, whereby he awarded the plaintiff £600 damages against the first defendant, a hairdresser, for breach of contract and negligence, and against the second defendants for negligence.

H
On Sept. 3, 1948, the plaintiff was treated by the first defendant with "Inecto," a hair dye manufactured by the second defendants. The plaintiff contracted dermatitis. At the trial the first defendant, having admitted liability, was called as a witness by the plaintiff, and he stated that he had read the instructions enclosed with the dye warning users that it might be dangerous to certain skins and advising that a test should be made before use, but that, notwithstanding that warning, he had applied the dye to the plaintiff's hair without a test. CROOM-JOHNSON, J., found against the second defendants on the ground that the first defendant had not been given adequate notice of the dangerous

nature of the dye and that the second defendants had not taken reasonable steps to bring the nature of the article to the knowledge of the plaintiff.

Melford Stevenson, K.C., and *Ryder Richardson* for the second defendants, *Rapidol, Ltd.*

C. H. Duveen for the plaintiff.

- TUCKER, L.J., stated the facts and continued: A number of authorities
- A have been cited to us by counsel for the plaintiff in support of the proposition that a manufacturer who puts a dangerous article on the market must take reasonable precautions to ensure that the ultimate recipient is warned of the danger. I think that that is not the correct way of stating the proposition. Every person who puts on the market a dangerous article (and the learned judge has found this to be a dangerous article) must take reasonable steps in all the
- B circumstances. This is not an article the nature of which can be ascertained by intermediate examination, and, therefore, it is an article which requires some warning. The question in this case is: Was the warning attached to this bottle a sufficient and adequate warning to be given in cases where the material is supplied to hairdressers for use on their customers? We must presume that the material is supplied to reasonable people, and the first defendant has said
- C that he read the warning, appreciated what it meant, and ignored it. I find it, therefore, impossible to hold that the warning which was, in fact, given in the present case was insufficient. Cases may possibly arise where criticism may be made that the warning is not in sufficiently large print, or complaints may be made where the substance is used by a woman on her own hair, and by holding that the warning was sufficient in the present case I must not be taken
- D to imply that a similar warning would be sufficient in those circumstances. The question is whether it was sufficient in the circumstances of this particular case, and, it having been established that the warning came to the knowledge of the man who was going to use it, namely, the first defendant, I think that it is impossible to say that the second defendants were in breach of their duty to take reasonable steps to give sufficient warning of the nature of the substance
- E which they were putting on the market by delivering it to hairdressers to use on their customers.

- With regard to the authorities, we have been referred to passages in some textbooks which are not altogether borne out by the cases which are supposed to be an authority for them. We were referred to the decision of ROCHE, J., in *Anglo-Celtic Shipping Co., Ltd. v. Elliott and Jeffery* (1) from which I do not
- F think counsel for the plaintiff derived much assistance. It is not, I think, an authority for what is stated in PROFESSOR WINFIELD'S "TEXTBOOK OF THE LAW OF TORT," 4th ed., p. 540, where the learned author says:

- "*Anglo-Celtic Shipping Co., Ltd. v. Elliott and Jeffery* (1) illustrates the rule. C owned a ship and sent it to B to clean the condenser. He told B to use a cleaning fluid, 'pluperfect liquid'. This was manufactured
- G by A and, if it came in contact with cast iron, it generated an explosive gas. Neither C nor B knew this, but A either knew, or ought to have known, it. An explosion occurred in the use of the liquid on cast iron and ROCHE, J., held that A was liable to C. Until 1932 it was not certain whether it is sufficient for A to warn B the first recipient of the chattel or whether he must also warn C, the ultimate transferee. ROCHE, J., held that he must warn C, but he admitted that only the House of Lords could settle the point."
- H

When one looks at the case I do not think that it is an authority for the proposition. ROCHE, J., said (42 T.L.R. 299):

"As to the second defendants, the law where a dangerous thing had been put into circulation had often been discussed, and he would not discuss it further; he agreed with an observation of SCRUTTON, L.J., in a recent case

that if it was to be discussed again it should be in the House of Lords. It was sufficient for him to assume the truth of the proposition that if the thing sold was of a dangerous nature a warning ought to be given. It was not necessary to discuss the case where an article sold did not belong to a class of things which were dangerous in themselves, but was dangerous because of some defect in the individual article. Nor was it necessary here to consider any duty to take care in other respects besides giving warning. He was satisfied that the pluperfect liquid was dangerous of itself; it was sold under a fancy name, its composition was not disclosed, and it was disguised by a particular smell which was purposely imparted to it. The different analyses which had been given in evidence suggested that there were irregularities in manufacture. And not only was the article dangerous in itself, but the instructions failed to give any adequate warning. So there must be judgment for the plaintiffs as against the second defendants, with costs."

The learned judge does not deal with the question whether a warning had got to be brought to the notice of C, or whether it would have been sufficient if the warning had been made known to B.

I pass over *Burfitt v. Kille (A. & E.)* (2) to which we were referred, as I do not think much assistance is to be obtained from that case. *Farrant v. Barnes* (3) was much relied on by counsel for the plaintiff. The facts in that case, as set out in the headnote, were as follows (11 C.B.N.S. 553):

"The defendant being desirous of sending a carboy of nitric acid to Croydon, his foreman gave it to one R., the servant of a railway carrier, who (as the railway company would only carry articles of that dangerous character on one day in each week), handed it to the plaintiff, the servant of a Croydon carrier, without communicating to him (and there being nothing in its appearance to indicate) its dangerous nature. Whilst being carried by the plaintiff to the cart, the carboy from some unexplained cause burst, and its contents flowed over and severely injured the plaintiff:—*Held*, that the defendant was liable for the injury thus resulting from his breach of duty."

It appears (*ibid.*, 556) that R.

"... knew that it was acid, and dangerous, but not that it was nitric acid; and that he told the plaintiff to be careful of it."

In the course of his judgment, ERLE, C.J., said (*ibid.*, 561):

"The application to the plaintiff being an application to take charge of and to carry and deliver a dangerous article, it was the duty of the defendant, who knew the danger, to take care that the dangerous character of the article should be made known to all persons who were to be concerned in the carriage of it. The jury have found that he did not do so. There was no evidence as to how the accident occurred—probably it was from the explosive nature of the article. But, be that as it may, if notice had been given of the dangerous character of the article, greater precaution possibly might have been used in the handling of it. I think the plaintiff is brought into such direct contact with the defendant that the distinction relied on to take the case out of the principle upon which the decision in *Langridge v. Levy* (4) proceeded fails. The defendant, knowing the dangerous character of the article, and omitting to give notice of it to the plaintiff, so that he might exercise his discretion as to whether he would take it or not, was guilty of a clear breach of duty."

WILLES, J., said (*ibid.*, 563):

"I apprehend that, as a matter of legal duty, a person who gives another dangerous goods to carry, goods which require more care and caution than

ordinary merchandise, and which are likely in the absence of such caution to injure persons handling them, is bound to give notice of their dangerous character to the party employed to carry them, and is liable for the consequences which are likely to ensue from the omission to give such notice."

Lastly, we were referred to *Hodge & Sons v. Anglo-American Oil Co.* (5). In that case a barge, the property of the Anglo-American Oil Co., was used by the company for the carriage of petrol and BANKES, L.J., came to the conclusion that, owing to the presence of petrol in it, the barge was a dangerous thing. The facts set out in the headnote (12 Ll.L. Rep. 183) show that the plaintiffs, Messrs. Hodge & Sons, were ship repairers and wharf owners at Millwall, who appealed from a judgment given in favour of the defendants, the Anglo-American Oil Co., and Messrs. Donald Miller & Co., barge repairers, of London, in an action by the plaintiffs claiming in respect of damage arising out of an explosion on the Anglo-American Co.'s oil tank barge Warwick, at Millwall, when she was being repaired by the plaintiffs, to whom she had been sent for that purpose by Miller & Co. The question was whether or not sufficient warning had been given of the condition of the barge, the condition being known to Messrs. Miller, but there being controversy whether or not it was known by Messrs. Hodge. BANKES, L.J., in the course of his judgment, said (*ibid.*, 184):

"It is in these circumstances that the question of liability arises. The Anglo-American Oil Co. were, in my opinion, under a double duty, (a) the duty of using reasonable means for securing the efficient cleaning out of the tank, and (b) the duty of giving any necessary warning of the dangerous character of the tank even after a proper and sufficient cleaning. The first duty, in my opinion, extended to all those who necessarily came into contact with the tank in the course of carrying out the repairs, including therefore the plaintiff Wilmott. With regard to the second duty, a warning would not, in my opinion, be required where the person who would otherwise be entitled to warning was already aware of the danger, or who might reasonably be assumed to be aware of it . . . I think that the Anglo-American Oil Co. were entitled to assume that Messrs. Hodges needed no warning as to that danger. It would appear from the evidence of Messrs. Hodges' manager that he was in fact sufficiently aware of the danger of working on the barge to know that it was wrong to let the men go to work before the tank was properly ventilated."

SCRUTTON, L.J., said (*ibid.*, 188):

"The law, therefore, seems to be: (1) That if the barge which has carried petrol is an article dangerous in itself, it is the duty of the owners to take proper and reasonable precautions to prevent its doing damage to people likely to come into contact with it. These precautions may be fulfilled by entrusting it to a competent person with reasonable warning of its dangerous character, if that danger is not obvious. If such precautions are not taken, the owner will be liable to third persons with whom he has no contract for damage done by the barge, which they could not have avoided with reasonable care."

ATKIN, L.J., dissenting with regard to one aspect of the case, said (*ibid.*, 191):

"It becomes unnecessary in this view to decide the question whether, assuming that there was only a duty to warn, that duty was excused on the ground that the employer of the injured men must be deemed to have known that the barge was in a dangerous condition, and therefore there was no duty to warn him or his men. It is probably a question of fact in each case whether a duty to warn is effectively performed by a warning to an employer. In some cases that may be the only reasonable warning

possible; or, at any rate, a sufficient warning; in other cases it may well be that notice to the employer should be supplemented, as, for instance, where a dangerous chattel is being sent on a long land transit, *e.g.*, by rail, and may be handled by many of the employers' servants working at a great distance from him."

I think that it is a question of degree and a question of fact in every case whether sufficient warning has been given. I would apply to this case the words of SCRUTTON, L.J., that, if the article—the barge—

"... which has carried petrol is an article dangerous in itself, it is the duty of the owners to take proper and reasonable precautions to prevent its doing damage to people likely to come into contact with it. These precautions may be fulfilled by entrusting it to a competent person with reasonable warning of its dangerous character, if that danger is not obvious."

In the present case the substance was not entrusted to a competent person, but it was supplied to a hairdresser with the knowledge of the manufacturers, and it must have been in the contemplation of the manufacturers supplying these goods to hairdressers that hairdressers may be expected to interpose their judgment and reason whether they are going to use a hair dye or not. In my view, if they give a warning which, if read by a hairdresser, is sufficient to intimate to him the potential dangers of the substance with which he is going to deal, that is all that can be expected of them. I think it would be unreasonable and impossible to expect that they should give warning in such form that it must come to the knowledge of the particular customer who is going to be treated. Counsel for the plaintiff says they must take reasonable steps to see that it will come to the notice of any customer. I cannot contemplate any steps which could be calculated to bring a matter of this kind to the knowledge of any person who is treated with the preparation. The most that can be expected of the manufacturers of goods of this kind is to see that the hairdresser is sufficiently warned.

I have not found it necessary to refer to the brochure, and the labels on the bottles, because the first defendant said that he had read them and understood them. I think they indicate sufficiently to any person who reads them, at any rate to a reasonable hairdresser, that the substance he is concerned with is of the nature alleged in the statement of claim, namely, that it is a dye which is "a dangerous article in that when applied to the heads of certain persons it would or might cause acute dermatitis." I think that that quality of the dye "Inecto" was sufficiently brought to the notice of the first defendant by the notices which have been put in evidence. For these reasons, I think that the plaintiff has failed to establish a case of liability on the part of the second defendants and that the appeal should succeed.

SOMERVELL, L.J.: I agree with the reasons and conclusions given by TUCKER, L.J.

SINGLETON, L.J.: I also agree.

Appeal allowed with costs in the court below. No order as to costs in the Court of Appeal.

Solicitors: *Macdonald & Stacey* (for the second defendants); *M. A. Jacobs & Sons* (for the plaintiff).

[Reported by J. D. PENNINGTON, Esq., Barrister-at-Law.]

EAST END DWELLINGS CO., LTD. v. FINSBURY
BOROUGH COUNCIL.

[KING'S BENCH DIVISION (Devlin, J.), May 8, 1950.]

Compulsory Purchase—Compensation—Interest in war-damaged hereditament—Flats subject to Rent Acts demolished by enemy action—Whether compensation to be assessed on the basis that rents controlled—Town and Country Planning Act, 1947 (c. 51), s. 53 (1) (a).

Before 1944 the claimants had owned a block of flats, all of which were subject to the Rent Restrictions Acts, having become controlled in 1939, and most of which were held on statutory tenancies. On June 24, 1944, the flats were completely demolished by enemy action, and a cost of works payment in respect of the damage was determined to be appropriate. The vacant site was compulsorily purchased by the local authority, and the question arose of the amount of compensation payable to the claimants having regard to the Town and Country Planning Act, 1947, s. 53 (1) (a), which provides that in such a case the value of the interest for the purposes of the assessment of compensation shall be taken to be the value which it would have if the whole of the damage had been made good before the date of the notice to treat. It was accepted that, if the flats had been re-built by the claimants, they would not have been obliged to let them at the standard rents.

HELD: "made good" in s. 53 (1) (a) was apt to include re-building the premises in substantially the same form as the previous building, but nevertheless the notional new building in this case was to be treated as being premises which had never before existed for the purposes of the Rent Acts, and, therefore, the compensation ought to be assessed on the basis that the rents of the notional building would not be restricted to the amount of the former standard rents.

Ellis & Sons Amalgamated Properties, Ltd. v. Sisman ([1948] 1 All E.R. 44), applied.

[FOR THE TOWN AND COUNTRY PLANNING ACT, 1947, s. 53 (1), see HALSBURY'S STATUTES, Vol. 40, p. 291.]

Case referred to :

(1) *Ellis & Sons Amalgamated Properties, Ltd. v. Sisman*, [1948] 1 All E.R. 44; [1948] 1 K.B. 653; [1948] L.J.R. 929; 2nd Digest Supp.

MOTION to set aside or remit an award of an arbitrator on the ground that it contained an error of law.

The claimants were owners of land on which flats subject to the Rent and Mortgage Interest Restrictions Acts, 1920 to 1939, had been completely demolished as a result of enemy action and had not been re-built. The respondent local authority, Finsbury Borough Council had acquired the land, and, in assessing the compensation, the arbitrator purported to proceed on the assumption prescribed by the Town and Country Planning Act, 1947, s. 53 (1) (a), that the whole of the war damage had been made good before the date of the notice to treat. On this basis he had assumed that the rents legally recoverable in respect of the flats in the newly constructed building would not have been subject to the statutory limits imposed by the Rent Restrictions Acts on the rents up to the date of the demolition, and he fixed the amount of compensation at £32,000. The respondent local authority contended that the words "made good" in s. 53 (1) (a) were inconsistent with the idea of a loss of identity of the original building by the construction of a new building in its place, and that for the purpose of the enactment, the building must be regarded as retaining its identity with the consequence that the old restrictions on rents would apply.

Rowe, K.C., and *Squibb* for the claimants.
Lawrence, K.C., for Finsbury Borough Council.

DEVLIN, J.: The claimants in this arbitration which took place before the official arbitrator, whose award I have now to consider, are the freeholders of two pieces of land situate in Collier Street and Killick Street, in the borough of Finsbury, the respondent being the local authority for that borough. The claimants had, before the war and until June 24, 1944, owned some buildings on the said land known as Winton Houses, which consisted of working-class flats. These flats were completely demolished as a result of enemy action on June 24, 1944. Up to that time they had all been let either on statutory tenancies, or, in a few cases, on contractual tenancies subject to the Rent and Mortgage Interest Restrictions Acts, 1920 to 1939. All the dwellings were, by reason of the rateable values thereof on Apr. 6, 1939, subject to the provisions of those Acts and they were, therefore, let at rents which did not exceed the standard rents with permitted increases payable under the Acts, which I can conveniently refer to as the 1939 standard rents. That being the position, if the claimants, as owners of the building, had re-built the premises with the aid of a cost of works payment under the War Damage Act, 1943, or out of their own resources, they would not have been required to let the flats so re-built at the 1939 standard rents. The decision of the Court of Appeal in *Ellis & Sons Amalgamated Properties, Ltd. v. Sisman* (1) appears exactly to cover that situation. Winton Houses having been completely demolished, a new building erected in its place—I will assume that it exactly resembled it—would be a different building, and no previous statutory tenant would have the right to say that his statutory tenancy in his particular reconstructed flat continued. I need not trouble with the small number of contractual tenancies, which I do not think seriously affect the argument in the present case. Whether they subsisted or not might depend on whether or not they had been terminated by notice at some particular time, but the most favourable assumption which I think I can make for the argument of counsel for the borough council is that all the tenancies were statutory tenancies. The re-constructed building being a new building, the claimants could have let it at rents higher than the 1939 standard rents. The Landlord and Tenant (Rent Control) Act, 1949, might have operated to restrict the rents which the claimants could demand, but, nevertheless, those rents would, as I think counsel accepts, have been higher than the 1939 standard rents.

That is the position apart from the Town and Country Planning Act, 1947. Before Winton Houses were re-built the land was acquired by the borough council who, accordingly, had to pay compensation to the claimants. The arbitrator had to assess the amount of that compensation under the Town and Country Planning Act, 1947, the only part of which I am concerned with is s. 53 (1) (a), which provides that the value of the interest for the purposes of the compensation payable in respect of the compulsory purchase shall be taken to be the value which it would have if the whole of the damage had been made good before the date of the notice to treat.

If the whole of the damage had been made good before the date of the notice to treat, the claimants would, on that site, have re-built Winton Houses, and one of the questions which the learned arbitrator had to determine was whether or not the value of Winton Houses, notionally re-built, was to be assessed on the basis that the flats could not have been let at more than the 1939 standard rents. In his award he proceeded on the assumption that the flats could be so let, as is set out at the beginning of the award, in the following terms:

“I assess the compensation payable in respect of the said land, on the assumption that, if the whole of the said war damage had been made good before the date of the said notice to treat, the rents legally recoverable in respect of the said dwellings would not be subject to the statutory limits imposed by the Rent and Mortgage Interest Restrictions Acts, 1920 to 1939, at the sum of £32,000.”

I have been told that, if he had proceeded on the other assumption, the figure agreed between the parties would have been £20,000.

This motion is to set aside or remit this award on the ground that it contained an error of law in the assumption which the arbitrator made. In my judgment, there is no error of law, and I think that the arbitrator has proceeded on the right assumption. As I understand the very full and able argument which I have heard from counsel for the borough council he accepts that the position under the Rent Restrictions Acts, if one were relying on that alone, would be that, there being a new building, the landlord would not be obliged to let the flats at the 1939 standard rents. He is bound to accept that, at any rate before me, having regard to the decision of the Court of Appeal in *Ellis & Sons Amalgamated Properties, Ltd. v. Sisman* (1). His argument, therefore, has been that the same result is not to be arrived at when one is considering a notional re-building under the Town and Country Planning Act, 1947, s. 53. That section, he says rightly, only applies if the damage has not been made good at the date of the notice to treat, but it goes on to state that one is to assume that the war damage has been made good immediately before the date of the notice to treat. On that hypothesis it seems to me that one would look at the matter in this way. The landlord, having completely re-built the premises, is making out a schedule of the rents which he desires to charge for the re-built flats, and just as he has completed that task he is served with a notice to treat. Would the schedule, in such circumstances, properly be a schedule of 1939 standard rents, or could it be for such higher rents as the landlord might properly ask, subject to the provisions of the Landlord and Tenant (Rent Control) Act, 1949. It seems to me that, when one is assessing the value on the hypothesis that is laid down in s. 53, it must be on the further hypothesis that the landlord would not be charging the 1939 standard rents.

Counsel for the borough council has placed great reliance on the words "made good" in s. 53 (1), which, he says, in effect are consistent only with the idea that the building which is made good has retained its identity. They are inconsistent, he argues, with the conception of the loss of identity, and although, therefore, loss of identity has certain results in a case under the Rent Restrictions Acts (see *Ellis & Sons Amalgamated Properties, Ltd. v. Sisman* (1)), when one finds the words "made good" in s. 53 one must assume a continuous identity. Otherwise, counsel says, those words cannot be given any proper meaning. I do not accept that view. Once one postulates, as one must because it is found in the facts in the award, that the building was completely demolished, and that the appropriate payment under the War Damage Act, 1943, is a cost of works payment (and unless it were s. 53 (1) would not apply), it seems to me to follow that the only "making good" which can be meant by that section is a re-building or reinstating of the old building in something either exactly or closely resembling the old form. It does not appear to me that the words "made good" are by themselves inconsistent with the idea of reinstatement in that way. Indeed, as counsel pointed out to me, they are so used in s. 8 (2) of the War Damage Act, 1943, which provides as follows:

"If the war damage is made good by reinstating the hereditament in the form in which it existed immediately before the occurrence of the damage, the amount of the payment shall be an amount equal to the proper cost of the works executed for the making good thereof."

I see, therefore, nothing at all inconsistent between the idea of making good in the sense of reinstatement and the idea of the building so made good and so reinstated being something that is different from and not identically the same as the old building, and, therefore, not within the provisions of the Rent Restrictions Acts. I observe that in *Ellis & Sons Amalgamated Properties, Ltd. v. Sisman* (1) the house was being reinstated, the cost of reconstruction being met

out of payments by the War Damage Commission, which, presumably, means that it was being dealt with on a cost of works basis. For those reasons I think that the arbitrator was right in his conclusion, and, therefore, there is no error of law on the face of the award and the motion fails.

Award upheld with costs.

Solicitors: *George C. Carter & Co.* (for the claimants); *John E. Fishwick*, clerk and solicitor of Finsbury Borough Council (for the borough council).

(Reported by F. A. AMIES, ESQ., Barrister-at-Law.)

GARDINER v. SEVENOAKS RURAL DISTRICT COUNCIL.

[KING'S BENCH DIVISION (Lord Goddard, C.J., Humphreys and Morris, J.J.), May 10, 1950.]

Cinematograph — Film — Storage — Inflammable substance—Storage in cave — “Premises” within the Celluloid and Cinematograph Film Act, 1922 (c. 35), s. 1 (1).

The respondents served on the appellant a notice under the Celluloid and Cinematograph Film Act, 1922, calling on him to comply with certain safety regulations at a cave where he had stored films. Described in the notice as “premises,” the cave consisted of an underground chamber formed artificially as the result of quarrying and excavations and entered through a cutting which was closed by a wooden door. It was contended by the appellant that the cave was not “premises” within the Act and, therefore, the notice did not apply. On appeal,

HELD: the cave constituted “premises” within s. 1 (1), and, therefore, the appellant must comply with the provisions of that sub-section.

[FOR THE CELLULOID AND CINEMATOGRAPH FILM ACT, 1922, s. 1, see HALSBURY'S STATUTES, Vol. 13, pp. 977, 978.]

CASE STATED by Sevenoaks (Kent) justices.

The respondents, as the local authority, served on the appellant a notice under the Celluloid and Cinematograph Film Act, 1922, requiring him to comply with certain safety provisions at a cave where he had stored films. On appeal by the appellant, the justices made an order that the appellant should within twenty-eight days give notice to the respondents of his intention to carry out the requirements, with certain exceptions, to their satisfaction or otherwise cease to use the premises for storing celluloid films. It was contended for the appellant that the caves were not “premises” within the meaning of s. 1 (1) of the Act, and that the word “premises” referred only to buildings or structures.

Manningham-Buller, K.C., and *L. R. Miller* for the appellant.

E. H. P. Wrightson for the respondents.

LORD GODDARD, C.J.: This is a Case stated by Kent justices sitting to hear an appeal brought by the appellant against Sevenoaks Rural District Council who had served on him a notice of certain requirements with regard to the storage of films under the Celluloid and Cinematograph Film Act, 1922. Under that Act a local authority can serve on the owner of premises notice to comply with various matters, and if he feels aggrieved he can appeal to a court of summary jurisdiction. In this case one question only arises—whether the place where the films in question were stored constitutes “premises” within s. 1 (1) of the Act.

It appears from the Case Stated that the appellant took a lease of the Chipstead Caves for a term of fourteen years at a yearly rent of £100, a condition of the

lease being that the caves should be used for no other purpose than the storing of films. These caves are underground and have been in existence for some fifty years. They are not caves in the natural sense, having been formed by excavating and quarrying for sandstone. Entrance to them is by means of a cutting. The most important thing in the findings is that the entrance is closed by a wooden door which is the only means of entrance and exit, and, therefore, they are an enclosed place.

A Section 1 (1) of the Act provides: "No premises shall be used for any purpose to which this Act applies" unless certain information has been given. Throughout the Act the word "premises" is used with regard to the place where the film is to be stored. Counsel for the appellant argued that "premises" in this Act must be construed as a house or building, or as something *ejusdem generis* with a building, and that it cannot apply to caves which have been
B formed in this way. "Premises" is, no doubt, a word which is capable of many meanings. How it originally became applied to property is, I think, generally known. It was from the habit of conveyancers when they were drawing deeds of conveyance referring to property and speaking of "parcels". They set out the parcels in the early part of the deed, and later they would refer to "the said premises," meaning strictly that which had gone before, and gradually
C by common acceptance "premises" became applied, as it generally is now, to houses, land, shops, or whatever it may be, so that the word has come to mean generally real property of one sort or another. There is no doubt that from time to time the word "premises" has been given different meanings, either extended or more restricted.

D With regard to the Celluloid and Cinematograph Film Act, 1922, the first thing to remember is that it is what I may call a "safety Act" and the provisions which it contains and the regulations which are made under it are designed, not only for the safety of persons living in the immediate neighbourhood of where the films are stored, but also for the safety of those working at the place of storage. People may have to go into the store from time to time
E either to arrange or remove the films. Speaking for myself, I think that in using the word "premises" in this Act Parliament intended to use the widest possible word. I do not say that every cave would come within the term "premises" in this Act, if, for instance, it was an open cave which would be open to the outside air the whole time. This, however, was not that class of place. It was a place with a door, and, in fact, the excavations had been turned
F into a closed warehouse. Having regard to that fact, in my opinion, the justices were right in holding that these caves were properly within the expression "premises" as used in this Act. Consequently, I think this appeal fails.

HUMPHREYS, J.: I agree.

MORRIS, J.: I agree.

G *Appeal dismissed.*

Solicitors: W. G. Street & Co. (for the appellant); W. H. House & Sons, Sevenoaks (for the respondent).

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

Re OPPENHEIM'S WILL TRUSTS. WESTMINSTER BANK, LTD.
v. OPPENHEIM AND OTHERS.

[CHANCERY DIVISION (Harman, J.), May 12, 1950.]

Will—*Forfeiture clause*—*Income payable to beneficiary* “so long as he shall be able to give a personal discharge”—*Appointment of receiver in lunacy of beneficiary's estate.*

By his will, dated Oct. 13, 1936, the testator gave his residuary estate to trustees on trust to pay the income thereof to his nephew H. “during the rest of his lifetime so long as he shall be able to give a personal discharge for such income and shall not have become bankrupt or assigned or charged such income in favour of any other person or corporation in any of which events the trusts in his favour shall determine.” The testator died in 1946, and the income of the residue was paid to H. until the end of 1948 when he was certified to be a person of unsound mind. On Jan. 25, 1949, a reception order under the Lunacy Act, 1890, was made, and, subsequently, a receiver of his estate was appointed under the Act.

HELD: the object of the forfeiture clause was to prevent the income getting into other hands, and the clause was not intended to operate where the income would remain for the benefit of H.; as the receiver was H.'s statutory agent and could give a good receipt for H.'s income, H. could give “a personal discharge” through the receiver; and, therefore, he had not forfeited his interest in the income of the testator's residue.

Re Marshall ([1920] 1 Ch. 284), *applied*.

[AS TO FORFEITURE CLAUSES, see HALSBURY, Hailsham Edn., Vol. 34, pp. 421-423, paras. 468, 469; and FOR CASES, see DIGEST, Vol. 39, pp. 50, 51, Nos. 613-618.]

Cases referred to:

- (1) *Re Marshall*, [1920] 1 Ch. 284; 89 L.J.Ch. 204; 122 L.T. 673; 39 Digest 50, 618.
- (2) *Re Westby's Settlement*, [1950] 1 All E.R. 479.
- (3) *Re Greenwood*, [1901] 1 Ch. 887; 70 L.J.Ch. 326; 84 L.T. 118; 44 Digest 1234, 10665.
- (4) *Re Custance's Settlements*, [1945] 2 All E.R. 441; [1946] Ch. 42; 114 L.J.Ch. 293; 173 L.T. 195; 2nd Digest Supp.

ADJOURNED SUMMONS to determine (*inter alia*) whether, on the true construction of the testator's will and in the events that had happened, an interest in the income of the testator's residuary estate, given by cl. 7 of the will, had been forfeited. The interest was expressed to last “so long as [the beneficiary] shall be able to give a personal discharge” for the income. A reception order, dealing with the beneficiary as a person of unsound mind, was made, under the Lunacy Act, 1890, on Jan. 25, 1949, and, subsequently, a receiver of his estate was appointed under the Act. The facts and the relevant provisions of the will appear in the judgment.

R. Cozens-Hardy Horne for the plaintiffs, executors and trustees under the will.
Cross, K.C., and *G. D. Johnston* for the defendants other than the tenant for life.

Montgomery White, K.C., and *J. A. Brightman* for the tenant for life.

HARMAN, J.: The testator, Henry James Oppenheim, died on Dec. 17, 1946, leaving a considerable estate. The executors and trustees of his will, which was made on Oct. 13, 1936, are the plaintiffs, Westminster Bank, Ltd., and the testator's brother, Augustus, who is the first defendant to this summons. The testator had, at all material times, only one nephew, the second defendant, Hugo Charles Henry Oppenheim, who was born on Sept. 9, 1917, and was,

therefore, an infant under the age of twenty-one when the will was made. The testator also had a sister, Rosalinda, now Mrs. Campbell (a defendant), and two other brothers, Alfred and Robert. Alfred died in 1927, leaving issue two daughters, Mrs. Waugh and Mrs. Kersley, who are also defendants, and Robert died *sine prole* in 1941.

A The testator explains in cl. 2 of his will that he is not leaving any share of his estate to his brothers, as they would be receiving other benefits on his death under the will of their father, and he goes on to say:

“ . . . my main consideration is that my nearest nephew in the male line and a son of him should benefit.”

B After giving certain pecuniary and specific legacies, by cl. 7 of his will he gave the residue of his estate on trust for sale and to pay an annuity to his sister Rosalinda, and subject thereto, “ if my nephew Hugo Oppenheim born on Sept. 9, 1917 (son of my brother Augustus) shall survive me ” on various discretionary trusts for the application of the income by the trustees for the benefit of Hugo until he should attain the age of twenty-five:

C “ . . . and upon further trust when my said nephew shall attain the age of twenty-five years to pay to him the income of my residuary estate during the rest of his lifetime so long as he shall be able to give a personal discharge for such income and shall not have become bankrupt or assigned or charged such income in favour of any other person or corporation in any of which events the trusts in his favour shall determine.”

D By cl. 8 of his will the testator dealt with the trusts which were to arise on the death of Hugo or the sooner determination of his interest under cl. 7, *viz.*, that the capital and income should be held on trust for such of certain persons as should be then living. This provision indicates that the class which is to take on the proposed defeasance is to be ascertained at the moment of defeasance.

E After the testator died the income was duly paid to Hugo, who had attained the age of twenty-five years, but at the end of 1948 Hugo entered a mental institution as a voluntary patient. In due course he was certified, and a reception order under the Lunacy Act, 1890, dealing with him as a person of unsound mind, was made on Jan. 25, 1949. Within the last day or so a receiver of his estate has been appointed, and that receivership, I take it, dates back to the time when his disability began. The question which I have to decide is: Has F the event, which has happened, of his being certified to be a person of unsound mind unable to manage his own affairs, brought about a cesser or determination of his interest, which is expressed to last “ so long as he shall be able to give a personal discharge ” for the income? It is contended by counsel for the beneficiaries other than Hugo that a person who cannot give a valid receipt, because he is under the disability of lunacy, cannot give “ a personal discharge,” G and, therefore, that Hugo's interest determined on the day when he ceased to be able to sign a valid receipt, *i.e.*, either on the date of his certification or on the date of the reception order, as to which there might have to be an inquiry. On the other hand, it is contended on behalf of Hugo that the forfeiture clause was intended to apply where there was a deprivation of the enjoyment of the income by the recipient of it and that an event like lunacy, which deprives H him of no part of the income, is not within the mischief of the clause. Moreover, it is said that “ a personal discharge ” does not mean that he himself must write the receipt for the income, but he can give his discharge by an agent, no less than by himself.

In *Re Marshall* (1), EVE, J., held ([1920] 1 Ch. 288):

“ The person appointed to act as a receiver under s. 116 of the Lunacy Act, 1890, is not strictly a receiver but the statutory agent of the person of unsound mind, and his receipt is receipt by such person and certainly

not the less so where, as in this case, the whole income is directed to be applied for the maintenance of such person."

This decision does not seem to have been doubted, and has, indeed, been accepted by the Court of Appeal, in *Re Westby's Settlement* (2). On the decision in *Re Marshall* (1) is based the argument of counsel for Hugo that, as the receiver can give a good receipt for income of the patient—which, undoubtedly, he can—that receipt is the patient's receipt through his statutory receiver and, therefore, his "personal discharge." I am also asked to take into account what FARWELL, J., said in *Re Greenwood* (3), which is referred to by SIR RAYMOND EVERSLED, M.R., in *Re Westby's Settlement* (2), the latest decision on this subject. SIR RAYMOND EVERSLED, M.R., cited ([1950] 1 All E.R. 483) the words of FARWELL, J., in *Re Greenwood* (3), where he said ([1901] 1 Ch. 891):

"... we must bear in mind that the courts do not construe gifts on forfeiture so as to extend their limits beyond the fair meaning of the words unless they are actually driven to it. Forfeitures are not regarded with favour, and there can be no particular desire to extend the terms of a forfeiture clause to a gift such as the present."

In *Re Greenwood* (3), a creditor of the tenant for life had served a garnishee order on the trustees, and FARWELL, J., held that it was not within the mischief of the forfeiture clause. In *Re Westby's Settlement* (2) the Court of Appeal overruled *Re Custance's Settlements* (4), in which COHEN, J., held that a statutory charge, *viz.*, expenses of a receiver, caused a forfeiture. The Court of Appeal held that that was not the kind of charge that was contemplated by forfeiture clauses and, therefore, it did not, in their opinion, work a forfeiture. [See now the Law Reform (Miscellaneous Provisions) Act, 1949, s. 8.]

In the case now before me, the testator directs that the income is to be paid to Hugo "so long as he shall be able to give a personal discharge for such income," and then follow the words, "and shall not have become bankrupt or assigned or charged such income." One is led to suppose that "to give a personal discharge" is something different from inability to do so arising out of bankruptcy, assignment or a mortgage. This supposition tends to support the argument of counsel for Hugo, but I am asked by counsel for the other beneficiaries to say that the words exactly fit that which has happened, *i.e.*, that, owing to his disability, Hugo can no longer give "a personal discharge" for the income, and, therefore, a forfeiture has come about. On the whole, I do not feel able to accept the contention of counsel for the other beneficiaries. I think that a person who has a statutory agent, as Hugo has, can give "a personal discharge" by his agent, even as, *e.g.*, if he were on the top of Mount Everest, his banker could give a personal discharge on his behalf. It seems to me, also, that the forfeiture was not intended to operate in a case where no one else would be entitled to the benefit of the income in the event which had happened, as the clause was intended to prevent the income getting into other hands. In this case, the whole of the income would remain for the maintenance and support of Hugo, and for his use if, as may be hoped and as the report does not suggest to be impossible, he recovers. In my opinion, therefore, the forfeiture clause has not come into operation and Hugo continues to be entitled to the income.

Declaration accordingly. Costs of all parties as between solicitor and client to be paid out of the residuary estate.

Solicitors: *Norton, Rose, Greenwell & Co.* (for the plaintiff and the defendants other than the tenant for life); *Petch & Co.* (for the tenant for life).

[Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.]

PENNY v. NICHOLAS.

[KING'S BENCH DIVISION (Lord Goddard, C.J., Humphreys and Morris, JJ.), May 9, 1950.]

Street Traffic—Excessive speed—Proof of speed—Evidence by one police officer of speedometer reading—Road Traffic Act, 1930 (c. 43), s. 10 (3) (as substituted by Road Traffic Act, 1934 (c. 50), s. 2 (3)).

A The appellant was convicted of the offence of driving a motor car in a built-up area at a speed exceeding thirty miles per hour contrary to the Road Traffic Act, 1934, s. 1 (1). The only witness called for the prosecution, a police constable, stated that he followed the appellant's car over a measured distance, keeping an even space between him and the appellant, and that the speedometer in the police car showed a speed of forty miles per hour. Tests of the speedometer had been carried out before and after the day of the alleged offence by other officers who informed the witness of the result of those tests, but did not give evidence themselves. For the appellant it was contended that the constable had no personal knowledge of the correctness of the speedometer and that any evidence of communications received by him from the other officers was hearsay and inadmissible.

B
C HELD: a person might be convicted of exceeding the speed limit on the evidence of one police officer if it was supported by evidence of the reading of a speedometer or some other mechanical means by which the officer's evidence became evidence of fact and not of mere opinion; in the present case the constable alleged that his speedometer registered a speed of forty miles an hour; and that was evidence on which, if so minded, the justices might act, even though there was no admissible evidence that the speedometer had been tested.

D *Observations of LORD HEWART, C.J., and CHARLES, J., in Melhuish v. Morris ([1938] 4 All E.R. 99, 100), not approved.*

Cases referred to:

- E (1) *Melhuish v. Morris*, [1938] 4 All E.R. 98; Digest Supp.
(2) *Weatherogg v. Johns*, (1931), cited in 95 J.P.Jo. 364.
(3) *Russell v. Beesley*, [1937] 1 All E.R. 527; 101 J.P. Jour. 37; 183 L.T. Jo. 68; Digest Supp.
(4) *Young v. Bristol Aeroplane Co., Ltd.*, [1944] 2 All E.R. 293; [1944] K.B. 718; 113 L.J.K.B. 513; 171 L.T. 113; *affmd.*, [1946] 1 All E.R. 98; [1946] A.C. 163; 115 L.J.K.B. 63; 174 L.T. 39; 2nd Digest Supp.
F (5) *Gorham v. Brice*, (1902), 18 T.L.R. 424; 42 Digest 870, 198.
(6) *Plancq v. Marks*, (1906), 70 J.P. 216; 94 L.T. 577; 42 Digest 870, 199.

CASE STATED by justices.

G The appellant was convicted and fined £1 by the Marlborough borough magistrates on a charge of unlawfully driving his car at a speed greater than thirty miles an hour in a built-up area at Marlborough on Oct. 2, 1949. He contended that the justices erred in law in convicting him because only one witness was called for the prosecution and his evidence was not corroborated in the manner required by the Road Traffic Act, 1930, s. 10 (3) (as substituted by the Road Traffic Act, 1934, s. 2 (3)), and also because that witness gave evidence of the correctness of the police car speedometer which was based on statements made to him by other officers, and was, therefore, hearsay.

H *Skelhorn* for the appellant.

Widgery for the respondent (the prosecutor).

LORD GODDARD, C.J.: This is a Case stated by Marlborough borough justices before whom the appellant was charged that he

" . . . did unlawfully drive a motor car on a certain road in a built-up area there situate at a speed greater than thirty miles per hour, contrary to s. 1 of the Road Traffic Act, 1934."

The justices convicted the appellant and fined him £1 and ordered his licence to be endorsed.

The question, at first sight a simple one, has developed into an interesting argument in which we have to consider certain authorities. I will read first the facts which the justices found.

"(1) that on Oct. 2, 1949, at 4.45 p.m. P.C. England was driving alone in a police car and followed the appellant's car from High Street, Marlborough, to the end of the built-up area along the Bath Road; (2) that P.C. England kept an even distance behind the appellant's car; (3) that the appellant's car was being driven by the appellant; (4) that from a point in the Bath Road opposite the Marlborough College Memorial Hall to the end of the built-up area, a distance of four-tenths of a mile, the speedometer in the police car showed an even speed of forty m.p.h.; (5) that on August 4, 1949, and Oct. 14, 1949, tests of the speedometer of the said police car were carried out [with the aid of a stop-watch]."

The Case sets out that those tests were made by a sergeant and another police constable who informed P.C. England that the speedometer was correct.

For the appellant it was contended:

". . . that the evidence of P.C. England, who was the only witness for the prosecution, was not corroborated in the way required by the Road Traffic Act, 1934, s. 2 (2) and (3), or at all, and our attention was drawn to the decision mentioned in para. 6 below—[*i.e.*, *Melhuish v. Morris* (1)]. (2) It was contended that there was no proof as to the correctness of the speedometer in P.C. England's car as P.C. England could only prove that he was concerned in driving a car at a given speed over a measured distance, he had no personal knowledge of the stop-watch readings or of the correctness of those readings or of the correctness of the stop-watch, and, therefore, could not give admissible evidence as to the correctness of the speedometer. (3) It was further contended that anything the police sergeant may have said to P.C. England was hearsay and not admissible and the justices were not entitled to take into consideration anything that the police sergeant said to P.C. England."

The justices then say:

"We being of the opinion upon the evidence of P.C. England that the speed alleged by P.C. England was recorded on the speedometer and that the speedometer was accurate, and, having regard to *Weatherhogg v. Johns* (2), that we had before us more than the evidence of one witness to the effect that in the opinion of that witness the speed limit was being exceeded, held that the objection on behalf of the appellant could not be sustained and convicted him."

They ask:

"(a) Whether we rightly admitted the evidence of P.C. England as to the tests of the speedometer which he carried out jointly with other police officers, and in the course of which he relied on the observations of and information given by such officers who did not give evidence before us. (b) Whether, on the above statement of fact, we came to a correct determination and decision in point of law."

I do not know by whom the actual drafting of the Case was carried out, but, *prima facie*, it would look as though, if we gave a strict meaning to question (a) the justices are asking us whether hearsay is rightly admissible in evidence. Of course it is not, and we should have no difficulty in answering that question. We do not, however, think we can dispose of the case in that way, but we think we shall have to send it back to the justices to consider it in the light of what we are now going to say with regard to evidence and proof in these cases. The

first case to which I need refer is *Russell v. Beesley* (3), which is authority for saying that the evidence of more than one police officer is not needed if it is supported by a speedometer or some other means by which the evidence given by the officer becomes evidence of fact and not of mere opinion. Section 10 (3) of the Road Traffic Act, 1930 (as substituted by s. 2 (3) of the Road Traffic Act, 1934), provides:

- A "A person prosecuted for driving a motor vehicle on a road at a speed exceeding a speed limit imposed by or under any enactment shall not be liable to be convicted solely on the evidence of one witness to the effect that in the opinion of the witness the person prosecuted was driving the vehicle at a speed exceeding that limit."

- B Therefore, if there is only the evidence of a police officer or any other person who says: "I saw the car, and, in my opinion, it was exceeding thirty miles an hour," that is not enough, although if two people give that evidence, it is in law sufficient to justify a conviction. *Russell v. Beesley* (3) and other cases show that, if the evidence of the one person relates to the reading of a speedometer, a mechanical device for recording speed, the justices can act on it and need not have the evidence of two persons. The justices in *Russell v. Beesley* (3) had
- C found in these terms ([1937] 1 All E.R. 528):

- "We being of opinion that in cases of this kind [not in this particular case] it is not desirable that the evidence of a police officer checking a person's speed from the speedometer in his own car should be accepted unless corroborated by another witness present at the time, dismissed the
- D information without giving any opinion upon the legal point raised."

- The court said that the justices were wrong, and that it was not necessary to call two witnesses, provided that the evidence given by the one witness who was called was not evidence of mere opinion. In that case it was supported by the fact that his speedometer showed a certain speed which he gave in evidence, and it is only fair to say, in view of the argument of counsel for the
- E present appellant, that there was evidence in that case that the speedometer had been tested.

- The case on which counsel for the appellant relied is *Melhuish v. Morris* (1), which, he contended, laid down that the court can only act on the evidence of one police officer supported by a speedometer reading if that speedometer has been tested. For reasons which I am going to develop in a moment, I
- F think that case goes too far. The justices, of course, need never accept any evidence if they do not believe it or feel that for some reason they cannot accept it. It may be that in any particular case the justices may say: "We are not going to accept the evidence of this speedometer," but the question that arises is whether or not it is necessary as a matter of law, before the speedometer reading can be accepted, that the court must have evidence before it that the
- G speedometer has been tested. That was the effect of the judgment of CHARLES, J., and LORD HEWART, C.J., in that case. In fact, CHARLES, J., said ([1938] 4 All E.R. 99):

- "Therefore, the case rested upon the accuracy of the speedometer, which had not been tested . . . It does not matter if five officers glued
- H their eyes to the speedometer if evidence is not given as to its accuracy."

Much the same was the opinion of LORD HEWART, C.J., who said that the police were relying on a mechanical device. MACNAGHTEN, J., took a different view, but that case is not very satisfactory because, as LORD HEWART, C.J., pointed out, only one side was present to argue. Counsel for the appellant said, however, that, at any rate so long as it stands, it is a decision which this court cannot overrule. We can, however, always differ from a case on the ground that it has not been argued on both sides. It has been laid down by the Court of Appeal

in *Young v. Bristol Aeroplane Co., Ltd.* (4) that where material cases or sections of statutes were not cited to the court in a case, the court need not follow the decision if those cases or enactments might have influenced it had they been cited. Two cases were not cited to the court in *Melhuish v. Morris* (1), which might have been cited if the case had been argued on both sides, and they would, I think, have had a very considerable influence on the decision.

The question in the present case is whether, if evidence is given that a mechanical device, such as a watch or speedometer, recorded a particular speed or a particular time, that recording is *prima facie* evidence on which the court can act. In a particular case the court might refuse to act on it, but here counsel for the respondent called our attention to the fact that the difference is very great. The offence is driving at a speed exceeding thirty miles an hour, and the evidence is that the speedometer showed that the appellant was exceeding that speed by ten miles an hour. It would be a very considerable error if the speedometer was as much out as that. A B

The first case to which I call attention as not being cited to the court in *Melhuish v. Morris* (1) is *Gorham v. Brice* (5), which arose out of the Locomotives on Highways Act, 1896. There a constable had timed a man with a stop watch. It was argued by counsel for the appellant in the case (18 T.L.R. 424) C

"... that the magistrates ought not to have admitted the evidence given by the constable as to the result shown by his timing the pace at which the appellant was travelling, because the watch had not been tested and there was nothing to show that it was accurate, and that, such evidence having been improperly admitted, the conviction should be quashed."

The court refused to accept that view. LORD ALVERSTONE, C.J., in giving judgment, disposed of the case in rather a summary manner because he is reported as having said (*ibid.*): D

"... he was unable to understand the motives with which such appeals were brought or what automobilists thought to gain by suggesting there was no evidence as to speed, when, as in practically every case, they did not like the findings of magistrates... They had the evidence given by the constable before them, and no suggestion was made that he was a person who ought not to be believed. The appeal was an attempt to turn a question of fact into a question of law." E

There the police officer said: "I had a stop watch in my hand, I timed the man, and I say he was going at such and such a pace." It was said that the court ought not to accept that evidence because there had been no test of the watch. The police officer was using a mechanical device—just the same as the speedometer—and that was what was decided in that case. F

The next case which was not cited to the court in *Melhuish v. Morris* (1) was *Plancq v. Marks* (6). There again evidence was given as to the rate of speed by means of stop watches, the court accepted the evidence, and the conviction stood. G

Those two cases seem to show that the expressions used by CHARLES, J., in *Melhuish v. Morris* (1), and by LORD HEWART, C.J., went too far, and that it is admissible evidence if an officer says: "I followed this man and observed from my speedometer that I was progressing at the rate of forty miles an hour. Therefore, he must have been progressing at that rate because I kept an even pace behind him." No one is saying that that is more than *prima facie* evidence. There may be cross-examination; there may be evidence given on the other side. The defendant may say: "That is all very well, but my own speedometer showed that I was only going at twenty-five or thirty miles an hour." Then the justices have to make up their minds between the parties, and it may be that, after seeing the witnesses and hearing their evidence, they may prefer the evidence given by the defendant to the evidence given by the police. H

The question is whether or not, if a police officer says: "I was following this man and the speedometer on my car showed that he was going, not at thirty and a half, or just over thirty miles an hour, but at forty miles an hour," that is not evidence on which the justices can act, although it is not strictly proved before them that the speedometer has been tested. Therefore, we propose to send the case back to the justices and to ask them whether, apart from the test that was afterwards carried out, they would have held on the evidence of P.C. England and his observation of the driving and his speedometer on October 2, the day of the offence, they were satisfied that the appellant was travelling over thirty miles an hour. They can say, if it is desired, that the evidence of the test was strictly not admissible, but the justices must make up their minds whether they were satisfied, apart from the test, that the car was being driven at a speed exceeding thirty miles an hour. This case is of some importance because we have made a considerable inroad on *Melhuish v. Morris* (1), a case in which, as I say, not only was the respondent not represented, but the cases to which I have referred were not brought to the attention of the court.

HUMPHREYS, J.: I agree with the result proposed by my Lord, and for the reasons given by him.

MORRIS, J.: I agree.

Case remitted to the justices.

Solicitors: *McKenna & Co.*, agents for *Moger & Couch*, Taunton (for the appellant); *Collyer-Bristow & Co.*, agents for *P. A. Selborne Stringer*, Trowbridge (for the respondent).

[Reported by F. A. AMIES, Esq., Barrister-at-Law.]

Affirmed. H.L. [1951] 2 All E.R. 869.

TAMPLIN & SON'S BREWERY BRIGHTON, LTD. v. NASH (INSPECTOR OF TAXES).

[COURT OF APPEAL (Somervell and Singleton, L.JJ., and Roxburgh, J.), March 20, 21, 22, May 1, 10, 1950.]

Income Tax—Deductions against profits—Brewery company—Tied houses—Premises held under long leases—Rent exceeding net annual value—Premises sub-let at rents lower than net annual value—Deduction of rent forgone—Income Tax Act, 1918 (c. 40), sched. D, Cases I and II, r. 3 (m)—Finance Act, 1940 (c. 29), s. 17 (2).

The taxpayers, a brewery company, were leaseholders of licensed houses under leases granted for a term exceeding fifty years, which were "long leases" within the meaning of s. 17 (1) of the Finance Act, 1940. The taxpayers sub-let the licensed houses to tied tenants who, in consideration of the tie, paid a rent less than the full annual value, and less, in the aggregate, than the amount which the taxpayers paid by way of rent to their lessor. In computing the amount of their profits to be charged to income tax the taxpayers sought to deduct the "rent forgone," namely, the difference between the rents which they received from the tied tenants and the rents which would have been received by them if they had sub-let the houses free from the burden of the tie. The Crown contended that the taxpayers were prohibited by the effect of s. 17 (2) of the Act of 1940 and r. 3 (m) of the Rules Applicable to Cases I and II of sched. D from deducting the rent paid by them.

HELD: in computing their profits for assessment to tax, the taxpayers were entitled to deduct the "rent forgone" on the letting of the tied houses.

Usher's Wiltshire Brewery, Ltd. v. Bruce ([1915] A.C. 433), *applied*.

Per SINGLETON, L.J.: "When a trader tenant has paid his rent (and that rent is not taken into account in the computation of his profits) and when he has paid the sched. A tax, he, as a trader, is in just the same position as if he were the owner of the freehold. He can then set the annual value of the premises against his profits as the freeholder does. There is nothing in s. 17 (2) [of the Finance Act, 1940] to prevent this. The result is that the trader who has a long lease is in precisely the same position as to tax as he was before the Act of 1940, and the Crown in effect obtains tax on the rent. This achieves the object of the section, which was not devised to place an additional burden on traders, but was meant to ensure that, when premises were let on long lease at a rent higher than the annual value, the landlord should be charged to tax on the rent."

[AS TO DEDUCTIONS AGAINST PROFITS, see HALSBURY, Hailsham Edn., Vol. 17, pp. 149-156, paras. 309-320; and FOR CASES, see DIGEST, Vol. 28, pp. 56, 57, Nos. 284-291.]

Cases referred to:

- (1) *Usher's Wiltshire Brewery, Ltd. v. Bruce*, [1915] A.C. 433; 84 L.J.K.B. 417; 112 L.T. 651; 6 Tax Cas. 399; 28 Digest 56, 287.
- (2) *Lowry v. Consolidated African Selection Trust, Ltd.*, [1940] 2 All E.R. 545; [1940] A.C. 648; 109 L.J.K.B. 539; 164 L.T. 56; 23 Tax Cas. 259; 2nd Digest Supp.
- (3) *Collyer v. Hoare & Co., Ltd.*, (1928), 17 Tax Cas. 169; *revsd.*, [1931] 1 K.B. 123; 100 L.J.K.B. 249; 144 L.T. 71; 17 Tax Cas. 184; *revsd.*, [1932] A.C. 407; 101 L.J.K.B. 274; 146 L.T. 469; 17 Tax Cas. 209; Digest Supp.
- (4) *Stevens v. Boustead (E.) & Co.*, [1918] 1 K.B. 382; 87 L.J.K.B. 321; 118 L.T. 294; 7 Tax Cas. 107; 28 Digest 45, 229.
- (5) *Gillatt and Watts v. Colquhoun*, (1884), 2 Tax Cas. 76; 28 Digest 47, 244.
- (6) *Russell v. Aberdeen Town and County Bank*, (1888), 13 App. Cas. 418; 58 L.J.P.C. 8; 59 L.T. 481; 53 J.P. 244; 2 Tax Cas. 321; 28 Digest 45, 227.

APPEAL by the taxpayers from a decision of CROOM-JOHNSON, J., dated Oct. 24, 1949, dismissing an appeal by the taxpayers from a decision of the Special Commissioners.

The taxpayers, a brewery company, held licensed houses under long leases at rents in excess of the net annual values and let them to tied tenants at rents lower than the net annual values. The Special Commissioners held that, in computing their profits for assessment to tax, the taxpayers were not entitled to deduct the difference between the rents which could have been obtained from the properties if let without the burden of the tie and the rents actually receivable under the tie. CROOM-JOHNSON, J., upheld the decision of the Special Commissioners. The Court of Appeal now allowed the appeal of the taxpayers. The relevant facts are set out in the judgment of SINGLETON, L.J.

Cyril King, K.C., Talbot, K.C., and Oliver Shaw for the taxpayers.
Grant, K.C., and R. P. Hills for the Crown.

Cur. adv. vult.

May 10. The following judgments were read.

SOMERVELL, L.J.: This is an appeal by the taxpayers from a decision of CROOM-JOHNSON, J., upholding a decision of the Special Commissioners for Income Tax. The appeal turns on the *ratio* of the decision in *Usher's Wiltshire Brewery, Ltd. v. Bruce* (1). That case was concerned, as is this, with tied houses let by a brewer to a tenant. The tenant was, of course, carrying on his business

in the tied house of which he was in occupation. The brewer, however, claimed, and claimed successfully, that a tied house, let to a tenant, be treated as held and used by him, the brewer, in the course of his business, so that he could bring in expenses in respect of it under his sched. D, Case I, computation. As LORD ATKINSON put it ([1915] A.C. 455):

A "The publican's trade is the vending of the landlord's beer and none other. The house is the market-place for that beer and none other . . . The two trades are as dependent upon and as connected with each other as they well can be."

B The Crown in that case contended that there were two distinct trades, the brewer's, of making and selling beer to, *inter alios*, their tied tenant, and the tenant's of selling the beer which he bought to the public. The brewer, as I have said, succeeded. The first and simplest deduction claimed and allowed was in respect of money spent on repairs to the houses. The second deduction claimed and allowed, on which the present argument arises, was stated in this way (*ibid.*, 434):

C "Difference between rents of leasehold houses or sched. A assessment of freehold houses on the one hand, and rents received from tied tenants on the other hand."

D In the bargain made between the brewer and the tied tenant the tenant undertook to get all his beer from the brewer, he undertook to pay a somewhat higher price for the beer than that paid by other customers, and he got the house at a rent less than it would have commanded if let as a free house—in other words at a rent less than its full annual value. As appears from the second deduction claimed, some of the houses let to tied tenants were freeholds and some leaseholds.

E The present argument arises in this way. The taxpayers leased a number of licensed houses from a company called Tamplins Licensed Properties, Ltd. The lessor company was a wholly owned subsidiary, but no point turned on this before this court. A rent of £40,000 paid by the taxpayers to the lessor company covered the houses with which we are concerned and others with which we are not concerned. No difficulty arises as to this, as, subject to the points of law, figures have, I understand, been agreed. It is also agreed that the proportion of the rent referable to these houses exceeded the annual value. F The premises in question were sub-let to tied tenants on terms similar to those I have stated. The taxpayers claim, under their sched. D computation, to deduct a sum equal to the difference between the rents received by them in respect of these houses and the rents which would have been received if the houses had been let free of the tie.

G The rent paid by the taxpayers to their lessor is, it is agreed, rent under a long lease within the meaning of s. 17 of the Finance Act, 1940, the material parts of which are as follows:

H "(1) This section applies to the following payments, that is to say (a) rents under long leases; . . . (2) Rules 1 and 4 of No. VIII of sched. A shall not apply to any payment to which this section applies, but any such payment shall, so far as it does not fall under any other Case, be charged with tax under Case VI of sched. D and be treated for the purposes of such of the provisions of the Income Tax Acts as apply to royalties paid in respect of the user of a patent as if it were such a royalty."

Rules 1 and 4 of No. VIII of sched. A to the Income Tax Act, 1918, are the rules which provide for the deduction from rent or other annual payments charged on land of a proportionate amount of the sched. A assessment paid by the occupier. The effect of treating rents paid under long leases as royalties is, by reason of the provisions of r. 3 (*m*) of the Rules Applicable to sched. D,

Cases I and II, to prohibit this deduction for the purpose of a Case I or II computation. Sums paid in respect of royalties fall under the All Schedules Rules, r. 19 and r. 21. If, therefore, the rent under a long lease is paid out of profits and gains brought into charge the payer is entitled to deduct and retain the tax.

I will consider the working of s. 17 (2) of the Act of 1940 in more detail later, but the main line of the argument can now be stated. If the deduction allowed by *Usher's* case (1) is that of rent paid, giving credit for rent received, then counsel for the Crown submits that this is prohibited by s. 17 (2) and r. 3 (m), at any rate in a case like the present, where the rent exceeds the annual value. If, on the other hand, what is allowed by *Usher's* case (1) is a notional sum arrived at by taking the difference between what could have been got for the house as a free house and what is paid by the tied tenant, then counsel for the taxpayers submits that s. 17 (2) does not affect the right. The rent under the long lease does not come into the calculation.

Before considering *Usher's* case (1) in more detail, I will consider the effect of s. 17 (2) in the case of an ordinary trader who holds under a long lease the premises which he occupies for the purpose of his trade. It is necessary to do this, as counsel for the Crown based an argument on the intention of the section to be gathered from its application in such a case. In the present case it was agreed that the rent under the long lease exceeded the sched. A annual value, and I will make this assumption in the figures which I will use. A trader's profit before deducting rent is £1,000. The rent under a long lease of the trade premises is £200. The annual value, as assessed for sched. A, is £100. Before the Act of 1940 it is agreed by counsel for the Crown that the trader could have deducted the long lease rent as a disbursement, reducing his taxable profits to £800. The trader will also have paid sched. A tax on the annual value, that is to say £100. He will recoup himself in respect of this by deducting it from the £200 paid to his landlord. The trader, therefore, bears tax on £800, his net profit. The landlord bears the sched. A tax on the annual value, but prior to 1940 the excess rent over and above the annual value escaped taxation. A trader who owns and occupies his business premises is entitled to deduct the annual value for the purpose of his sched. D computation. I am considering the ordinary case in which the premises are in this country and the trader is assessed to sched. A tax. If he holds the premises on lease at a rent below the sched. A annual value, it is agreed that he is entitled to deduct a sum equal to the annual value. There is a dispute which arose in the second appeal* whether he is to be treated as deducting first the rent and then the difference between that rent and the annual value or whether one treats the deduction as one of annual value *simpliciter*. The result is that prior to 1940 a trader lessee of business premises could deduct the rent or the amount of the annual value, whichever was the higher. On the figures which I have put, counsel on behalf of the Crown agrees that, after 1940, the trader remains entitled to deduct the amount of the annual value. This reduces the £1,000 profit to £900. He pays tax on this sum under sched. D. He also bears sched. A tax on the annual value, £100. He has, therefore, paid tax so far on £1,000. The provisions of s. 17 (2) entitle him to deduct and retain tax on the whole of the £200 rent. He, therefore, bears tax, as before, on £800. His position is unaffected, but the landlord suffers tax by deduction on the whole £200 instead of only on £100. The section has taxed the excess rent which previously escaped.

In *Usher's* case (1) there was no suggestion that the amount of the rent paid by the brewer was other than the sched. A annual value, nor was there any suggestion that that value was not the amount by which the house could have been let as a free house. As EARL LOREBURN said ([1915] A.C. 446):

* *Webbs (Aberbeeg), Ltd. v. Davies* the subject-matter in which case was the same as in *Tamplin's* case. The appeal succeeded, being covered by the decision in the present case.

"... no argument was offered to show that the rent paid by the brewery company is other than the proper annual value."

Counsel for the Crown submits that the basis of the deduction in the case of the leasehold houses in *Usher's* case (1) was the rent paid by the brewer to be deducted as a disbursement, diminished by the rent received from the tied tenant. As a long lease rent cannot now be deducted by reason of s. 17 (2) of the Finance Act, 1940, the basis of any *Usher* deduction in the case of premises held under long leases has gone. Counsel for the Crown relied particularly on the exposition of *Usher's* case (1) given by LORD RUSSELL OF KILLOWEN in *Lowry v. Consolidated African Selection Trust, Ltd.* (2). LORD RUSSELL said ([1940] 2 All E.R. 560):

"... so far as concerns the leaseholds, the position seems to present no abnormal features. It is a plain case of entering actual income and actual outgoings."

The actual outgoing, says counsel for the Crown, is the rent, which, if it is a long lease rent, cannot now be deducted as an outgoing.

Counsel for the taxpayers submits that an examination of the speeches in *Usher's* case (1) and of equally authoritative expositions of the decision show that this was not the basis. He submits that the deduction allowed is not based on a rent paid, but is the difference between the proper annual value—the value in the market of the house let as a free house—and the rent received from the tied tenant. He relies on the description of the *Usher* deduction as "rents forborne" in the speech of LORD WARRINGTON OF CLYFFE ([1932] A.C. 415) in *Collyer v. Hoare & Co., Ltd.* (3). LORD TOMLIN (*ibid.*, 419) described the deduction as "rent forgone."

In *Lowry's* case (2) VISCONT MAUGHAM, commenting on some observations by LORD SUMNER in *Usher's* case (1) in which the expression "rent forgone" occurred, said ([1940] 2 All E.R. 555):

"The second sentence contains the words 'rent forgone,' but I think that the words in their context mean only rent which might have been, but was not actually, received."

In *Usher's* case (1) EARL LOREBURN said ([1915] A.C. 446);

"In consideration of this 'tie' the tenants occupy at rents less than the annual value [*i.e.*, in the case of the freehold houses] and less than the rents which the brewery company itself has to pay for the houses, and the sum claimed to be deducted must be taken to represent *in each case* the difference between the rents actually received from the tied tenants and the proper annual value."

The words which I have italicised support the argument of counsel for the taxpayers. The speech of LORD ATKINSON also supports counsel's argument, as admittedly does LORD SUMNER'S, where the expression (*ibid.*, 469) "rent foregone" is to be found. LORD PARKER OF WADDINGTON describes the deduction in the case of leasehold houses (*ibid.*, 463) as:

"... the difference between the rent they [the brewers] pay and the rent they receive."

This supports the argument of counsel for the Crown.

If I may say so with respect, as that case proceeded on the basis that the rent, the sched. A annual value, and the rent which could have been obtained if the house had been let as a free house were all the same figure, it is, perhaps, not surprising that the deduction is described in somewhat differing words.

The principle is best seen by considering a case where the brewer owns the freehold of the tied house. I assume the annual value is £100, and this is accepted as the figure at which the brewer could let the house as a free house. He gets

£40 rent from his tied tenant, on which he suffers sched. A tax by deduction. He is entitled under the decision in *Usher's* case (1) to deduct £60 in his sched. D computation. In other words, he is not treated as making any profit until he has got back in profits on the beer he sells the £60, being the difference between the rent he could get and what he charges the tied tenant. He has not, of course, paid any tax on this £60, as he would have done if he had himself occupied the premises through a manager. Therefore, as it seems to me, the deduction is accurately described by the words "rent forborne" or "rent forgone." If the rent the brewer pays is equal to, or higher than, the sum at which the house could be let as a free house, I should have thought that the principle applicable must still be the same, namely, rent forborne. Assuming however, that counsel for the Crown is right and that in such a case the brewer could deduct rent paid, as he would wish to if it was higher than the annual value, as an ordinary outgoing, giving credit for the rent he receives, I do not think that that would lead to the conclusion that s. 17 (2) prohibits the *Usher* deduction altogether. On this basis, the position of the brewer *qua* a tied house would be aptly described by the following formula. He is entitled to deduct the rent at which the house could be let free or the actual rent he pays, whichever is the higher, giving credit for the rent received. This is analogous to the position of a trader-occupier, who can deduct the annual value or the rent he pays, whichever is the higher. Counsel for the Crown agreed that in the case of an ordinary trader-occupier lessee s. 17 (2), having prohibited the deduction of the rent, has not taken away the right to deduct the annual value. As the figures quoted earlier show, if this were not so, s. 17 (2) would have put the ordinary trader-occupier in a worse position. On analogous reasoning, the brewer can still, I think, deduct rent forgone.

I, therefore, come to the conclusion, subject to further arguments which I shall consider in a moment, that, having regard to the principle in *Usher's* case (1) and to what was said in the majority of the speeches in that case and the later speeches referred to, the basis of the *Usher* deduction is in all cases rent forgone, and is, therefore, unaffected by the provisions of s. 17 (2). If I am wrong to this extent, that, where the rent actually paid led to a larger deduction (this was allowable before the Act of 1940), I do not think that the prohibition by s. 17 (2) of that basis precludes the taxpayers relying on the alternative of rent forgone, as claimed in the present case.

The Crown submitted figures, which counsel for the taxpayers did not dispute, to show that, if any *Usher* deduction was allowed in the case of a brewer paying rent under a long lease, the brewer paid less tax as a result of the application of s. 17 (2) than he did before. This, the Crown submitted, was clearly not intended. I am inclined to agree, but I do not think this would justify the court in giving the decision in *Usher's* case (1) a basis other than that which is, in my opinion, to be extracted from it, nor in making s. 17 (2) prohibit a deduction which it does not prohibit. The matter is admittedly a complicated one, and Parliament may well have overlooked the repercussions of s. 17 (2) on the facts of the present case.

Finally, the Crown submitted that since the decision in *Usher's* case (1) amendments to what is now r. 5 (1) of the Rules Applicable to Cases I and II of sched. D have destroyed the basis on which *Usher's* case (1) was decided, and that decision was no longer applicable. Rule 5 (1) at present reads as follows:

"The computation of tax shall be made exclusive of the annual value of lands, tenements, hereditaments, or heritages occupied for the purpose of the trade or profession and separately assessed and charged under sched. A."

The last eight words have been added since *Usher's* case (1) was decided, by the Finance Act, 1926, s. 36 (I) and sched. IV. There is, I think, a difficulty in

that argument at the outset. There are observations in *Usher's* case (1), particularly in the speech of LORD ATKINSON, comparing the position of a tied tenant with a manager and showing how similar the position is from the point of view of the brewer's trade. Nevertheless, it was plain that the tied house was in the occupation of the tied tenant. It was not occupied by the brewer for the purpose of his trade. This is emphasised in the argument of the Attorney-General ([1915] A.C. 441). I doubt whether the predecessor to r. 5 (1) was the basis of the decision in *Usher's* case (1) for that reason, and also from the analysis given of what seems to me its principle. At the date when *Usher's* case (1) was decided the predecessor of r. 5 was r. 2 of the Rules Applicable to Cases I and II of sched. D to the Income Tax Act, 1842 (DOWELL'S INCOME TAX LAWS, 1913 edn., p. 294). The relevant words are:

"The computation of the duty to be charged in respect of any trade . . . shall be made exclusive of the profits or gains arising from lands, tenements or hereditaments occupied for the purpose of such . . . trade."

Section 9 of the Finance Act, 1898, also dealt with this subject, but does not seem to me to affect the issue. In 1917 it was decided that this rule allowed the deduction of the annual value of premises abroad occupied for the purposes of the trade: see *Stevens v. Boustead* (4). The concluding words in the present r. 5 would negative any such claim today, because the lands would not have been assessed and charged under sched. A. There are further answers to the Crown's argument. If I am right, the House of Lords, in *Usher's* case (1), was not basing itself on the rule allowing the deduction of annual value. It was on the very special relationship of brewer and tied tenant allowing a deduction of rent forborne. Secondly, these tied houses were separately assessed and charged under sched. A. Counsel for the Crown, if he reaches this stage, has, as it seems to me, to add these words: "to the extent to which that charge is paid or borne by the person claiming the exclusion."

I, therefore, think that the appeal succeeds. The Special Commissioners and the learned judge took the view that the *Usher* allowance was a claim to the deduction of the lease rent paid by the brewer, credit being given for the rent received, and was, therefore, prohibited by s. 17 (2) of the Finance Act, 1940. They relied on the observations of LORD RUSSELL OF KILLOWEN in *Lowry's* case (2), which I agree support the Crown's argument. This subject is, at any rate to me, a complicated one, and I have given my reasons to the best of my ability for coming to a different conclusion.

SINGLETON, L.J.: The taxpayers appealed against additional first assessments raised on them in respect of their profits from carrying on the trade or business of a brewery. The question to be determined depends on what effect, if any, s. 17 of the Finance Act, 1940, has on the assessment of a brewery company in so far as its tied houses are concerned. The houses are owned by another company, Tamplin's Licensed Properties, Ltd., and under an agreement for lease they are held by the taxpayers for a term of sixty-one years computed from Oct. 1, 1933, the taxpayers paying a block rent of £40,000 a year to Tamplin's, Ltd. The taxpayers let each of the houses to a tied tenant on terms which are commonly to be found as between brewers and their tied tenants. The object of the lettings was to enable the taxpayers to obtain a better market for their beer, and, as one would expect the rents paid by the tied tenants are much less than the sched. A assessment of the houses and much less in the aggregate than the sum of £40,000 paid to the holding company.

For the purpose of making up their annual accounts for the year ended Apr. 30, 1941, the taxpayers included as a debit item the block rent of £40,000, and as a credit item the sum of £5,329 received as rent from the tied tenants. It is now admitted that the agreement for lease under which the houses were held from Tamplin's, Ltd., was a long lease within the meaning of s. 17 of the

Finance Act, 1940, and it is claimed by the Crown that under sub-s. (2) of that section the rent payable by the taxpayers must be treated as if it were a royalty paid in respect of the user of a patent which, under the provisions of rule 3 (*m*) of the Rules Applicable to Cases I and II of sched. D, may not be deducted in computing the amount of the profits to be charged. This is not really in dispute, but the claim of the taxpayers is that they are entitled, in arriving at their profits, to a deduction in respect of the properties which they let on tied tenancies, namely, a sum equal to the difference between the rents they receive from the tied tenants and the rents which would have been received by them if the houses had been let separately free from the burden of the tie—the annual value.

The system of tied houses is of long standing, and was followed by the taxpayers in order to obtain a better market for their beer, from which it is to be assumed that the profit from sales would be the greater. If the houses were not tied, the taxpayers would get higher rents, but lower sales, or less profit, from their sales of beer. They are a commercial undertaking looking for profit. Tax in respect of each of the houses is, of course, charged on the annual value under sched. A. The tax chargeable on the taxpayers under sched. D is to be computed on the full amount of the balance of the profits or gains arising from their trade. In *Gillatt and Watts v. Colquhoun* (5) the Solicitor-General (Sir Farrer Herschell) in his argument said:

“Where a man owns premises, and uses them for business purposes, he may be considered as paying the rent to himself which he would otherwise pay to somebody else. The ownership of the premises may be looked upon as something apart from the carrying on of the business, and it may be that he is entitled to treat the matter as if he paid himself just what anybody else would pay as the rent of the premises.”

That was a case in which leasehold premises had been acquired and used for trade purposes. It was held that the deduction from the assessment on the trade profits in respect of such premises must be limited to the existing annual value thereof, whatever the premium originally paid might have been. SMITH, J., in his judgment, said (2 Tax Cas. 85):

“... I am bound by the finding in this case in para. 5, where they say ‘The premises in question are assessed under sched. A of the Income Tax Acts at the sum of £1,000, which for the purposes of this case is to be taken as the “annual value” of the premises.’ Now upon the statement of this case how much is to be set off against the gross takings . . . ? It seems to me it should be £1,000 and not £1,775.”

From this it appears clear that the same principle applies in the case of leasehold property as in the case of freehold property. In computing the balance of the profits or gains the trader who makes use of his own freehold or leasehold property for the purposes of his business is entitled to a deduction in respect of the annual value of the property, namely, the sched. A assessment.

In *Russell v. Aberdeen Town and County Bank* (6), it was not disputed that the annual value of the premises owned by the bank was the proper measure of the deduction if the premises were exclusively used for the purposes of the trade or business of banking. LORD FITZGERALD, after defining profits, said (13 App. Cas. 429):

“... the annual value of them [*i.e.*, the premises] forms a proper deduction in estimating the balance of profits . . . ”

Usher's Wiltshire Brewery, Ltd. v. Bruce (1) was before the House of Lords in 1914, and the decision provides strong support for the submission made on behalf of the taxpayers. The brewery company there were the owners or lessees of a number of licensed houses, which they let to tied tenants. They

claimed (*inter alia*) that in the computation of their profits they should be allowed as a deduction the differences between the rents of leasehold houses, or sched. A assessments, on the one hand, and the rents received from tied tenants, on the other hand; and they were successful. No particular point seems to have been made in that case of leasehold houses as between sched. A assessments and the rents which the company were paying. EARL LOREBURN said ([1915] A.C. 446):

A "In consideration of this 'tie' the tenants occupy at rents less than the annual value and less than the rents which the brewery company itself has to pay for the houses, and the sum claimed to be deducted must be taken to represent in each case the difference between the rents actually received from the tied tenants and the proper annual value. For no argument was offered to show that the rent paid by the brewery company is other than the proper annual value. And it is agreed that this letting at reduced rents is made solely . . . to swell the profits of the brewery business. On ordinary principles of commercial trading such loss arising from letting tied houses at reduced rents is obviously a sound commercial outlay. Therefore this item must be deducted."

B
C No good purpose would be served by further citations from the speeches in that case, except to notice the expression "money forgone" used by LORD SUMNER (*ibid.*, 469). I shall refer to the effect of the decision later. I do not think that CROOM-JOHNSON, J., was right in saying that the taxpayers' case was dependent solely on the speech of LORD SUMNER. It seems to me that support for it is to be found from the decision of the House and from most of the speeches.

D In *Collyer v. Hoare & Co., Ltd.* (3) it was decided that, in determining the amounts to be allowed as deductions in respect of deficiencies of rent, each tied house must be considered separately, and that, in computing the deduction to be made, account must be taken of premiums paid as well as of rent—from which it would appear that the matter was treated on the basis of the company's form of accounts. That case is of importance as showing the way in which the decision in *Usher's case* (1) was regarded. In the court of first instance ROWLATT, J., said (17 Tax Cas. 180):

E "It [*Usher's case* (1)] said there is no distinction in the particular case of a tied house between a manager and the tenant."

F In the House of Lords LORD BUCKMASTER said ([1932] A.C. 410):

G "So far as the tied houses are concerned, if in any case rent paid by the tenant is less than the amount of the assessment under sched. A, it has been decided in *Usher's case* (1) that the appellants are entitled in preparing their accounts for assessment under sched. D to deduct as an expense the difference between the rent received and the sched. A assessment . . . They are in fact regarded as business premises of the undertaking. The decision referred to places that point beyond controversy."

LORD ATKIN said (*ibid.*, 416):

H "Whether the expense allowed in *Usher's case* (1) is based upon a deduction of the sched. A valuation as on premises used in the brewer's business, mitigated by the sum received from the tied tenant, or whether it is regarded as a notional sum paid for the advantage of the tie, it is allowed as an expense incident to the particular house in respect of which it is incurred."

LORD TOMLIN said (*ibid.*, 419):

"In *Usher's case* (1), where tied houses of a brewery company were held by the tenants at rents below the sched. A valuations, your Lordships'

House . . . treated the difference between the rent and the valuation in the case of each house as rent forgone, or money spent exclusively for the purpose of earning profits, and held that expense to be one which could be deducted for the purpose of ascertaining profits and gains under sched. D.'

Lowry v. Consolidated African Selection Trust, Ltd. (2) is not really in point, except for the criticism ([1940] 2 All E.R. 562) by LORD RUSSELL OF KILLOWEN of part of the speech of LORD SUMNER in *Usher's* case (1), on which criticism CROOM-JOHNSON, J., may be said to have based his judgment in favour of the Crown. VISCOUNT MAUGHAM said (*ibid.*, 555), that LORD SUMNER in *Usher's* case (1) by the words "rent forgone," meant "only rent which might have been, but was not actually received" adding that *Usher's* case (1) had no application to the case which was then being considered by the House of Lords.

The position arising from the authorities to which I have referred may be summarised in this way: (i) A trader who owns the premises on and from which he carries on his business is entitled, in computing the balance of his trading profits or gains, to make a deduction of the annual value of the premises. (ii) In this regard no distinction has been drawn between the case of the freeholder and that of the leaseholder: see *per* LORD ATKINSON in *Usher's* case (1) ([1915] A.C. 455). (iii) The decision in *Usher's* case (1) placed the brewer who let his houses on tied tenancies in an exceptional position. They are to be regarded as business premises of the undertaking. (iv) The amount of the deduction allowable to the brewer is the rent forgone—words interpreted by VISCOUNT MAUGHAM as meaning rent which might have been received but was not actually received. Hence the importance of the sched. A assessment, or the rack rent at which the premises are worth to be let by the year—the "potential rack rent," as LORD RUSSELL OF KILLOWEN described it ([1940] 2 All E.R. 560) in *Lowry's* case (2).

A trader's accounts are made up of receipts on the one hand and payments on the other hand, and one type of payment is rent, be it under lease or under agreement. In *Usher's* case (1) no distinction was drawn between leasehold rents and sched. A assessments. In practice, the amount of the payment out is the important factor to the trader, and his accounts are made out accordingly. In the ordinary case a deduction in respect of the user of his premises has been allowed to the trader on the basis of the rent he was paying. That was the commercial and the natural way of arriving at his profit. Rule 3 of the Rules Applicable to Cases I and II of sched. D recognises that, when a deduction is permissible, it may be calculated according to the rent or the annual value. It points to an alternative, and it is reasonable to assume that the trader would choose the one which suited him the better, if and when he was allowed to do so.

Section 17 (2) of the Finance Act, 1940, has brought about an alteration in this, at least in relation to premises let on long leases. The question for consideration is how far, if at all, it has affected the principle of *Usher's* case (1). The question is stated in para. 13 of the Case in this way:

"Whether the [taxpayers were] entitled in arriving at [their] profits to a deduction in respect of those properties held by [them] on long lease from T.L.P. which were sub-let by [them] on tied tenancies, the amount of the deduction claimed by the [taxpayers] being a sum equal to the difference between the rents received by the [taxpayers] for such properties and the rents which would have been received by [them] had they been let separately free from the burden of the tie."

It is to be noticed that the sole question raised is as to rent forgone—as stated, the difference between tied rents and annual values. It was admitted that *Usher's* case (1) governed the case of a freeholder, but it was said that a change had been made in the case of a leaseholder under a long lease who let the premises to a tied tenant. If the principle of rent forgone is right, I fail to see any

distinction between the case of the freehold house and of the leasehold house in the hands of a trader and used by him for the purposes of his trade.

Sub-section (2) of s. 17 of the Act of 1940 reads:

"Rules 1 and 4 of No. VIII of sched. A shall not apply to any payment to which this section applies, but any such payment shall, so far as it does not fall under any other Case, be charged with tax under Case VI of sched. D and be treated for the purposes of such of the provisions of the Income Tax Acts as apply to royalties paid in respect of the user of a patent as if it were such a royalty."

The object of this is to make the landlord chargeable to tax on the rent he receives as distinct from the sched. A assessment of the premises. It is agreed that the block rent of £40,000 is a payment to which the sub-section applies. The payment is therefore to be treated as if it were a royalty paid in respect of the user of a patent. This brings into play r. 19 (2) of the All Schedules Rules, under which, when such a royalty is paid wholly out of profits brought into charge (as in this case), the person paying is entitled to deduct and retain the amount of the tax. Furthermore, r. 3 (m) of the Rules Applicable to Cases I and II of sched. D forbids the deduction against profits of any royalty, and it was not disputed that the rent for leasehold houses did fall within s. 17, and was, accordingly, not allowable in computing the profits of the taxpayers for the material years. The claim of the taxpayers was based on the decision in *Usher's case* (1) and, as I have said, was in respect of the amount of rent forgone.

The change made by s. 17 (2) can be seen more readily if one takes the case of the ordinary trader apart from any question of tied houses. Before the change the trader who owned the freehold of the premises from which his business was carried on was entitled to deduct the annual (or sched. A) value from his profits. The trader who paid rent for the premises was normally allowed to deduct the rent if it was greater than the annual value, though naturally he deducted the annual value if it was higher than the rent. Section 17 (2) does not touch the position of the trader who owns the freehold, nor does it mention annual value as such. It deals with rents under long leases. The first result is that by reason of r. 3 (m) the trader can no longer deduct the payment of rent in computing the balance of his profits or gains. The second result, arising from r. 19 (2) of the All Schedules Rules, is that, if he pays the royalty wholly out of profits, he is entitled, when paying his landlord, to deduct the amount of the tax and to retain it. At first sight his position appears to be the same as it was beforehand, but he has paid sched. A tax, and the commencing words of s. 17 (2) take away from him the right which he otherwise would have had of deducting sched. A tax when paying his rent. Indeed, it must be clear that he could not deduct both tax on the rent and sched. A tax. The position can be illustrated by taking the cases of four traders, each of whom occupies for the purposes of his trade premises of an annual value of £100 and each of whom makes a profit of £1,000 on a year's trading. A owns the freehold. His position is not effected by s. 17 (2). He pays sched. A tax on the land which he owns. He is entitled to set against his profits the annual value of the land (£100) so that he pays tax under sched. D on £900. B, C and D have each a long lease of their premises. I assume that each is charged to tax under No. VIII of the Rules Applicable to sched. A and pays sched. A tax. B pays £100 a year rent. Before the Act of 1940 he would have been able to set the rent or the annual value (£100) against his profits, which at 9s. in the £ would have meant a saving of tax of £45. Under the Act of 1940, when he pays his landlord, he is entitled to deduct and retain tax on the rent, £100—that is £45. He has, however, already paid £45 sched. A tax. C pays £200 a year rent. Before the Act of 1940 he would have set the £200 against his profits, thus saving £90 in tax.

He can no longer do that, but he is entitled on paying his landlord to deduct tax of £90 and to retain it. He, too, has paid £45 sched. A tax which prior to 1940 he could have deducted from his rent. D pays a nominal rent, £1. Before 1940 he would have set the annual value, £100, against his profits, thus saving £45 in tax. He can deduct 9s. on paying his rent. The position under sched. A tax is virtually as before in that he bears almost the whole of it. Thus, unless there is some compensating advantage elsewhere, B, C and D are each the amount of the sched. A tax worse off than they were before the Act of 1940. I know of no provision under which that can be recovered directly. I fail to see any reason for penalising the trader who has a long lease while the position of the trader who owns the freehold is unchanged; and this is especially noticeable in the case of D, who is practically in the position of a freeholder. Again, in the cases of B, C and D the Crown has collected at the expense of landlord and tenant tax on the total rent as well as on the sched. A assessment of the premises.

The answer seems to me to be that, when the trader tenant has paid his rent (and that rent is not taken into account in the computation of his profits) and when he has paid the sched. A tax, he, as a trader, is in just the same position as if he were the owner of the freehold; he can then set the annual value of the premises against his profits as the freeholder does, there being nothing in s. 17 (2) to prevent this. The result is that the trader who has a long lease is in precisely the same position as to tax as he was before the Act of 1940, and the Crown in effect obtains tax on the rent. This, I believe, achieves the object of the section, which was not devised to place an additional burden on traders but was meant to ensure that, when premises were let on long lease at a rent higher than the annual value, the landlord should be charged to tax on the rent. It seems a long way round, but the Income Tax Acts form a complicated structure. If the rent is higher than the annual value the Crown collects additional tax at the expense of the landlord; if the rent is the same as, or less than, the annual value the position neither of the landlord nor of the tenant (the trader) is affected. It is not necessary to consider this aspect of the matter further in view of the agreement of counsel on the resumed argument that this is a correct statement of the position. None the less, it is useful to have before one the effect of s. 17 (2) in the case of the ordinary trader before coming to a conclusion as to how far it affects the decision of the House of Lords in *Usher's* case (1). In that case LORD PARKER OF WADDINGTON pointed out ([1915] A.C. 463) that the appellants claimed

"... the sched. A assessment value or the rent they pay as a deduction, giving credit on the other side of the account for the rent paid by the tenants of the tied houses."

That claim was upheld.

If a trader uses his own premises for the purposes of his trade he is entitled to set-off the annual value of the premises against profits, otherwise he would be getting no return in respect of the premises on which he is assessed for the purposes of sched. A. He could let the premises, but instead he uses them for the purposes of his trade. In a sense that is a case of rent forgone. LORD BUCKMASTER in *Collyer's* case (3) commenting on the decision in *Usher's* case (1), said ([1932] A.C. 411), that tied houses of a brewery company are to be regarded "as business premises of the undertaking." That is the basis of the decision in *Usher's* case (1). Each tied house is then theoretically worth its annual value to the company, and the company is entitled to a deduction in respect of that; but it receives a tied rent for which credit must be given: consequently the difference between the annual value and the tied rent is the amount of rent forgone, and the amount of the deduction to which *prima facie* the company is entitled. It is not surprising that complications arise when premises which

are really in the possession of the tied tenants are to be regarded as business premises of the brewery company.

A I do not see that s. 17 (2) of the Finance Act, 1940, has altered the principle of the decision of the House of Lords in *Usher's* case (1). It has deprived the trader of an option which he had in relation to rent, but it leaves untouched the right in the ordinary trader to set the annual value of the premises against his profits; and it is from this that the right to deduct rent forgone arises. If the brewery company received nothing from the tied tenants it would normally be allowed to set off the annual value against its profits: if it receives something by way of rent or otherwise that must be taken into account. In the ordinary case it may be sufficient to deduct the rent received from the annual value; in some cases it will be necessary to examine the tenancy agreements in order to arrive at the true position. In my view, the question raised by para. 13 of the Case should be answered in the affirmative, and the appeal should be allowed.

B ROXBURGH, J.: I agree, and I can state briefly the basis of my agreement. Counsel for the Crown has not convinced me that *Usher* allowances have been abolished in the case of freehold premises let by brewers as tied houses. He suggested that they had been abolished because alterations had since been made in what is now r. 5 of the Rules Applicable to Cases I and II of sched. D. I agree with my Lords in rejecting that argument. If, then, a brewer with freehold tied houses is entitled to deduct the difference between their annual value and the rent he receives for them, what commercial or logical reason could there be for denying to a brewer who held the house on a long lease at perhaps a nominal rent the right to make a similar deduction? If the allowance is to be related to annual value, why should it not be so related when he pays a rent above the annual value? These difficulties disappear if the *Usher* allowance is related in every case, not to the rent paid by the brewer, but to the true annual value or potential rack rent; and I agree with my Lords that it ought to be, for the reasons stated by them. I agree also that s. 17 (2) of the Finance Act, 1940, may have had an unexpected repercussion.

E *Appeal allowed with costs. Case to be remitted to the Special Commissioners to adjust the figures in accordance with the judgment.*

Solicitors: Godden, Holme & Co. (for the taxpayers); Solicitor of Inland Revenue (for the Crown).

[Reported by C. N. BEATTIE, Esq., Barrister-at-Law.]

Affirmed. C.A. post, p. 549.

BANQUE DES MARCHANDS DE MOSCOU (KROUPETSCHESKY)

(In liquidation) v. KINDERSLEY AND ANOTHER.

G [CHANCERY DIVISION (Harman, J.), April 25, 26, 27, May 17, 1950.]

Company—Winding-up—Jurisdiction—Company not carrying on business in England, but having substantial assets here—Method of service of petition—Companies Act, 1929 (c. 23), s. 338 (1).

H In 1932 a Russian bank, which had been dissolved by decree of the Soviet regime in 1918, and which, while it had carried on business in England only through agents, had large assets in this country, was wound-up by an order of the Chancery Division under the Companies Act, 1929, s. 338, service of the petition having been made by advertisement. In 1943, K., on behalf of a partnership firm, which had been dissolved and of which he had been a partner, sought to prove in the liquidation against the bank for a sum which he alleged was the balance due to the firm from the bank. In 1949 the liquidator of the bank, by leave of the registrar under s. 191 of the

Act of 1929, issued a writ against the surviving partners of the partnership firm claiming payment of a consolidated balance of moneys alleged to be due to the bank on various accounts. On Jan. 9, 1950, the liquidator served notice on the said defendants rejecting the proof which K. had sought to make in 1943. The defendants issued a summons for an order dismissing or staying the action, or to have the name of the bank struck out, on the ground that the bank (in liquidation) was non-existent and that the action had been commenced without authority. The defendants argued that the winding-up was a nullity because the bank had never had a place of business nor carried on business in England except through agents, and because the petition had not been properly served.

HELD: (i) by seeking to prove in the liquidation, the defendants had unequivocally recognised the validity of the winding-up and the title of the liquidator, and, therefore, it was not open to them in the present proceedings to refuse to recognise the winding-up.

(ii) there was no authority binding the court to hold that the existence of substantial assets belonging to the bank in England (which could only be administered by means of a winding-up) was not alone sufficient to give the court jurisdiction to wind-up the bank.

Re Tovarishestvo Manufactur Liudvig-Rabenek ([1944] 2 All E.R. 556), and *Re Dendre Valley Railway & Canal Co. Ex p. Moss* (1850) (19 L.J.Ch. 474), applied.

Re Lloyd Generale Italiano (1885) (29 Ch.D. 219), distinguished.

(iii) even if the point were open to anyone but the bank itself, there was no ground for saying that service by advertisement was not proper in the circumstances.

[AS TO COMPANIES WHICH CAN BE WOUND-UP UNDER THE COMPANIES ACT, 1929, see HALSBURY, Hailsham Edn., Vol. 5, pp. 844-848, paras. 1461-1467; and FOR CASES, see DIGEST, Vol. 10, pp. 816, 817, 1206-1208, Nos. 5317-5324, 8535-8553.]

Cases referred to:

- (1) *Russian Commercial and Industrial Bank v. Comptoir d'Escompte de Mulhouse*, [1925] A.C. 112; 93 L.J.K.B. 1098; 132 L.T. 99; Digest Supp.
- (2) *Banque Internationale de Commerce de Petrograd v. Goukassow*, [1925] A.C. 150; 93 L.J.K.B. 1084; 132 L.T. 116; Digest Supp.
- (3) *Lazard Bros. & Co. v. Banque Industrielle de Moscou*, [1932] 1 K.B. 617; 101 L.J.K.B. 65; 146 L.T. 240; Digest Supp.
- (4) *Russian and English Bank v. Baring Bros. & Co. Ltd.*, [1932] 1 Ch. 435; 101 L.J.Ch. 157; 146 L.T. 424; Digest Supp.
- (5) *Re Russian and English Bank*, [1932] 1 Ch. 663; 101 L.J.Ch. 226; 147 L.T. 57; Digest Supp.
- (6) *Russian and English Bank and Florance Montefiore Guedalla v. Baring Bros. & Co., Ltd.*, [1936] 1 All E.R. 505; [1936] A.C. 405; 105 L.J.Ch. 174; 154 L.T. 602; Digest Supp.
- (7) *Re Tovarishestvo Manufactur Liudvig-Rabenek*, [1944] 2 All E.R. 556; [1944] Ch. 404; 113 L.J.Ch. 250; 171 L.T. 66; 2nd Digest Supp.
- (8) *Re Dendre Valley Railway & Canal Co. Ex p. Moss*, (1850), 19 L.J.Ch. 474; 15 L.T.O.S. 246; 14 Jur. 754; 10 Digest 1207, 8539.
- (9) *Re Union Bank of Calcutta, Ex p., Watson*, (1850), 3 De G. & Sm. 253; 19 L.J.Ch. 388; 15 L.T.O.S. 389; 64 E.R. 467; 10 Digest 1207, 8540.
- (10) *Re Lloyd Generale Italiano*, (1885), 29 Ch.D. 219; 54 L.J.Ch. 748; 10 Digest 1208, 8549.
- (11) *Re Tea Trading Co. K. & C. Popoff Bros.*, [1933] Ch. 647; 102 L.J.Ch. 224; 149 L.T. 138; Digest Supp.

PROCEDURE SUMMONS.

In an action brought by the liquidator of the Banque des Marchands de Moscou the defendants applied for an order dismissing the action, or an order that all further proceedings in the action be stayed, or that the name of the alleged plaintiff be struck out so as to bring the action to an end, on the ground that the alleged plaintiff was non-existent, and that the action had been commenced without authority.

A *Russell, K.C., and R. Gwyn Rees* for the defendants.

Upjohn, K.C., and R. H. Walton for the plaintiff, the Banque des Marchands de Moscou (in liquidation).

Cur. adv. vult.

May 17. **HARMAN, J.**, read the following judgment. This summons is one more strand in the tangled legal skein involving a number of companies, chiefly banking companies, which were corporations in Russia under the Tzarist regime, and were, as it is now recognised, dissolved by decrees of the Soviet government in 1918. Since 1925 the law reports have been eloquent of the difficulties involved in the fact that these so-called Russian banks have, in several instances, had large assets or claims in this country, and, in others, creditors here. The difficulty arises out of the fact that as corporations the banks have ceased to exist, and, therefore, *prima facie* cannot sustain any action.

A comparatively early instance is *Russian Commercial and Industrial Bank v. Comptoir d'Escompte de Mulhouse* (1). In that case the House of Lords declined to accept the evidence that the Russian banks were dissolved, but held also, which is more pertinent for the present purpose, that, if the defendant relies on lack of authority to bring an action, that is not a point to be taken by way of defence, but by way of preliminary objection on a motion to strike out or on a summons to stay. A similar decision was reached in *Banque Internationale de Commerce de Petrograd v. Goukassow* (2). The story was carried further in 1932 when the partnership firm of Lazard Brothers & Co., surviving members of which are the defendants in the present suit, brought an action against a Russian bank and obtained a judgment by default, on the strength of which they obtained a garnishee order against the Midland Bank which held certain funds belonging to the Russian bank: see *Lazard Bros. & Co. v. Banque Industrielle de Moscou* (3). On appeal, it was decided that the Russian bank had ceased to exist, at any rate in 1930 when the judgment was obtained; that the judgment was, therefore, a nullity; and that it and the garnishee order must be set aside and the amount obtained on it by Messrs. Lazard paid back. The importance of that case for the present purpose lies chiefly in the observation made by SCRUTTON, L.J., where he says ([1932] 1 K.B. 627):

“The present Russian company had no branch in England, or anywhere else outside Russia. No English court had any jurisdiction to wind it up.”

This observation is *obiter dictum*.

G In the same year an action came before EVE, J., brought in the name of another Russian dissolved corporation: *Russian and English Bank v. Baring Bros.* (4). That action was stayed on the preliminary point taken by the defendants that the plaintiffs no longer existed either in Russia or in Great Britain. The bank in that case at one time had a branch in London. The learned judge at the hearing suggested that the bank's claim against Baring Brothers might, nevertheless, be pursued if it were wound-up under s. 338 (2) of the then newly enacted Companies Act, 1929. This sub-section seems to have been framed to fit the case of dissolved Russian corporations, but it is limited by its terms to such a corporation “which has been carrying on business in Great Britain.” The suggestion of EVE, J., was acted on and a petition to wind-up the company came before BENNETT, J., in the same year: *Re Russian and English Bank* (5). The learned judge made a winding-up order in that case, but he made it, not under s. 338 (2), but under s. 338 (1) (d), which is a re-enactment of the provisions or

the Companies Acts going back to 1862. The learned judge held that s. 338 (2) had not altered the law. I shall have to return to this section later. It is to be observed that the petition last mentioned was served by advertisement in the same way as has been done in a petition to wind-up the plaintiff company in this case. The Russian and English Bank having been wound-up, as I said, a liquidator was appointed who obtained authority under the Companies Act, 1929, s. 191, to bring an action against Baring Brothers, but this action was stayed by CLAUSON, J., whose order was affirmed by the Court of Appeal, and the plaintiffs' solicitors were ordered to pay the costs. On appeal, however, to the House of Lords, a majority decided (*Russian and English Bank and Florance Montefiore Guedalla v. Baring Bros. & Co., Ltd.* (6)) that such an action would lie, and it is on the pattern of that action that the present suit is founded. A

The plaintiff in this action was wound-up by an order made by EVE, J., in 1932, and this action has been brought by the liquidator by leave of the registrar under s. 191 of the Act of 1929 against the defendants as the surviving partners within the jurisdiction of the firm of Lazard Brothers & Co. before mentioned. The action is to recover a balance said to be due from the partnership as a result of banking or analogous transactions. It is not denied that there was a long business association between the plaintiff and Messrs. Lazard, but the defendants have taken out this summons to stay the action and to obtain an order for costs against the plaintiff's solicitors or the liquidator on the grounds that the plaintiff is non-existent and that the action has been launched without proper authority. That the plaintiff is non-existent as a corporation, and has had no existence since 1918 is not in dispute, but that, having regard to the decision of the House of Lords in *Russian and English Bank v. Baring Bros. & Co., Ltd.* (6) in 1936, would be no bar to this action if the winding-up proceedings were valid and leave to bring the suit properly obtained. B C D

It is on the first point that the defendants rely. They allege that the winding-up was a nullity, first because the plaintiff never had a place of business nor carried on business in this country except through agents, and, secondly, because the petition was not properly served. The defendants did not seek to set aside the winding-up order, but I think it is rightly urged on their behalf that as debtors or supposed debtors they are strangers to the winding-up and not bound by it if it was improperly obtained: see the observations of LORD BLANESBURGH to this effect in *Russian and English Bank v. Baring Bros. & Co., Ltd.* (6) ([1936] 1 All E.R. 510). The defendants, however, are, according to their own contentions, not only not debtors to the plaintiff, but are creditors of the plaintiff. In this latter capacity they are bound by the winding-up order which must be valid as against them unless and until they set it aside by properly constituted proceedings. E F

It seems to me that this constitutes the answer to this summons, for the defendants have, by seeking to prove in the liquidation, unequivocally recognised the validity of the winding-up and the title of the liquidator. By an affidavit made on Sept. 23, 1943, the first defendant, on behalf of the former firm, sought to prove in the liquidation against the company for over £26,000 which he swore was the balance of the firm's account against the company. This proof was not dealt with by the liquidator until Jan. 9, 1950, when he served notice on the defendants rejecting the proof. The defendants did not accept this decision, and on Jan. 25, 1950, took out a summons in the winding-up to have the time for appeal against the rejection of their proof extended until after the trial of the present action. That application was refused by the registrar and an appeal against his refusal is still pending before WYNN-PARRY, J. G H

In these circumstances, as the defendants have been, and still are, asserting that they are creditors of the plaintiff and entitled to recover their debt or a dividend on it in the winding-up, it seems to me quite wrong that they should be allowed to refuse to recognise the winding-up proceedings in the present action.

It is true that their claim has not been admitted, neither has it been withdrawn, and, if they are right in their present attitude, they can recover the money due on one side of the account or a dividend on it from the liquidator, but decline to allow him credit or a set-off for moneys on the other side of the account. In other words, they are claiming to be entitled to receive, but never to pay. This is an attitude of which I cannot approve, nor do I think that in law the defendants are entitled to adopt it. They are, as the Scottish lawyers have it, approbating and reprobating, or, in the more homely English phrase, blowing hot and cold.

This is enough to dispose of the present application, but as other points were carefully argued before me I think I ought to say something about them. The main point relied on by the defendants was that EVE, J.'s order was made without jurisdiction, the reason being that this company never carried on business within the jurisdiction. Now if one turns to s. 338 of the Act of 1929 it provides, so far as material for this purpose:

"(1) Subject to the provisions of this Part of this Act, any unregistered company may be wound-up under this Act, and all the provisions of this Act with respect to winding-up shall apply to an unregistered company, with the following exceptions and additions . . . (d) The circumstances in which an unregistered company may be wound-up are as follows:—(i) If the company is dissolved, or has ceased to carry on business, or is carrying on business only for the purpose of winding-up its affairs."

It is agreed that the words "is dissolved" mean "has been dissolved" and a first reading of the section leads to the conclusion that there is no territorial limit to the jurisdiction in a suitable case, but the earlier part of the section talks about the principal place of business of an unregistered company, and it has been said that, reading the section as a whole, there is no jurisdiction under it unless the business was carried on in this country—witness the observation of SCRUTTON, L.J., in *Lazard Bros. & Co. v. Banque Industrielle* (3) ([1932] 1 K.B. 627) referred to earlier.

The main authority on which counsel for the defendants relied for this proposition was *Re Tovarishstvo Manufactur Liudvig-Rabenek* (7). There, a dissolved Russian corporation, which alleged that it had an asset in this country, namely, a fund held by the plaintiffs in the present case (an assertion which the House of Lords has recently negatived), was the respondent to a petition to wind-up. In that case, COHEN, J., inquired into the question whether the company ever carried on business in England. That was the investigation he was asked to make,

and that company was able to satisfy him that it did so carry on business within the meaning of s. 338 because its directors from time to time stayed at an hotel in England and conducted the business thence. The learned judge certainly assumed that it was necessary to found jurisdiction to find that business had been so carried on. To that he was invited by counsel for the petitioner: see ([1944] 2 All E.R. 559). He was not asked to wind-up the company on the ground

that, although it had no place of business here and did not, except through agents, carry on business here, there were large assets which, except through a winding-up, there was no means of administering, so that creditors would be without a remedy. It would, in my judgment, be most unfortunate if the existence of such assets does not confer jurisdiction. I should not, however, be prepared to hold on the authority of COHEN, J., that the mere existence of assets here is

insufficient. In the first place, the section is on the face of it unlimited by this consideration, and, in the second, it seems to me that under similar words the court held that it had jurisdiction as long ago as 1850 when WIGRAM, V.-C., made an order under the Winding-Up Acts, 1848-1849, in *Re Dendre Valley Railway and Canal Co.* (8) which had no offices or place of business in England and was domiciled at Brussels: see also *Re Union Bank of Calcutta* (9), a petition under the same Acts, where KNIGHT BRUCE, V.-C., assumed that he had jurisdiction though he declined to exercise it.

The case on the other side, namely, *Re Lloyd Generale Italiano* (10), as explained by COHEN, J., in *Rabenek's case* (7) ([1944] 2 All E.R. 561), turned on the fact that there were no assets in this country, and, no doubt, in such a case there was no jurisdiction and indeed nothing to wind-up. In the present case there are very large assets and no other means of administering them but a winding-up. Moreover, I am asked to declare incompetent an order made by EVE, J., nearly twenty years ago under which many proceedings have been taken, including proceedings in the House of Lords. I should be very slow to do this. I was confronted with a transcript of the proceedings on the petition, and it was urged on me that the learned judge really ruled as founding his jurisdiction on the fact of a registration made here in 1920 after the date when, as it is now recognised, the company had been dissolved. No doubt, that would have been a bad ground, but it was by no means the only consideration before the learned judge, and one of those considerations was that there were large assets here which could not otherwise be administered. No formal judgment was delivered and I cannot say what was in the mind of the judge when he gave his decision. I should not feel myself at liberty now to disregard it.

Some evidence was filed on the present application on the question whether this company ever did carry on business in England. As to that, I say only that I am not satisfied that it did, but, at this distance of time, that is a matter which is very difficult to prove or disprove, and I am far from saying that, if the petitioners had been called on to prove it in 1932, they might not have been able to do so.

The second reason why the defendants said that the winding-up order was a nullity was because it was not properly served, and for this purpose they relied on a decision of MAUGHAM, J., in *Re Tea Trading Company K. and C. Popoff Brothers* (11). That was a petition to wind-up another dissolved Russian corporation, but it had had a place of business in this country, namely, a branch in London. In those circumstances, the judge decided that the proper way to serve such a petition was not by advertisement, but under the Companies (Winding-Up) Rules, 1929, r. 28, by service at the principal or last known place of business of the company. This his Lordship described as "the best if not the only way of dealing with an unregistered company which has been dissolved." I am content to agree that where such a company has had a place of business here that may be right, but where there has been no place of business—as in *Rabenek's case* (7)—I cannot think that no resort can be had to substituted service. In fact, this is a highly metaphysical question, the premise being that the respondent has no existence and the inquiry is to effect service on a non-existent entity. As well inquire how many angels can stand on a needle's point. If the object be to bring the petition to the notice of any former director or shareholder, it seems to me that advertisement may be more effective than service on a former place of business. At any rate, substituted service has been allowed in most of the Russian bank cases, and I am not going to say that it was not good service even if, which I doubt, this point is open to anybody but the company which was respondent to the petition. For these reasons, in addition to the first reason on which I base my judgment, I should be prepared to hold that the defendants are not entitled to the relief claimed.

Order accordingly. Plaintiff's costs to be costs in the cause.

Solicitors: *Linklaters & Paines* (for the defendants); *Slaughter & May* (for the plaintiff).

[Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.]

PAYNE AND ANOTHER v. COE.

[CHANCERY DIVISION (Danckwerts, J.), May 11, 1950.]

Building Society—Society in dissolution—Annual meeting—Duty of trustees to summon—Building Societies Act, 1874 (c. 42), s. 32—Building Societies Act, 1894 (c. 47), s. 9.

On Apr. 2, 1940, the dissolution of a building society was commenced by means of an instrument of dissolution signed pursuant to the Building Societies Act, 1874, s. 32, para. 3. The trustees thereof applied to the court for the determination of the question whether they ought to call annual general meetings of members until the dissolution should have been completed.

HELD: there was no provision in the Building Societies Acts, 1874 and 1894, which either expressly or by necessary implication imposed on the trustees the duty in the circumstances to call annual general meetings, and, therefore, they were not bound to do so.

Kemp v. Wright ([1895] 1 Ch. 121), explained.

[AS TO THE DISSOLUTION OF A BUILDING SOCIETY, see HALSBURY, Hailsham Edn., Vol. 3, pp. 441-444, paras. 838-843; and FOR CASES, see DIGEST, Vol. 7, pp. 502, 503, Nos. 286-300.]

Case referred to:

(1) *Kemp v. Wright*, [1895] 1 Ch. 121; 64 L.J.Ch. 59; 71 L.T. 650; 59 J.P. 133; 7 Digest 503, 296.

ADJOURNED SUMMONS to determine whether the plaintiffs, the surviving trustees of an instrument of dissolution of the Pall Mall Building Society, ought to call an annual general meeting of the members of the society each year until the dissolution of the society should be completed.

Montgomery White, K.C., and *M. J. Albery* for the plaintiffs, the surviving trustees of the instrument of dissolution.

J. A. Brightman for the defendant, a member.

DANCKWERTS, J.: This case arises on the provisions of the Building Societies Acts, 1874 and 1894, which, like the Friendly Societies Acts, are conspicuous more for the things which they do not say than for those which they do. The Pall Mall Building Society was incorporated on Oct. 4, 1932. On Apr. 2, 1940, an instrument of dissolution of the society was executed pursuant to the provisions of the Building Societies Act, 1874, s. 32, and the plaintiffs are the two survivors of the three trustees for whom provision was made in that instrument. After the execution of the instrument of dissolution an action was begun by the Royal Mutual Benefit Building Society in respect of certain operations of one Charles William Neville, who was a director of this society and others, against a number of building societies, including the building society which is concerned in these proceedings. The writ in that action was issued on Sept. 8, 1943, and at one time it was thought that there was a possibility of this society's being subjected to considerable liabilities if that action terminated in a certain way. It is also worth noting that the trustees, the plaintiffs in the present application, were originally parties to that action, and an order was obtained from a master in chambers in the King's Bench Division joining instead the society in dissolution. Whether that order was the right procedure or not may be open to doubt. At any rate, it cannot decide the point which I have to decide in these proceedings.

On Feb. 21, 1946, the trustees made an application by originating summons which was heard by VAISEY, J., on Apr. 17, 1947, and he authorised* the calling of a meeting by the trustees for the compulsory winding-up of the society. By the order then made the court declared

* See *Payne v. Coe*, [1947] 1 All E.R. 841.

"that a meeting of the members of the above-mentioned society can and ought to be called by the plaintiffs for the purpose of considering and if thought fit passing a resolution under s. 32, para. 4, of the Building Societies Act, 1874, for authorising a member to present a petition on behalf of the said society for the winding-up of the society by the court,"

but the question whether the trustees had the power to call any such meeting does not seem to have been considered by the learned judge. However, a compromise was reached by the society, or by the trustees, with the Royal Mutual Benefit Society. This was brought before VAISEY, J., for approval on Apr. 12, 1948, and was then approved, and the order directed execution of the trusts of the instrument of dissolution, which provision was intended to protect the trustees from any contingent and unascertained claims which might be made by reason of the action to which I have referred. The trustees were absolved from the duty of calling the meeting which I have mentioned, although that does not appear in fact in the order. Subsequently, a letter was received from the Chief Registrar of Friendly Societies suggesting that annual meetings of the society ought to have been called, and ought to be called, notwithstanding that at an earlier date he had expressed the view that annual meetings no longer needed to be called, and the question which I have to decide to-day is whether, in the position in which the society now is, of being in dissolution, the plaintiffs ought to call annual general meetings of the members each year until the dissolution shall be finally completed.

The Building Societies Act, 1874, s. 32, provides:

"A society under this Act may terminate or be dissolved—1. Upon the happening of any event declared by its rules to be the termination of the society. 2. By dissolution in manner prescribed by its rules. 3. By dissolution with the consent of three-fourths of the members, holding not less than two-thirds of the number of shares in the society, testified by their signatures to the instrument of dissolution . . . 4. By winding-up, either voluntarily under the supervision of the court or by the court, if the court shall so order, on the petition by any member authorised by three-fourths of the members present at a general meeting of the society specially called for the purpose to present the same on behalf of the society . . ."

Paragraph 1 would only apply to a terminable society which was to come to an end in a certain event. This society is a permanent society and therefore it has no fixed date for termination. This society has been dissolved pursuant to its rules, combined with para. 3, *i.e.*, by an instrument signed by three-fourths of the members holding not less than two-thirds of the number of shares in the society. The society, therefore, either has been dissolved or is in process of dissolution. At the conclusion of s. 32 the following provision appears:

"Notice of the commencement and termination of every dissolution or winding-up shall be sent to the registrar, and registered by him."

The Building Societies Act, 1894, s. 11, also refers to "the commencement of the dissolution" and "the termination of the dissolution." That curious provision is not supported by any definition or other statutory provision indicating when a dissolution may be considered to have terminated. It is easy enough to see when it may have commenced, but it is very difficult to see what exactly is meant by "the termination of the dissolution."

There is no doubt that the society has either been dissolved, or has been put into dissolution so that it is no longer operative as a society in the sense of a going concern. If and so far as I am unhampered by statutory provisions or any necessary deductions from them, I should reach the conclusion without difficulty that it was inconsistent with the present position that annual general meetings of the members should continue to be held, but I have to consider whether there is any statutory provision, or any provision in the rules of the society, which

compels me to come to the conclusion that, notwithstanding the present position of the society, there is still a duty to call the members of the society together once at least in every year for the purpose of an annual general meeting.

The Building Societies Act, 1874, s. 16, deals with matters which are to appear in the rules of a society. It provides:

A “The rules of every society hereafter established under this Act shall set forth—1. The name of the society, and chief office or place of meeting for the business of the society . . . 3. The purposes to which the funds of the society are to be applied, and the manner in which they are to be invested . . . 5. The manner of altering and rescinding the rules of the society, and of making additional rules: 6. The manner of appointing, remunerating, and removing the board of directors or committee of management, auditors, and other officers: 7. The manner of calling general and special meetings of the members: 8. Provision for an annual or more frequent audit of the accounts, and inspection by the auditors of the mortgages and other securities belonging to the society . . . 12. The powers and duties of the board of directors or committee of management and other officers . . . 14. The manner in which the society, whether terminating or permanent, shall be terminated or dissolved.”

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Section 16 (6) appears to indicate that directors are “officers.”

I turn to the rules of the society. Rule 1 provides for the name. The rules further provide:

D “2. The object of the society which is permanent shall be to raise, by the subscriptions of the members, a fund for making advances to members out of the funds of the society, upon security of freehold or leasehold estate, by way of mortgage. 3. The funds shall be raised by shares, to be called uncompleted and completed shares. The value of every share shall be £10. Shares may be issued from time to time in the discretion of the board, but no preferential shares are to be issued. 4. Every person subscribing for a share shall be a member . . .”

E

Rule 5 provides for subscriptions and there are provisions relating to interest and transfer. The rules also provide:

F “21. The business of the society shall be conducted by not less than five nor more than ten directors one of whom may be a managing director. The remuneration of the board shall be fixed by the members at the annual meeting. One-third of the board, or as near that proportion as possible, and those appointed by the board (if any) during the year shall go out of office at every annual meeting, but shall be eligible for re-election without a re-nomination, and the vacancies shall be filled up annually as provided by these rules. Every nomination for the office of director shall be signed by ten members duly qualified to nominate and be sent to the secretary in the month of April next before the annual meeting . . . The secretary shall be appointed by the directors who shall fix his remuneration and may remove him from office on just cause being shown. 22. At every annual meeting the members shall elect and appoint an auditor, who must be a practising accountant, who shall audit the accounts of the ensuing year, and shall inspect the mortgages and other securities belonging to the society. The remuneration of the auditor shall be fixed by the members at the annual meeting. The board shall have power to remove an auditor and to appoint another in his place. 23. Notices of all meetings of the members shall be sent to all members at least seven days before such meetings. 24. Meetings of the members may be held at such place in the county of London as the board shall approve. 25. A meeting of the members shall be held annually not later than Mar. 31 in each year to receive the annual account and statement and report of the directors, and for general purposes. 26.

G

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Special meetings shall be held whenever directed by the board, and the board shall give such direction at any time upon the written request of twenty members of the society, who shall give to the board written notice of the proposals to be made in such special meeting, and deposit with the secretary such sum of money as the board shall deem sufficient to pay the expenses of convening and holding such meeting, and the members present at such meeting shall decide whether such expenses shall be paid out of the funds of the society or out of the money so deposited as aforesaid . . . 39. The board shall, at the end of the year, prepare, or cause to be prepared, a general statement of the funds and effects of or belonging to the society, in the form prescribed by the chief registrar, in accordance with the Building Societies Acts, together with an account of the money received and expended since the publication of the preceding periodical statement, and such statement shall be certified by the auditor and countersigned by the secretary, and every member shall be entitled to a copy . . . 42. The society may be dissolved in any manner prescribed by the Building Societies Act, 1874, s. 32, para. 3 or para. 4, and the Secretary of State's regulations."

The rules contain a definition of "year," which shall mean the society's official year, and every year shall be taken to expire on Dec. 31; and "by the word 'board' shall be understood board of directors."

The Building Societies Act, 1874, s. 21, provides:

"The rules of a society under this Act shall be binding on the several members and officers of the society, and on all persons claiming on account of a member, or under the rules, all of whom shall be deemed and taken to have full notice thereof."

Section 23 is about officers giving security, and s. 24 about officers accounting; s. 25 is "Investment of surplus funds", and s. 26 is about transfer of stock, all of which are powers which are conferred on the board of directors. I have already referred to s. 32. Section 40 provides:

"The secretary or other officer of every society under this Act shall, once in every year at least, prepare an account of all the receipts and expenditure of the society since the preceding statement, and a general statement of its funds and effects, liabilities and assets, showing the amounts due to the holders of the various classes of shares respectively, to depositors and creditors for loans, and also the balance due or outstanding on their mortgage securities (not including prospective interest), and the amount invested in the funds or other securities; and every such account and statement shall be attested by the auditors, to whom the mortgage deeds and other securities belonging to the society shall be produced, and such account and statement shall be countersigned by the secretary or other officer; and every member, depositor, and creditor for loans shall be entitled to receive from the society a copy of such account and statement, and a copy thereof shall be sent to the registrar within fourteen days after the annual or other general meeting at which it is presented, and another copy thereof shall be suspended in a conspicuous place in every office of the society under this Act."

That section must be read with s. 2 of the Act of 1894 which provides:

"(1) Every annual account and statement under s. 40 of the Building Societies Act, 1874, shall be made up to the end of the official year of the society to which it relates, and shall be in such form and shall contain such particulars as the Chief Registrar of Friendly Societies may from time to time, with the approval of a Secretary of State, direct, either generally or with respect to any society or class of societies. The form of annual account and statement prescribed for general use by the chief registrar under this section, and every alteration of that form, shall as soon as practicable be

laid before each House of Parliament, and shall not come into operation until the expiration of forty days from the date at which it is so laid. Provided that every such account and statement shall set forth . . .”

certain things. Sub-section (2) provides for the certificate of an auditor, and sub-s. (3) provides:

- A “A copy of every such annual account and statement shall be sent to the registrar within fourteen days after the annual or other general meeting at which it is presented, or within three months after the expiration of the official year of the society, whichever period expires first.”

- B So, there is a provision under which the annual account is to be transmissible to the registrar notwithstanding that the annual meeting of the society has not yet been held. There follows in sub-s. (4) a provision defining the “official year.” Section 5 contains provisions which enable the registrar, with the consent of the Secretary of State, to summon a meeting of the society in certain conditions either (s. 5 (1)) on the application of one-tenth of the whole number of members of the society or (s. 5 (5) (c)):

- C “Where evidence is furnished by a statutory declaration of not less than three members of a society, of facts which, in the opinion of the registrar, call for investigation, or for recourse to the judgment of a meeting of the members.”

Finally, s. 9, which is of great importance, provides:

- D “Where a society under the Building Societies Acts is being dissolved in manner prescribed by its rules or in pursuance of the consent of three-fourths of the members, the provisions of the Building Societies Acts shall continue to apply in the case of the society as if the liquidators or other persons conducting the dissolution of the society or the trustees appointed under the instrument of dissolution were the board of directors or committee of management of the society.”

- E Counsel for the trustees has argued that there is no obligation on the trustees of the instrument of dissolution to summon a general meeting of the society, either annual or otherwise, because, if there is such an obligation, it must be found, he says, either in the instrument of dissolution, or in the rules, or in the statutory provisions. To deal, first of all, with the instrument of dissolution, s. 32 provides what is to appear therein, but there is nothing in its provisions which requires the instrument of dissolution to contain anything about meetings. This instrument of dissolution, after certain statements which are in the nature of recitals and referring to depositors and other creditors and stating “such moneys shall be paid out of the first moneys which shall be received by the trustees hereby appointed,” contains paras. 4 and 5 which tell the trustees what they are to do. Paragraph 4 provides:

- G “After payment of the claims of depositors and other creditors, the funds and property of the society shall be appropriated and divided among the members thereof in the proportion of the amount standing to each member's credit in the books of the society.”

- H Paragraph 5 simply appoints the trustees and directs what remuneration they are to receive. There is nothing in those paragraphs or elsewhere in the instrument of dissolution which in terms requires any annual or other meeting to be called.

It is said, however, that the Building Societies Act, 1894, s. 9, requires the trustees to carry out the duties which were imposed on the board of directors under the rules of the society, and, therefore, to call annual meetings and to submit annual accounts in accordance with the provisions of the rule. Counsel for the defendant, in support of that argument, referred me to *Kemp v. Wright* (1), which, he said, shows that after a society has gone into dissolution the rules of

the society remain operative, and, therefore, he argued, the rules of the society which provide for annual accounts and the calling of annual meetings are still in operation in the present case. I think that *Kemp v. Wright* (1) decided only that the rights of the members of the society depend on the rules, in the sense that, immediately prior to the dissolution, their rights in the assets of the society are fixed by those rules, and that the dissolution did not alter their rights. Of course, the contract between the members of the society *inter se* depends on the rules of the society, and to that extent the rules of the society must remain operative after the society has gone into dissolution, but that does not in the least decide the question whether provisions as to meetings and so on remain any longer in operation, and, as counsel for the trustees observed, s. 9 simply provides that the trustees appointed under the instrument of dissolution are to continue to be subject to the provisions of the Act as if they were the board of directors or committee of management of the society. There is in terms no reference to the rules of the society at all; but, says counsel for the defendant, you have to read the rules of the society in conjunction with the provisions of the Act. Therefore, he says, if you refer to r. 39, you find a provision under which the board are to prepare a general statement of the funds and effects of the society at the end of every year, and, as by s. 40 of the Act of 1874 an annual account of that kind is to be prepared by the secretary or "other officer" of the society, for the purposes of s. 40 the board of directors must be treated as together the "other officer" referred to in that section. There are, it follows, still annual accounts to be taken, and by implication those accounts are to be audited and sent to the registrar within a certain time. They must be approved by an annual meeting of the society, and, therefore, r. 25 imposes on the trustees, as it did on the board of directors, the requirement of calling an annual meeting of the society to deal with the annual accounts.

The point is not without difficulty, and I can see the force of the arguments which are put forward in support of that proposition, but it seems to me that there is in fact no provision in the Act which leads necessarily to that result. There are a number of provisions in the rules which are quite incompatible with their operation at the present time. Indeed, there are several provisions of the Act which are unworkable if you translate literally "board of directors" into "trustees of an instrument of dissolution"—for instance, s. 26 of the Act of 1874. On the whole, it seems to me that, if there is to be imposed on the trustees the duty of calling annual meetings of the society and producing annual accounts for submission to the Registrar of Friendly Societies, which might, be it observed, render them subject to heavy penalties under the Building Societies Act, 1894, s. 21, some specific provision in, or some necessary implication from the provisions of, the Acts must be found. I am unable to find any such provision or any such implication, and, therefore, I come to the conclusion that there is nothing in the Building Societies Acts which imposes on the trustees under the instrument of dissolution any obligation to call annual meetings of the society for the purposes of the Acts.

Declaration accordingly. Costs of all parties to be taxed as between solicitor and client and paid out of the funds of the society.

Solicitors: *Callingham, Griffith & Bate* (for all parties).

[Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.]

Re R. (deceased).

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Willmer, J.), April 18, 19, May 12, 1950.]

Probate—Defence—Want of knowledge and approval—Circumstances giving rise to suspicion—Need to be attendant on, or relevant to, preparation and execution of will—Allegation of immoral conduct between deceased and beneficiary struck out—Contentious Probate Rules, r. 40A—R.S.C., Ord. 19, r. 25 (a), r. 27.

The plaintiffs, as executors, claimed to establish the will of the deceased under which the sole beneficiary was R.F. The defendants, in attacking the will, alleged, *inter alia*, that the deceased at the time of executing it did not know and approve of its contents, and in their substance of case they pleaded that the deceased and R.F. had been associated for a long time in acts of immorality. On an application by the plaintiffs for an order that this allegation be struck out of the defence under R.S.C., Ord. 19, r. 27, because of its scandalous nature,

HELD: (i) in dealing with a plea of want of knowledge and approval the circumstances held to excite the suspicion of the court must be circumstances attending, or, at least, relevant to, the preparation and execution of the will; the present will was drawn up by solicitors; in the absence of any evidence to show that R.F. or his parents were concerned in the preparation or execution of the will the allegation of scandalous conduct was not relevant to the question whether the deceased knew and approved of its contents; and, accordingly, it must be struck out.

Rule in Barry v. Butlin (1838) (2 Moo. P.C.C. 480), *applied*.

(ii) the allegation was also in direct contravention of the last sentence of r. 40A of the Contentious Probate Rules, since no other plea (*e.g.*, a plea of lack of testamentary capacity or of undue influence), under which the allegation might have been made, was included in the defence.

[AS TO OPPOSITION TO PROBATE FOR WANT OF KNOWLEDGE AND APPROVAL, see HALSBURY, Hailsham Edn., Vol. 14, pp. 229, 230, paras. 389-391; and FOR CASES, see DIGEST, Vol. 23, pp. 130-133, Nos. 1291-1321, and Digest Supp.]

Cases referred to :

- (1) *Christie v. Christie*, (1873), L.R. 8 Ch. App. 499; 42 L.J.Ch. 544; 28 L.T. 607; Digest, Pleading, 63, 536.
- (2) *Barry v. Butlin*, (1838), 2 Moo. P.C.C. 480; 1 Curt. 637; 12 E.R. 1089; 23 Digest 130, 1294.
- (3) *Fulton v. Andrew*, (1875), L.R. 7 H.L. 448; 44 L.J.P. 17; 32 L.T. 209; 23 Digest 133, 1317.
- (4) *Tyrrell v. Painton*, [1894] P. 151; 70 L.T. 453; 23 Digest 132, 1304.
- (5) *In the Estate of Musgrove, Davis v. Mayhew*, [1927] P. 264; 96 L.J.P. 140; 137 L.T. 612; 44 Digest 284, 1159.
- (6) *Guardhouse v. Blackburn*, (1866), L.R. 1 P. & D. 109; 35 L.J.P. & M. 116; 14 L.T. 69; 23 Digest 111, 1044.
- (7) *Low v. Guthrie*, [1909] A.C. 278; 78 L.J.P.C. 126; 23 Digest 132, 1306.
- (8) *Shrewsbury (Earl) in the Estate of, McLeod v. Shrewsbury (Earl)* [1922] P. 112; 91 L.J.P. 46; 126 L.T. 415; 23 Digest 129, 1278.

APPEAL from a decision of Mr. Registrar COMPTON MILLER refusing to make an order to strike certain allegations out of the defence under R.S.C., Ord. 19, r. 27, in a probate action. WILLMER, J., adjourned the summons into open court that the matter might be fully argued.

The plaintiffs, as executors, claimed to establish the will of the deceased, dated Dec. 24, 1946, under which one R.F. was sole beneficiary. The defendants, the brothers of the deceased, opposed probate on various grounds including

the contention that at the time of executing his will the deceased was unaware, and did not approve, of its contents. In support of that plea they alleged a homosexual relationship between the deceased and R.F. and this allegation the plaintiffs applied to have struck out as scandalous.

J. E. S. Simon and C. Trevor Reeve for the plaintiffs.

John Mortimer for the defendants.

Cur. adv. vult.

May 12. **WILLMER, J.**, read the following judgment. This is an appeal from a decision of the registrar dismissing an application of the plaintiffs for an order that certain words contained in the substance of case under para. 3 of the defence be struck out. When the matter was before me in chambers it appeared to me that the questions raised were of such widespread and general importance that, at the request of counsel for the plaintiffs, I adjourned the matter into court for argument. After a full argument from counsel on both sides I thought it right to take time to consider my judgment.

The action is brought by the plaintiffs as executors under the will of the deceased, dated Dec. 24, 1946, claiming to have the will established. The sole beneficiary under the will is one R.F., whom for reasons which will be obvious I refrain from calling by his full name. R.F. was not related in any way to the deceased, but was the son of a local innkeeper and his wife. The defendants are the lawful brothers of the deceased, and by their defence they attack the will on three grounds. First, they put the plaintiffs to proof that the will was duly executed in accordance with the provisions of the Wills Act, 1837. Secondly, they allege that at the time of making the will the deceased was not of sound mind, memory, and understanding. The substance of the case under this heading alleges that during the latter years of his life the deceased was a chronic alcoholic, with the result that his intellect was weakened and his memory became defective. For the purposes of this application no question turns on this allegation. Thirdly, the defendants allege that at the time when the will purports to have been executed the deceased did not know and approve of its contents. It is in respect of the allegations made in the substance of the case under this heading that the present application is made.

It is not either necessary or desirable to recite in detail the allegations which are objected to and sought to be struck out. It will be sufficient to summarise them as follows. It is alleged that for some years before the making of the will the deceased professed and openly boasted of a homosexual attraction to R.F. Allegations are made of conduct on the part of the deceased from which it might be inferred that acts of intimacy of a homosexual character in fact took place between the deceased and R.F. It is alleged that the deceased made daily visits to the inn where R.F. resided with his parents and there habitually indulged in excessive drinking. Lastly, it is alleged that the deceased complained of the meanness of R.F.'s parents who, he said, had had all his money. In addition to the allegations objected to, the defendants repeat the substance of the case under para. 2, and claim that in the circumstances the plaintiffs must be put to strict proof that the deceased knew and approved of the contents of the will. It is important to observe that no allegation is made either of fraud or undue influence on the part of R.F. or his parents. Nor is it alleged that either R.F. or his parents prompted or took part in the preparation or execution of the will, or that they even so much as knew of its existence. The inference to be drawn from an examination of the document itself is that it was prepared by solicitors, and it purports to have been attested by two clerks in the employment of the plaintiffs' solicitors.

The application is made under R.S.C., Ord. 19, r. 27, which is in the following terms:

"The court or a judge may at any stage of the proceedings order to be struck out or amended any matter in any indorsement or pleading which

may be unnecessary or scandalous or which may tend to prejudice, embarrass or delay the fair trial of the action . . .”

A That the allegations objected to impute to the deceased conduct of a scandalous character there can be no doubt, but that circumstance does not necessarily make the pleading “scandalous,” so as to be objectionable within the meaning of the rule. It is, furthermore, contended on behalf of the plaintiffs that the pleading in its present form does tend to prejudice and embarrass the fair trial of the action, because it may well be that rather than face the scandal and publicity of having these allegations made in open court, the beneficiary under the will, R.F., may prefer that the plaintiffs should not proceed with the action. I can well believe that this may be so. It is conceded, however, by B counsel for the plaintiffs that a pleading cannot be ordered to be struck out under this rule, however unpleasant the allegations may be, unless it is shown that they are completely irrelevant and wholly unnecessary for the due prosecution of the action. As was said by LORD SELBORNE, L.C., in *Christie v. Christie* (1) (L.R. 8 Ch. App. Cas. 503):

C “The sole question in such a case is whether the matter alleged to be scandalous . . . would be admissible in evidence to show the truth of any allegation in the bill that is material with reference to the relief that is prayed.”

D In these circumstances it appears to me that the question which I have to decide is whether these allegations could conceivably be admissible in evidence on the issue whether the deceased knew and approved of the contents of the will.

E On behalf of the plaintiffs it was contended that these allegations, however relevant they might be on the question of the testamentary capacity of the deceased (in relation to which they are not pleaded), or on an issue of undue influence (which is not raised), could not in any circumstances be relevant, and, therefore, could not be admissible in evidence, in relation to the question whether the deceased knew and approved of the contents of the will. Reliance was also placed by the plaintiffs on the provisions of r. 40A of the Contentious Probate Rules. The effect of this rule is, subject to the leave of the court, to limit a defendant in an action such as this to five pleas, as follows: (1) that the will was not duly executed in accordance with the provisions of the statute; (2) that the deceased was not of sound mind, memory, and understanding; (3) that F the execution of the will was obtained by undue influence; (4) that the execution of the will was obtained by fraud; (5), lastly, that the deceased did not know and approve of the contents of the will. The rule, as set out in TRISTRAM AND COOTE’S PROBATE PRACTICE, 19th ed., p. 170, then proceeds as follows:

G “Any party pleading the last of the above pleas shall therewith (unless otherwise ordered by the judge) deliver to the adverse parties and file in the registry particulars in writing, stating shortly the substance of the case he intends to set up thereunder; and no defence shall be available thereunder which might have been raised under any other of the said pleas, unless such other plea be pleaded therewith.”

H On behalf of the defendants it was contended that the facts set out in the allegations objected to were such as (if established) would be likely to raise in the mind of the court a suspicion whether the alleged will was that of a free and competent testator who was in a position to exercise, and did exercise, thought, judgment and reflection in relation thereto. Such facts, if known to a solicitor drawing the will would, it was alleged, be bound to put him on inquiry, and were such as it would be the duty of counsel to bring to the attention of the court. If so, it was contended that it was not only proper, but necessary, that they should be pleaded. It was pointed out, in my judgment rightly,

that it is not for me, at this stage, to say whether the facts alleged do raise a suspicion. That will be for the judge at the trial to decide. I can only order the allegations to be struck out *in limine* if I am satisfied that they are incapable of raising a suspicion such as would influence the decision of the court. It is further contended on behalf of the defendants that r. 40A of the Contentious Probate Rules is no longer in force, but must be regarded as superseded by R.S.C., Ord. 19, r. 25 (a), by which alone, it is said, pleading of defences in probate actions is now governed.

To arrive at a conclusion as to the validity of those contentions I think it is necessary to examine with some care the nature of the plea of want of knowledge and approval. There are two situations in which such a plea may be raised. The first is where it can be alleged that the execution of the will has been attended by some *bona fide* mistake—for example, a mistake in drafting or copying—which the testator omitted to notice when executing the will. It is not suggested that any question of that sort arises in the present case. The other situation in which the plea of want of knowledge and approval is commonly raised is where the circumstances attending the execution of the will are such as to excite suspicion, under the rule laid down by the Privy Council in *Barry v. Butlin* (2). It is within this class that it is sought to bring the present case. The circumstances in *Barry v. Butlin* (2) were that the deceased's solicitor, who prepared the will, was himself a substantial beneficiary under it, and the question which had to be decided was whether the suspicion engendered by this circumstance, as well as by the provisions of the will itself, had been satisfactorily dispelled by the party propounding the will. In delivering the judgment of the Privy Council, PARKE, B., enunciated two rules, which have since been universally accepted and applied as governing cases of this character. The first rule is (2 Moo. P.C.C. 482):

" . . . that the *onus probandi* lies in every case upon the party propounding a will; and he must satisfy the conscience of the court that the instrument so propounded is the last will of a free and capable testator."

So far as this rule is concerned, PARKE, B., explained (*ibid.*, 484), that the *onus*

" . . . is in general discharged by proof of capacity, and the fact of execution, from which the knowledge of and assent to the contents of the instrument are assumed."

The second rule is (*ibid.*, 482):

" . . . that if a party writes or prepares a will, under which he takes a benefit, that is a circumstance that ought generally to excite the suspicion of the court, and calls upon it to be vigilant and jealous in examining the evidence in support of the instrument, in favour of which it ought not to pronounce unless the suspicion is removed, and it is judicially satisfied that the paper propounded does express the true will of the deceased."

It will be observed from the words which I have just quoted that this second rule was limited by PARKE, B., to cases in which the will was prepared by a person taking a benefit under it. It is true that in reviewing the particular facts of the case he refers to the circumstance that the deceased was a person of weak mind, but he does not treat this as being of itself a circumstance to arouse suspicion, for he says (*ibid.*, 487):

" . . . the only consequence will be, that it adds to the suspicion which unquestionably belongs to the circumstance of the attorney who prepared the will, taking no less than a fourth of the estate, and the legatees taking the whole to the exclusion of his own family, and calls upon us to watch the proof of the will itself with increased jealousy and suspicion."

The rule in *Barry v. Butlin* (2) was approved and applied by the House of Lords in *Fulton v. Andrew* (3), which was, again, a case in which the will was prepared by persons who took a substantial benefit under it. In that case LORD HATHERLEY took the opportunity of re-stating the rule in the following terms (L.R. 7 H.L. 471):

- A “There is one rule which has always been laid down by the courts having to deal with wills, and that is, that a person who is instrumental in the framing of a will, as these two persons undoubtedly were, and who obtains a bounty by that will, is placed in a different position from other ordinary legatees who are not called upon to substantiate the truth and honesty of the transaction as regards their legacies. It is enough in their case that the will was read over to the testator and that he was of sound mind and memory, and capable of comprehending it. But there is a farther onus upon those who take for their own benefit, after having been instrumental in preparing or obtaining the will. They have thrown upon them the onus of shewing the righteousness of the transaction.”
- B

- C With one exception, to which I will presently refer, in all the subsequent cases in the reports in which the rule in *Barry v. Butlin* (2) has been applied, the circumstance giving ground for suspicion has been the fact that the will was prepared, or its execution produced, by a person taking a benefit under it. The exception is *Tyrrell v. Painton* (4), where the will was prepared by the son of the defendant, the defendant being the person in whose favour the will was made. In that case the Court of Appeal held that the rule in *Barry v. Butlin* (2) is not, to quote the words of LINDLEY, L.J. (*ibid.*, 157),

- D “. . . confined to the single case in which a will is prepared by or on the instructions of the person taking large benefits under it, but extends to all cases in which circumstances exist which excite the suspicion of the court.”

- E LINDLEY, L.J., however, goes on to make it clear that the circumstances to which he was referring must be circumstances attending the preparation or execution of the will, for he goes on to say (*ibid.*, 157):

“Here the circumstances under which the will of the 9th was prepared and signed are such as to cause the gravest suspicions.”

- F In a previous passage (*ibid.*, 156) he had said substantially the same thing. A. L. SMITH, L.J., speaks of (*ibid.*, 158)

“. . . the grave suspicions surrounding the will,”

and a little lower down the page uses the significant phrase:

“. . . especially a will brought into existence as this will was.”

- G DAVEY, L.J., neatly and concisely sums up the rule which the Court of Appeal were laying down in the following words ([1894] P. 159):

“. . . the principle is that whenever a will is prepared under circumstances which raise a well grounded suspicion that it does not express the mind of the testator, the court ought not to pronounce in favour of it unless that suspicion is removed.”

- H The conclusion which I draw from these authorities is that in dealing with a question of knowledge and approval of the contents of a will the circumstances which are held to excite the suspicions of the court must be circumstances attending, or at least relevant to, the preparation and execution of the will itself. This view is, I think, confirmed by the decision of the Court of Appeal in *In the Estate of Musgrove* (5), where it was held that a suspicion engendered by extraneous circumstances, arising subsequent to the execution of the will, was not a sufficient reason for rebutting the presumption of due execution

of a will regular on its face. In the course of an exhaustive judgment LORD HANWORTH, M.R., said ([1927] P. 280):

"What of the suspicion? It is not such as attaches to the document itself in the sense in which SIR JAMES WILDE uses the term in *Guardhouse v. Blackburn* (6), or as it arose in *Tyrrell v. Painton* (4) in the preparation of the will. The wide definition of suspicion stated by LINDLEY, L.J., in the latter case, that it 'extends to all cases in which circumstances exist which excite the suspicion of the court,' appears to have been used in reference to the preparation of the will, its intrinsic terms, and the circumstances surrounding its preparation and execution, and DAVEY, L.J., seems to have had the same matters in mind. Their judgments were not intended to alter, but to affirm the principles laid down in the cases I have cited."

There is some authority in MORTIMER ON PROBATE LAW AND PRACTICE, 2nd ed., p. 76, for the proposition that in some circumstances matters extraneous to the preparation and execution of the will may properly be held to excite the suspicion of the court whether the deceased knew and approved of its contents. It is there stated:

"Again the following circumstances may require satisfactory explanation, especially where the person who prepared the will was a beneficiary thereunder: the fact that the testator gave no instructions for the will, and was without independent advice, legal or otherwise; that persons who benefited assumed authority over him, while he was weak or debilitated; excluded his relations and friends; obtained money from him; and assumed control of his affairs. Any one of these circumstances, standing alone, may admit of explanation, but their cumulative effect would be to raise a strong suspicion that the testator was a mere passive instrument in their hands."

It is with hesitation that I venture to criticise an authority which is entitled to such well-deserved respect, but if the author means by this passage that circumstances such as he refers to, if not in some way concerned with, or shown to be relevant to, the preparation and execution of the will are such as ought to excite the suspicion of the court, I doubt whether the views expressed are consistent with the rule as defined in *Barry v. Butlin* (2) and the subsequent cases to which I have referred. It is to be noted that all the authorities cited in support of the proposition in the text are anterior in date to *Barry v. Butlin* (2).

Turning to the allegations in this case to which exception is taken, there is nothing to show that the beneficiary, R.F., or any of his family, had any part whatsoever in the preparation of this will. On the contrary, as I have already stated, it would appear that the will was prepared by solicitors. The allegations are not connected in any way with the preparation and execution of the will. In these circumstances, is counsel for the defendants well founded in contending that the matters alleged are such that they will have to be brought to the attention of the court? The answer must be: Only if they are relevant in some way to the preparation and execution of the will—that is, only if they go to show that the will was prepared in circumstances capable of raising a well-founded suspicion that it did not express the mind of the testator, to quote the phrase used by DAVEY, L.J., in *Tyrrell v. Painton* (4). In so far as the allegations go to show an attachment to, or an affection for, the beneficiary, R.F., the inference is rather the other way, for in such circumstances the testator might well have desired to benefit R.F. in preference to other persons. If it be said that the relations alleged between the deceased and R.F. at least go to show eccentric behaviour on his part, this might well be used in support of the allegation that he was lacking in testamentary capacity. The same may be said of the allegation that the deceased habitually drank to excess in the inn kept by R.F.'s parents, but, unless these eccentricities of the deceased go to

A show a lack of testamentary capacity, I do not see in what other way they can possibly be relevant to the question whether he knew and approved of the contents of the will. The allegation that the deceased complained of the parents of R.F. having had all his money might have been relevant to a suggestion that the will was procured as the result of undue influence on their part, but undue influence has not been alleged. It is one of the complaints made by counsel for the plaintiffs that the pleading in its present form proceeds by way of innuendo—that it tends to suggest undue influence without actually alleging it. The pleader, he says, is willing to wound, but afraid to strike. That, it is contended, offends against the principle laid down by LORD LOREBURN, L.C., in *Low v. Guthrie* (7), when he said that the rule—that is, the rule laid down in *Barry v. Butlin* (2) and applied in *Fulton v. Andrew* (3)—is not to be ([1909] A.C. 282)

B “... used as a screen behind which one man was to be at liberty to charge another with fraud or dishonesty without assuming the responsibility of making that charge in plain terms.”

C If it is intended to allege undue influence on the part of R.F. or his parents, such an allegation should, in my judgment, be pleaded in plain and unambiguous terms. In the absence of such a plea and in the absence of anything to show that R.F. or his parents were in any way concerned with the preparation and execution of this will, I do not see how the allegations put forward can possibly be relevant to the question whether the deceased knew and approved of the contents of the will.

D It is obvious that in the nature of things a fair measure of latitude must be allowed to the pleader in alleging facts in support of a plea of want of knowledge and approval, but after careful and anxious consideration I have come to the conclusion that this pleading goes too far, and that, having regard to the manner in which the application of the rule in *Barry v. Butlin* (2) has been limited in the authorities to which I have referred, the facts alleged in this case in the passage objected to cannot, in the circumstances of the particular case, possibly be relevant to the issue of want of knowledge and approval. Being of a scandalous nature, and such as may tend to prejudice the fair trial of the action, I think that they ought to be struck out. Having regard, however, to what I have said as to the possibility of these allegations being relevant to the testamentary capacity of the deceased, or to a possible plea of undue influence, my order will be without prejudice to any application for amendment that may hereafter be made.

F I have reached this conclusion, as will be seen, quite independently of the provisions of r. 40A of the Contentious Probate Rules. I think I should add, however, that, in my judgment, the allegations sought to be struck out are also objectionable as being in direct contravention of the last sentence of that rule. G I do not assent to the proposition that r. 40A has been now entirely superseded by the provisions of R.S.C., Ord. 19, r. 25A. Clearly the editors of the ANNUAL PRACTICE do not take that view, for in the notes to Ord. 19, r. 25A, they specifically refer to r. 40A of the Contentious Probate Rules. As recently as 1922, in *In the Estate of Shrewsbury (Earl)* (8), r. 40A was treated by SIR HENRY DUKE, P., as being still in force: see [1922] P. 117, where, however, the learned H President refers erroneously to the rule as r. 40: By s. 103 (1) of the Supreme Court of Judicature (Consolidation) Act, 1925, reproducing s. 21 of the Supreme Court of Judicature Act, 1875, it is provided as follows:

“Save as is otherwise provided by this Act or by rules of court, all forms and methods of procedure which, under or by virtue of any law, custom, general order or rules whatsoever, were formerly in force in any of the courts the jurisdiction of which is vested in the High Court or the Court of Appeal respectively, and which are not inconsistent with this Act or

with rules of court, may continue to be used in the High Court and the Court of Appeal respectively in the like cases and for the like purposes as those in and for which they would have been applicable in the former respective courts."

It is obvious that by R.S.C., Ord. 19, r. 25A, which was first made in 1901, a subsequent amendment was made with regard to the pleading of defences in probate actions, but Ord. 19, r. 25A, does not by any means cover the whole ground covered by r. 40A of the Contentious Probate Rules, and, in particular, it does not deal at all with the matter covered by the last sentence of that rule, which is what the plaintiffs rely on in this case. Certainly it does not expressly revoke r. 40A, and, seeing that it does not purport to cover the whole of the ground covered by r. 40A, I do not think it can be taken to have revoked that rule by implication. I prefer to follow the view expressed by SIR HENRY DUKE, P., and to treat r. 40A as being still in force, except in so far as its provisions have been amended by R.S.C., Ord. 19, r. 25A. If that is the right view, it appears to me to be an additional reason for holding that the allegations objected to in this case should be struck out. As already indicated, it appears to me that these allegations could have been raised under the plea of testamentary incapacity, or, possibly, under a plea of undue influence. If so, it is not open to the defendants, under the rules, to raise them on a plea of want of knowledge and approval. For these reasons my conclusion is that this appeal succeeds, and there will be an order striking out the passage particularised in the summons, without prejudice to any further application for amendment which may hereafter be made.

Appeal allowed. Order to strike out passages objected to in summons. Costs in cause.

Solicitors: *Ellis, Bickersteth Aglionby & Hazel* (for the plaintiffs); *Hasties* (for the defendants).

(Reported by R. HENDRY WHITE, Esq., Barrister-at-Law.)

LOESCHER v. DEAN. SAME v. SAME AND WOODBRIDGE & SONS.

[CHANCERY DIVISION (Harman, J.), May 10, 16, 1950.]

Solicitor—Costs—Lien—Money in "client account"—Charging order—Plaintiff awarded decree of specific performance subject to payment of money to defendant—"Property recovered or preserved" through solicitor's instrumentality—Solicitors Act, 1932 (c. 37), s. 69.

The plaintiff obtained a decree of specific performance of a contract to convey certain property, subject to the payment by him of £268 4s. 9d. to the defendant, and was awarded costs. On Apr. 17, 1950, the money was paid to the defendant's solicitors who attended the completion on the defendant's behalf, and the conveyance was made to the plaintiff. On the same day the plaintiff applied for and obtained an order *nisi* to garnishee all debts due from the defendant's solicitors to the defendant in respect of the plaintiff's costs, which had been taxed at £268 16s. 5d. On Apr. 19, 1950, the garnishee order having been served on them, the defendant's solicitors took out a summons in the action for a charging order in respect of their own costs under the Solicitors Act, 1932, s. 69.

HELD: (i) although (as they were bound to do) the solicitors had placed the money received by them from the plaintiff in the "client account" opened by them, they had a lien on it for the amount of their costs incurred

on the defendant's behalf, and, as by a garnishee order the creditor could not be put in any better position than the debtor, the garnishee order *nisi* must be discharged to the extent of the solicitors' lien.

Stumore v. Campbell & Co. ([1892] 1 Q.B. 314), *distinguished*.

(ii) the money paid by the plaintiff pursuant to the order for specific performance was not "property recovered or preserved through [the solicitors'] instrumentality" within s. 69 of the Act of 1932, and, therefore, the solicitors were not entitled under that section to a charging order in respect of their costs in the specific performance proceedings.

Hyde v. White ([1933] P. 105), *considered*.

[AS TO SOLICITOR'S LIEN AND CHARGING ORDER, see HALSBURY, Hailsham Edn., Vol. 31, pp. 238-261, paras. 264-282; and FOR CASES, see DIGEST, Vol. 42, pp. 259-264, 290-297, Nos. 2925-2990, 3250-3308.]

Cases referred to:

(1) *Plunkett and Another v. Barclays Bank, Ltd.*, [1936] 1 All E.R. 653; [1936] 2 K.B. 107; 105 L.J.K.B. 379; 154 L.T. 465; Digest Supp.

(2) *Roberts v. Death*, (1881), 8 Q.B.D. 319; 51 L.J.Q.B. 15; 46 L.T. 246; 21 Digest 629, 2131.

(3) *Hancock v. Smith*, (1889), 41 Ch.D. 456; 58 L.J.Ch. 725; 61 L.T. 341; 43 Digest 1022, 4615.

(4) *Stumore v. Campbell & Co.*, [1892] 1 Q.B. 314; 61 L.J.Q.B. 463; 66 L.T. 218; 21 Digest 620, 2081.

(5) *Brandao v. Barnett*, (1846), 3 C.B. 519; 12 Cl. & Fin. 787; 7 L.T.O.S. 525; 136 E.R. 207, H.L.; *reversg.* S.C. *sub nom.*, *Barnett v. Brandao*, (1843), 6 Man. & G. 630, Ex. Ch.; *restg.* *Brandao v. Barnett*, (1840), 1 Man. & G. 908; 3 Digest 285, 878.

(6) *Miller v. Attlee*, (1849), 3 Exch. 799; 13 L.T.O.S. 121; 13 Jur. 431; 42 Digest 259, 2930.

(7) *Hyde v. White*, *White v. Hyde*, [1933] P. 105; 149 L.T. 96; *sub nom.*, *Re White*, 102 L.J.P. 71; Digest Supp.

PROCEDURE SUMMONSES.

In an action for the specific performance of a contract to convey certain property, the plaintiff was awarded a decree of specific performance subject to his paying to the defendant £268 4s. 9d. The plaintiff tendered the money to the defendant's solicitors, and, in order to secure payment of his costs, immediately obtained a garnishee order *nisi* in respect of all debts owed to the defendant by his solicitors. The plaintiff issued a summons to have the order *nisi* made absolute. The defendant's solicitors issued a summons in the action for a charging order in respect of the £268 4s. 9d. under the Solicitors Act, 1932, s. 69.

Skone James for the plaintiff.

Lindner for the garnishees, the defendant's solicitors.

HARMAN, J.: This matter arises out of a decree in a specific performance action which was made by me on Feb. 13, 1950, in the common form for such orders in these days. It was ordered that the agreement be specifically performed, and that, on the plaintiff's paying to the defendant the sum of £268 4s. 9d., the defendant should convey certain real property to the plaintiff.

It was also ordered that the defendant do pay the plaintiff his costs of the action to be taxed. On Apr. 17 the plaintiff tendered his £268 4s. 9d. and he received a conveyance duly executed by the defendant, and the other proper documents accompanied it. The money was paid in the ordinary course of completion at the plaintiff's solicitor's office, was received by the defendant's solicitor who attended the completion as attorney for the defendant, and was paid by him into his client account where it now is. On the same day the plaintiff applied for a garnishee order to garnishee all debts due from the

defendant's solicitors to their client in respect of the plaintiff's costs which had then been taxed at £268 16s. 5d.—practically the same sum as was in fact in the client account—and they obtained an order *nisi* accordingly. That order was served on the defendant's solicitors, who, on Apr. 19, took out a summons in the action for a charging order on this same sum under the Solicitors Act, 1932, s. 69. The two summonses came together before the master and have been adjourned to me.

The first question is whether this is good subject-matter for garnishee proceedings at all. By a garnishee order the creditor cannot be put in a better position than the judgment debtor himself, and, therefore, if the defendant could not claim this money as his as against his solicitor, neither can the plaintiff, who is the creditor, attach it in the hands of the solicitor, because it is not a debt due and owing from the solicitor to the defendant. This is money which is in the solicitor's client account, and under the Solicitors' Accounts Rules, 1935, made under the Solicitors Act, 1933, s. 1, it is compulsory for a solicitor to keep a client account. A "client account" is defined in the rules as:

"... a current or deposit account at a bank, to be kept in the name of the solicitor, in the title of which the word 'client' appears."

Under r. 3, the solicitor is bound to pay such money as that in question here into the client account, and he may only pay into it trust money, or money belonging to the solicitor necessary for opening the account, and certain other sums. He may only draw from a client account in the case of client's money either money required to pay the client or money to pay a debt due to the solicitor from the client—that is not a debt, I think, for costs—or money drawn on the client's authority, or money for his costs after he has told his client that he intends to draw on the client's account for his bill.

In 1936 *DU PARCQ, J.*, decided *Plunkett v. Barclays Bank, Ltd.* (1), where a question was raised as to the rights between the solicitor and the bank in respect of money in a client account, and it was held that that was money due from the bank to the solicitor and, therefore, a garnishee order *nisi* could properly be made on it, although, when it came to making the garnishee order absolute, no doubt if the money in the account was wholly client's money, no final order would be made because it would not be the money of the debtor. In the course of his judgment *DU PARCQ, J.*, said ([1936] 1 All E.R. 657):

"The sum of £48 5s. which was the only money paid into the account [the client account] had been paid into the bank in the shape of notes and coin. It followed that unless the plaintiff had broken the law, which ought not to be assumed, the sum of £48 5s. was 'money held or received on account of a client' within [r. 4] (a). It was accordingly trust money as is the money recovered by a judgment creditor in an action which he brings as trustee for another person (see *Roberts v. Death* (2)) or the money paid by a stockbroker into an account into which he pays nothing but moneys received on behalf of clients (see *Hancock v. Smith* (3))."

Therefore, although that was not the point he was deciding, the learned judge did assume that money in a client account is trust money, and so in a sense no doubt it is, but the question remains whether, notwithstanding that, a solicitor has any lien on it. Counsel for the plaintiff urged on me that he had no lien, mainly, I think, on the authority of *Stumore v. Campbell & Co.* (4). There the plaintiff applied to attach in the hands of a firm of solicitors money deposited with those solicitors for a special purpose which had failed. The solicitors claimed that they had a lien on that money against the debtor, notwithstanding the failure of the special purpose, because he owed them money in respect of litigation on some other subject, and, therefore, they said that in a claim he made to the return of the money they could set off their right, but it was held that, as the special purpose had failed, the money they had was trust

money and no lien attached to it. LORD ESHER, M.R., reversing the judgment of A. L. SMITH, J., said ([1892] 1 Q.B. 316):

- A “It appears that some money was placed in the hands of the defendants, who are solicitors, for a particular purpose. So long as that purpose existed there was a trust imposed on them, and they were bound, if they accepted the money at all, to employ it or lay it out in the particular way indicated by the trust. That trust failed, and the result of that failure was that another trust arose immediately to pay back the money to the person who gave it. It is admitted that, being trustees, no lien would attach in their favour, because the money was intrusted to them for a specific purpose. *Brandao v. Barnett* (5) is conclusive on this point.”
- B So that there it was admitted that there was no lien, but merely a right of counter-claim in an action. That seems to me to be quite a different case from the present. Here the money was not entrusted to the solicitor for any specific purpose. It was paid to him in the ordinary course of his business as solicitor for the client. He received it as the client's agent, and he paid it into the client account as he was bound to do. But the question is whether that releases it from his lien.
- C Counsel for the plaintiff says that so long as he has not delivered his bill and notified the client of his intention to withdraw the money to pay it he has no lien because he could not immediately take the money out of the account. I agree that he could not take the money out of the account, because the rules say that he may not do so until he has gone through certain steps, but I cannot accept that he has not got a lien on it as any solicitor has on any client's property
- D that he has in his hands until his bill is paid. It is difficult to find authority for the proposition that the ordinary solicitor's retaining lien, which goes back to long before the Solicitors Acts, is a thing which extends to money, but in MR. CORDERY'S book on the LAW RELATING TO SOLICITORS, 4th ed., p. 455, where he is discussing the liens of solicitors, he points out that there are two of them:
- E “. . . one is a right to retain property already in his possession until he has been paid costs due to him in his professional character; the other is a right to ask the court to direct that personal property recovered under a judgment obtained by his exertions stand as security for his costs of such recovery.”
- F He points out that the latter right is a statutory right. The other right still remains and is independent of the statute—he calls it the “retaining lien”—and he says:
- “The retaining lien is founded on the general law of lien which springs from possession, and is in general governed by the same rules as other cases of possessory lien.”
- G The text continues (*ibid.*, 456), after the heading: “Property which may be subject to lien”:
- “The lien attaches [to various chattels] or money, but money being divisible the lien only attaches on the amount actually due.”
- H The authority for that is *Miller v. Attlee* (6), and there all that appears is that PARKE, B., held there was no lien in favour of a solicitor on any part of the money beyond the amount of his debt. It was assumed or conceded that the solicitor had a lien on the money to the extent of his debt. I do not see why a solicitor, if he has money in his possession, has not got an ordinary lien on it. The fact that he puts it in a client account does not mean that it is any the less his account although it is earmarked in that way, and it seems to me that the client could not come to him and ask for the handing over of the money. It would be an answer to say: “You have not paid my bill and I shall not

pay you your money until you have." Consequently, the money not being money which the debtor could obtain from the solicitor without paying his bill, neither can a creditor obtain it, and, therefore, in my judgment, I must discharge the garnishee order *nisi* against this money to the extent, at any rate, of the solicitors' right to their lien. At the present moment I do not know what that may amount to.

Supposing I am wrong about that and this money in the client account is in trust and no lien attaches on it, another question arises, and that is whether the statutory right under the Solicitors Act, 1932, applies so as to give the solicitors, Messrs. Woodbridge, a charging order under s. 69 of the Act. This empowers the court to declare that a solicitor is entitled to

"... a charge on the property recovered or preserved through his instrumentality for his taxed costs in reference to that suit ..."

That is a limited right, and the question is whether this is a good subject-matter for such an order as being "money recovered or preserved" through the instrumentality of the solicitor in the suit. It is rather a topsy-turvy point because the money has come into the solicitor's possession, in spite of the best efforts of the solicitor and the defendant who resisted the action till the last moment. They refused, until ordered, to convey. They did not want the money. The money, as it were, was put on them, because there was no order on the plaintiff to pay it. The order merely said that on payment of that money the plaintiff was entitled to ask for a conveyance. The plaintiff did tender the money and did get the conveyance, and that is the money which has, therefore, come into the possession of the defendant through his solicitor. In my judgment, that is not in any reasonable sense of the term "money recovered or preserved" in the suit by the solicitors.

Counsel for the garnishees asked me to hold that it was, mainly, I think, on the authority of a probate case, *Hyde v. White* (7), in which it was held that a share under an intestacy was "money recovered or preserved" by the solicitors for the party propounding the wills. The probate suit was unsuccessful because the will was rejected, and as a result the deceased was intestate and a sum of money was due to the plaintiff notwithstanding that she was unsuccessful in her suit. LORD MERRIVALE, P., said ([1933] P. 107):

"The property in question is the estate of Henry Benjamin White, who is dead, and it has not previously been vested by any judicial or administrative act in any other person. There were persons who had inchoate rights in it and one of the persons who had those rights was his sister, the plaintiff, who had issued a writ ... in the Probate Division."

The sister claimed, as he says, under the wills, but, they being pronounced against, she became entitled as under an intestacy. I question whether her rights were inchoate rights. The rights were uncertain, but not inchoate. It does not seem to me that that is authority for saying that money paid to the defendant against his will in a specific performance suit, and as a result of his losing it, is "money recovered or preserved." So that, if I thought that this were good subject-matter for garnishee proceedings, I should think the solicitors would not be entitled to a charging order under the Act, but as my decision goes, that question does not arise.

Garnishee order, but subject to the right of the solicitors to a lien in respect of the sum properly due to them for costs at the date of the order nisi. Inquiry directed as to the amount of that sum. Summons for charging order dismissed. No order for costs.

Solicitors: Woodroffes (for the plaintiff); Speechly, Mumford & Craig, agents for Woodbridge & Son, Uxbridge (for the garnishees).

[Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.]

PRIESTMAN COLLIERIES, LTD. v. NORTHERN DISTRICT
VALUATION BOARD AND ANOTHER.

[KING'S BENCH DIVISION (Lord Goddard, C.J., Morris and Finnemore, JJ.),
May 1, 2, 12, 1950.]

Coal—Nationalisation of industry—Valuation of transferred interests—Price if sold “in the open market by a willing seller to a willing buyer”—“All relevant circumstances”—Regulations controlling prices—Coal Industry Nationalisation Act, 1946 (c. 59), s. 13 (4), s. 13 (5).

The claimants were the owners of mining stocks and stores, including a quantity of mining timber, which were transferred to the National Coal Board under the Coal Industry Nationalisation Act, 1946, and were comprised in a “compensation unit.” In determining the value of the compensation unit under s. 13 of the Act the district valuation board held that they had to take into account the existence on Jan. 1, 1947 (the date of the notional sale under s. 13 (4)), of the Control of Timber (No. 35) (Mining Timber Prices) Order, 1944, whereby fixed prices were imposed for imported mining timber, and, where the sale was to the owner of a coal mine situate in Great Britain when buying for use in the coal mine, the price was lower than on a sale to any other buyer. Accordingly, they fixed the value of the mining timber at £4,862 10s. 10d. The claimants contended that the phrase “open market” in s. 13 (4) contemplated a market in which a seller could expect to receive the highest unlimited price resulting from the free competition of all potential buyers, and, therefore, account should not be taken of the Order of 1944 controlling prices. It was agreed by the claimants and the district valuation board that “the sale of this unit would be at the site where the various items lay and that the purchaser who would offer the best price would be a purchaser who was going to use the articles comprised in the unit on that site.”

HELD: (i) the phrase “open market” in s. 13 (4) of the Act of 1946 contemplated, not a purely hypothetical market which was to be regarded as exempt from any restrictions imposed by law, but a market in which a willing buyer and a willing seller could legitimately have operated on Jan. 1, 1947; under s. 13 (5) in determining the value of the unit regard was to be had to “all relevant circumstances”; and, therefore, the board were obliged to take into account the existence of the Order of 1944 controlling prices at the material date.

(ii) the agreement between the parties that the purchaser who would offer the best price was one who was going to use the articles on the site where the various items lay postulated that the purchaser who would give the best price would be a purchaser of the coal mine, and, therefore, the scale on which the amount of the valuation was to be determined was that laid down in sched. I, Part I, col. 3 of Tables 1 and 2, to the Order of 1944, viz., that of the prices on the sale to the owner of a coal mine situate in Great Britain when buying for use in the mine.

[FOR THE COAL INDUSTRY NATIONALISATION ACT, 1946, s. 13, see HALSBURY'S STATUTES, Second Edn., Vol. 16, pp. 295, 296.]

Case referred to:

(1) *Swift & Co. v. Board of Trade*, [1925] A.C. 520; 94 L.J.K.B. 629; 133 L.T. 49; 25 Digest 138, 558.

SPECIAL CASE stated by a referee under the Coal Industry Nationalisation (Valuation of Compensation Units) Regulations, 1947, reg. 40 (1).

The claimants were a colliery company whose interests were transferred to the National Coal Board under the Coal Industry Nationalisation Act, 1946. These transferred interests were comprised in a “compensation unit” which was the subject of a draft valuation fixed by the Northern District Valuation

Board by notice on June 30, 1949. The claimants gave notice that they required to be heard on the part of the draft valuation relating to the value of stocks of timber, and at the hearing on Sept. 16, 1949, the board confirmed that value at £4,862 10s. 10d. The claimants gave notice that they desired to have the value reviewed by a referee, and the hearing of the reference took place on Jan 17, 1950. The claimants contended (a) that, as the value to be ascertained was the amount which the timber might have been expected to realise if the Act had not been passed and if the timber had been sold in the open market by a willing seller to a willing buyer, in arriving at the value the prices fixed by the Control of Timber (No. 35) (Mining Timber Prices) Order, 1944, should be disregarded, and, therefore, the correct value was £8,125 16s. 3d.; and (b) that, if the prices fixed by the Order were to be regarded, the value was the sum obtainable on a sale to a buyer other than the owner of a coal mine, and was £6,317 7s. 1d. The referee held that the maximum price fixed in the Order should be disregarded, and awarded compensation at £8,125 16s. 3d. Alternatively, if he were wrong in this, he valued fifty per cent. of the timber at the amount obtainable on a sale to a mine owner and the other fifty per cent. at the amount obtainable on a sale to another buyer.

The Attorney-General (Sir Hartley Shawcross, K.C.), Pearson, K.C., and Marnham for the Minister of Fuel and Power.

MacKenna, K.C., and Featherstone for the claimants.

Cur. adv. vult.

May 12. **MORRIS, J.**, read the following judgment of the court. This is a Special Case, stated pursuant to the provisions of reg. 40 (1) of the Coal Industry Nationalisation (Valuation of Compensation Units) Regulations, 1947 (S.R. & O., 1947, No. 1345), by which certain questions of law are formulated for the decision of the court. These question arose in the course of a review by the learned referee of a determination made by the Northern District Valuation Board, which was established under the Coal Industry Nationalisation Act, 1946, s. 12 (5).

It is provided by s. 10 (1) of the Act that compensation is to be made, as set out in the Act, in respect of the transfer to the National Coal Board of the "transferred interests." By s. 10 (5) it is provided that for the purposes of compensation the "transferred interests" are to be dealt with in "compensation units," each one of which is to be allocated to one of the valuation districts. The compensation unit which is the subject of the present proceedings comprises certain transferred interests of Priestman Collieries, Ltd., the claimants. The unit consists of a large quantity of mining stocks and stores, including a quantity of mining timber. A draft valuation of the unit was made by the Northern District Valuation Board. No dispute arose in regard to the valuation of the greater part of the unit, but the claimants objected to the valuation of the stocks of timber on the ground that the value attributed to them was not the correct value in accordance with the provisions of the Coal Industry Nationalisation Act, 1946. A hearing took place before the Northern District Valuation Board, who confirmed the valuation made. By a notice given under reg. 27 of the Coal Industry Nationalisation (Valuation of Compensation Units) Regulations, 1947, the claimants required to have the determination of the board reviewed. A hearing then took place before the learned referee who was selected and appointed for the purposes of the review.

By s. 13 (1) of the Act of 1946:

"As soon as may be after a compensation unit has been allocated to a valuation district, and it has been determined under s. 11 of this Act whether and to what extent the value of each transferred interest included therein is attributable to usefulness for activities relevant to district wages ascertainties, the district valuation board for the district shall determine the value of the unit and determine how much of that value is coal industry value and how much of it is value for subsidiary purposes."

Section 13 (4) is as follows:

"For the purposes aforesaid the value of a compensation unit shall be taken to be the amount which it might have been expected to realise if this Act had not been passed and it had been sold on the primary vesting date in the open market by a willing seller to a willing buyer, no allowance being made on account of the vesting of the transferred interests comprised in the unit being compulsory."

A There follows a proviso which is not material for present purposes. Section 13 (5) provides:

"For the purposes of the last preceding sub-section, the sale of a compensation unit to be assumed shall be a sale thereof (with all property and rights which are to vest in the board, by virtue of regulations made under or by virtue of s. 5 or s. 6 of this Act, with the transferred interests included in the unit) subject to all matters subject to which those interests are to vest in them, but free from any charge or lien for securing money or money's worth or other matters free from which those interests are to vest in them; and regard shall be had to all relevant circumstances, and, amongst those circumstances, (a) to the state of the things in which the transferred interests subsisted at the date of their vesting in the board; (b) to all relevant facts known at the time of the determination or review which were in existence on the primary vesting date, notwithstanding that any of them would not have been known at that date."

D The primary vesting date was Jan. 1, 1947. On that date there was in force the Control of Timber (No. 35) (Mining Timber Prices) Order, 1944 (S.R. & O., 1944, No. 920). By that Order fixed prices were imposed for imported mining timber and maximum prices for home-grown mining timber. The learned referee sets out in the Special Case that it was agreed before him that, if this Order applied to the mining timber which was the subject of the review, then the valuation of £4,862 10s. 10d. arrived at by the Northern District Valuation Board was correct if calculated on the basis of a sale to the owner of a coal mine situate in Great Britain, and that, if the Order did not apply, then the proper figure was £8,125 16s. 3d., representing the economic value in the open market at the material date, *i.e.*, Jan. 1, 1947.

The first question which arises for the opinion of the court is formulated by the learned referee as follows:

F "Whether, in determining the value of the stocks of mining timber in question, the Northern District Valuation Board must or must not take into account the existence of the Order controlling prices at the material date and determine the value in accordance with the provisions of that Order."

G A second question is formulated which arises if the court is of opinion that the terms of the Order controlling prices are applicable. In regard to the first question, the matter depends on the meaning of the phrase "open market" as used in its context in s. 13 (4) of the Act of 1946. The main submission made on behalf of the Minister of Fuel and Power was that the value to be ascertained was the amount which the unit might have been expected to realise on Jan. 1, 1947, if voluntarily sold by a willing seller to a willing buyer under conditions H then actually existing and subject to any and all restrictions that would on that date apply to anyone who chose to sell or to anyone who chose to buy. On behalf of the claimants it was submitted that, because of the existence of price regulation for mining timber under the Control of Timber (No. 35) (Mining Timber Prices) Order, 1944, and because of the fact that, by the Control of Timber (No. 32) (General Provisions) Order, 1944 (S.R. & O., 1944, No. 917), limitations were imposed on the class of those who could buy or sell timber, no open market could be said to exist. It was submitted that there can be no

open market where prices are fixed or maximum prices are imposed and there are bidders prepared to go beyond such prices. It was further contended that the phrase "open market" pre-supposed and contemplated a market in which a seller could expect to receive the highest unlimited price which resulted from the free competition of all potential buyers.

In the opinion of the court, the phrase "open market," in s. 13 (4), does not contemplate a purely hypothetical market which is to be regarded as exempt from any restrictions imposed by law. The section does not postulate conditions wholly divorced from reality. The directed inquiry in effect is: "What would the seller of the unit have realised on Jan. 1, 1947?" In pursuing that inquiry it must be assumed that on that date the seller was willing to sell and that the buyer was willing to buy. Any notion of a compulsory sale must be ignored. The seller must be deemed to have done as well as a willing seller would reasonably have been expected to do on Jan. 1, 1947, but that does not mean that he should be regarded as a person not bound by the law. It must be assumed that he would deal in the market on Jan. 1, 1947, subject to the law of the land. Any restriction or limitation imposed on him by law, or imposed on any willing buyer, must be recognised and taken into account. The sale to be regarded for the purposes of s. 13 (4) must be a notional one, but a notional sale in the market in which, and subject to the conditions under which, willing buyers and sellers could legitimately have operated on Jan. 1, 1947. It is enjoined by s. 13 (5) that regard should be had "to all relevant circumstances." What is contemplated, therefore, is a sale that might have taken place in the actual market on the prescribed date—*rebus sic stantibus*.

The court was referred to certain authorities. We are of opinion, however, that, when deciding the meaning in its context of the phrase now under consideration, no direct or conclusive assistance is derived from authorities which deal with other phrases in other contexts. Thus, in *Swift & Co. v. Board of Trade* (1), consideration was given to words of a regulation which applied to the assessment of compensation to be paid for requisitioned food. The words were:

"... but in determining the amount of the compensation the arbitrator shall have regard to the cost of production of the article and to the allowance of a reasonable profit, without necessarily taking into consideration the market price of the article at the time."

It was held that the regulation did not warrant the awarding of an amount more than could have been legally realised by an actual sale and that an arbitrator had to ascertain what the requisitioned goods would have produced under all the conditions which existed at the time when they would have been sold, including the maximum controlled prices. It is not without interest to note that, in his speech in that case, LORD SUMNER said ([1925] A.C. 545):

"Compensation is not given for the requisitioning of the article itself, for the compulsory acquisition, for disadvantage arising from maximum prices or other war measures, or for the lapse of time between the original requisition and the publication of the award, and as the entire transaction is *sui generis*, these things must either be expressly given by the regulation or they are not given at all."

Later in his speech he said (*ibid.*, 547):

"He must not give compensation for any form of loss except for the article requisitioned itself, and he must not put upon it for purposes of compensation a price, which it would have been illegal for the merchant to realise if left to himself."

The court is of opinion, however, that the present question is essentially one of the construction of the particular provisions of s. 13 of the Coal Industry Nationalisation Act, 1946, and, for the reasons assigned, the court answers the first question presented for its opinion in the affirmative. The result is that the

Northern District Valuation Board were obliged to take into account the existence of the Order of 1944 controlling prices at the material date and to determine the value of the stocks of mining timber in accordance with its provisions.

The second question for the opinion of the court is stated by the learned referee as follows:

A "If the terms of the Order are applicable, then should the scale on which the amount of the valuation is determined be that of the prices to the owner of a coal mine situate in Great Britain when buying for use in that mine, or that of the prices to any other buyer, or any and, if so, what combination of the two?"

B On behalf of the claimants it was submitted that the wording of s. 13 (4) of the Act of 1946 does not postulate, or necessarily postulate, the sale of a compensation unit being made as a sale in one lot, and that, if the unit were broken into lots and sold in lots, the mining timber might have been sold to someone other than a coal owner. The practical significance of these contentions results from the fact that in the Control of Timber (No. 35) (Mining Timber Prices) Order, 1944, sched. I, Part I, one range of prices is fixed for imported timber in the case of a sale to the owner of a coal mine situate in Great Britain when buying for use in such a coal mine, whereas a higher range of prices is fixed in the case of a sale to any other buyer.

C In this particular case the hearing before the Northern District Valuation Board proceeded on the basis that the notional purchaser would be the owner of a coal mine. In the written reasons of the Northern District Valuation Board, it is recited:

D "It was agreed by both sides that the sale of this unit would be at the site where the various items lay and that the purchaser who would offer the best price would be a purchaser who was going to use the articles comprised in the unit on that site."

E This very reasonable agreement seems to postulate that the purchaser who would give the best price would be a purchaser of the coal mine. Counsel for the claimants advanced the further contention that, even on a concurrent sale of the timber and the coal mine to the same purchaser, the lower range of prices would not operate, because the sale of the timber would not be a sale to someone who was at the time of the sale already "the owner of a coal mine." In the opinion of the court, this last contention proceeds on too narrow a basis to make it reasonable or acceptable, and, in any event, a purchaser of the coal mine and of the stores and stocks could in practice so arrange the dates and sequences of his purchases that he would qualify to purchase the imported mining timber at the lower range of prices.

F In the opinion of the court, this second question is, in this case, concluded by the common agreement of the parties on the basis of which the matter proceeded before the Northern District Valuation Board. Accordingly, the court answers the second question by deciding that the scale on which the amount of the valuation is determined is that of the prices to the owner of a coal mine situate in Great Britain. The court is in agreement with the decision of the Northern District Valuation Board when they determined

G "... that the value of the stocks of mining timber comprised in this unit on the primary vesting date as between a willing buyer and a willing seller in the open market is that prescribed by the [Control of Timber (No. 35) (Mining Timber Prices) Order, 1944] and that the value for imported timber is that laid down in sched. I, Part I, col. 3 [of Tables 1 and 2], and that the value for home grown market timber is the maximum price prescribed by sched. I, Part II."

Order accordingly. No order as to costs.

Solicitors: *Treasury Solicitor* (for the Minister of Fuel and Power); *Watson, Burton, Booth & Robinson*, Newcastle-on-Tyne (for the claimants).

[*Reported by F. A. AMES, ESQ., Barrister-at-Law.*]

BENNETT, WALDEN & CO. v. WOOD.

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Asquith and Jenkins, L.J.J.), May 11, 1950.]

Agent—Estate agent—Commission—Contract to pay commission on “securing an offer”—Offer subject to contract.

The plaintiffs, a firm of estate agents, after being instructed by the defendant to negotiate the sale of his property, wrote to him: “We thank you for your instructions . . . to act as your agents in the sale of [your] property, and beg to confirm that in the event of our securing for you an offer . . . our commission will be at the recognised Auctioneers and Estate Agents Institute scale . . .” Later, the plaintiffs introduced a potential purchaser who signed an agreement to buy the house subject to contract, but the defendant did not proceed to completion and the bargain went off.

Held: on a proper construction of the words “securing for you an offer” the word “offer” meant a firm offer which by acceptance would give rise to a contractual relationship. An offer subject to contract lacked that essential characteristic, for its acceptance did not create a contract, and the plaintiffs were, therefore, not entitled to commission.

Dictum of LORD RUSSELL OF KILLOWEN in Luxor (Eastbourne), Ltd. v. Cooper ([1941] 1 All E.R. 47), applied.

[AS TO REMUNERATION OF AGENT, see HALSBURY, Hailsham Edn., Vol. 1, pp. 256-263, paras. 431-436; and FOR CASES, see DIGEST, Vol. 1, pp. 488-493, Nos. 1664-1692, and pp. 512-514, Nos. 1770-1776.]

Cases referred to :

- (1) *Graham and Scott (Southgate), Ltd. v. Oxlade*, [1950] 1 All E.R. 856.
- (2) *Dennis Reed, Ltd. v. Goody*, [1950] 1 All E.R. 919.
- (3) *Luxor (Eastbourne), Ltd. v. Cooper*, [1941] 1 All E.R. 33; [1941] A.C. 108; 110 L.J.K.B. 131; 164 L.T. 313; 2nd Digest Supp.
- (4) *Dennis Reed, Ltd. v. Nicholls*, [1948] 2 All E.R. 914; 2nd Digest Supp.

APPEAL by the defendant from an order of His Honour JUDGE GRANVILLE-SMITH, made at Edmonton County Court, and dated Feb. 8, 1950, giving judgment for the plaintiffs on their claim to commission on the introduction by them to the defendant of a prospective purchaser of the defendant's house.

On Oct. 7, 1948, the plaintiffs, who were estate agents, received instructions from the defendant to sell his property, 92, Amberley Road, Bush Hill Park, Enfield, at the price of £2,900 or some such offer as would be acceptable to the defendant. On the same day the plaintiffs wrote to the defendant: “We thank you for your instructions . . . to act as your agents in the sale of the above property, and beg to confirm that in the event of our securing for you an offer of £2,900 or some such offer as shall be acceptable to you our commission will be at the recognised . . . scale.” On Jan. 17, 1949, the plaintiffs introduced a Mrs. Anderson as a potential purchaser. Mrs. Anderson offered to purchase the house for £2,525 subject to contract and paid a deposit of £20 to the plaintiffs as agents for the defendant. The defendant accepted the offer, but subsequently did not proceed to completion. The county court judge found that there was a contract of agency on the terms of the letter dated Oct. 7, 1948, and held that the plaintiffs were entitled to commission.

Wilson, K.C., and *Wakley* for the defendant.

P. A. Bruce (for *L. R. Miller*) for the plaintiffs.

SIR RAYMOND EVERSLED, M.R.: This appeal provides another illustration of the problems arising out of contracts relating to estate agents' commission, two other examples of which have been recently before this court in *Graham & Scott (Southgate), Ltd. v. Oxlade* (1) and *Dennis Reed, Ltd. v. Goody* (2).

Let me say at once that I do not propose in the present case to embark on any general observations about the nature of contracts of this character. For present purposes the question is a short point, namely, what is the proper significance to be given to the phrase "securing for you an offer"?

A Before I come to that, however, I must state rather more fully the circumstances which have given rise to the case. The plaintiffs sued the defendant for commission and based their claim on the terms of a letter dated Oct. 7, 1948, which, they say, was accepted by the defendant as constituting the terms of the agency. There is no doubt, to my mind, that the plaintiffs were accepted or appointed as the agents of the defendant on some terms. In the court below (to judge from the notes of the judgment of the learned county court judge) a considerable issue was fought on the question whether there was a contract in the terms of the letter to which I have referred. On that he found B in the plaintiffs' favour. In this court and by his notice of appeal, the defendant has sought to challenge that finding on various grounds. He has also suggested a number of arguments based on the assumption that the terms of the agency were those to be found in the letter of Oct. 7. The plaintiffs do not on any view put their case higher than by resting it on the terms of the letter, and in C the circumstances I have thought it convenient to deal first with the construction of the document, and, therefore, to assume in the plaintiffs' favour that the bargain was in fact in the terms recorded in the letter of Oct. 7. In the event, I have not found it necessary to embark on the other problems.

D I will read the letter of Oct. 7 in full. It is addressed to the defendant. It is headed 92, Amberley Road, Bush Hill Park (the defendant's house which he was proposing to sell), and it reads as follows:

E "We thank you for your instructions dated Oct. 7, 1948, to act as your agents in the sale of the above property, and beg to confirm that in the event of our securing for you an offer of £2,900 or some such offer as shall be acceptable to you our commission will be at the recognised Auctioneers and Estate Agents Institute scale. We would be obliged if you would inform us if (i) the house is sold, (ii) there is a change in the price asked, (iii) if any of our applicants appear to be interested or make an offer."

F It is signed by the plaintiffs. An interval of some three and a half months elapsed, and on Jan. 17, 1949, the plaintiffs appeared at the defendant's house with a Mrs. Charlotte Anderson and then and there another document came into existence. It is addressed to Messrs. Bennett, Walden & Co., the plaintiffs, as agents for Mr. Herbert Stanley Wood, the defendant. It goes on:

G "Dear Sirs, *Re* 92, Amberley Road, Bush Hill Park, Enfield. I hereby agree to purchase the above named freehold property at a purchase price of £2,525 subject to contract. I enclose cheque for £20 being deposit and in part payment of the purchase money, which you are to hold as stakeholders. The completion to take place on or before Feb. 7, 1949."

It is signed by Mrs. Anderson. Underneath the signature appears:

"I accept the above offer. Signed, H. Wood, vendor."

H Because of that last line, it is, I think, plain that agency on the part of the plaintiffs, which Mr. Wood was disposed to dispute, was established. His agreement to, or acceptance of, the offer in that form was necessitated at least for the reason that the price of £2,525 was less than the £2,900, which was the specified price mentioned in the document of Oct. 7. The essential feature for present purposes of the document of Jan. 17, 1949, is that Mrs. Anderson only made her offer or proposal to purchase "subject to contract," and it is now too well established to need more than reference that, by executing the document in that form, she did not make a firm offer at all, and, notwithstanding the acceptance by the defendant, she was not bound in law as the result of this document. They had clothed in the form of an agreement that which

amounted to no more than a record of a stage in the negotiations then reached.

To decide the present case, that (subject to one matter which counsel for the plaintiffs has rightly emphasised) is all I need refer to of the facts of the case. The question is solely this: By the phrase in the letter of Oct. 7, "securing for you an offer," is it contemplated that something short of what is ordinarily called a firm offer will do? Is it sufficient, in order that the agents shall earn their commission, that they should provide or produce something which, though expressed to be an agreement to purchase on the terms of an offer, is, in truth, no more than a proposal in the negotiations? To my mind, the answer to that question is in the negative. Counsel for the plaintiffs rightly points out that parties may agree between themselves on a bargain in such terms and producing such result as they think proper. There is no reason why a man should not (if he chooses) agree with agents to pay commission on the happening of any event which they may name. It is to be observed that VISCOUNT SIMON, L.C., in *Luxor (Eastbourne), Ltd. v. Cooper* (3) draws attention to the fact that a bargain to pay commission on receipt of an adequate offer forms an example of one category of contracts for remunerating agents distinct from contracts to pay commission on the agent "finding a purchaser," or other words which indicate that the commission is only due when there has come into existence a completed sale or its equivalent. COHEN, L.J., in *Graham and Scott (Southgate), Ltd. v. Oxlade* (1), sets out that passage ([1950] 1 All E.R. 858) from the speech of VISCOUNT SIMON, L.C., where he said ([1941] 1 All E.R. 40):

"It may be useful to point out that contracts under which an agent may be occupied in endeavouring to dispose of the property of a principal fall into several obvious classes. There is the class in which the agent is promised a commission by his principal if he succeeds in introducing to his principal a person who makes an adequate offer, usually an offer of not less than the stipulated amount. If that is all that is needed in order to earn his reward, it is obvious that he is entitled to be paid when this has been done, whether his principal accepts the offer and carries through the bargain or not."

LORD RUSSELL OF KILLOWEN in the *Luxor* case (3) observed that, if the contract is designed to attract commission on no more being done than the provision of an offer, then that result must be stated in quite clear and precise terms. That part of the speech of LORD RUSSELL OF KILLOWEN ([1941] 1 All E.R. 47) also appears in the judgment of COHEN, L.J., in *Graham & Scott (Southgate), Ltd. v. Oxlade* (1) ([1950] 1 All E.R. 859):

"It is possible that an owner may be willing to bind himself to pay a commission for the mere introduction of one who offers to purchase at the specified or minimum price, but such a construction of the contract would, in my opinion, require clear and unequivocal language."

In the present case the contract is in terms plainly directed to creating an obligation on the securing of an offer. The form of words is different from the forms of words which were adopted in the recent cases I have mentioned, and which, perhaps, are the more common, namely, words indicating an obligation to pay on "finding a purchaser" or "on finding a person willing and able to purchase." Numerous variations have come into existence of that latter class of case and in *Dennis Reed, Ltd. v. Goody* (2) DENNING, L.J., in his judgment ([1950] 1 All E.R. 925), treated all these formulae, "find a purchaser," "find a party prepared to purchase," "find a purchaser able and willing to complete the transaction" etc., as synonymous. But the examples given do not include among them a formula such as we have here, which, as I have already said, seems to be treated by both VISCOUNT SIMON, L.C., and LORD RUSSELL OF KILLOWEN in *Luxor's* case (3) as by nature being in a somewhat different category. I think it is probably desirable that in contracts of this kind the

court should not, by drawing fine distinctions between one formula and another, lead to all kinds of different results which may be capricious in their operation. On the other hand, parties contracting in particular words must be assumed to intend the ordinary meaning of those words, and we are here construing, as counsel for the plaintiffs has emphasised, the words "securing for you an offer," and no others. All that is, however, generality.

- A The vital question is what is meant by "securing for you an offer." As I have indicated, and following the language of LORD RUSSELL OF KILLOWEN, a contract providing a commission in such circumstances as counsel for the plaintiffs suggests must be looked at carefully, and, if the contention of the plaintiffs in the action is correct, it must be clearly manifest from the language. Certainly the argument of counsel for the defendant, on the one hand, and
- B counsel for the plaintiffs, on the other, makes it plain that that characteristic cannot, at any rate, be confidently asserted of this letter. Applying the proper test of construction, *viz.*, what is the ordinary, straightforward, meaning of the language, it seems to me reasonably clear that the answer here is that by "offer" is meant a firm offer. In the ordinary sense of the term in business matters an offer is something which by acceptance creates a bargain. An offer subject
- C to contract lacks that essential characteristic, for its acceptance does not create a contract. *Prima facie* when the word "offer" in such a document as this is used, what is meant is something, which, if accepted, gives rise to a contractual relationship. I think that that view is supported by the use of the word "securing"—making sure—for something which amounts to no more than a step in the negotiations provides no kind of assurance or security for the principal.
- D Counsel for the plaintiffs conceded that a contract in this form was not intended to provide and ought not to be construed so as to provide the opportunity of more than one commission in respect of the same subject-matter for the agent, but, if there is here to be no such requirement as I have indicated, namely, if "offer" means, not a firm offer, but a mere proposal, then there will be the greatest possible difficulties in identifying the particular proposal which attracts
- E the commission. It is true that that has not arisen in this case, but it is a legitimate way to test the matter.

It seems to me, therefore, tolerably plain that by "offer" is here meant what I have described as a firm offer. I do not think the result of that is necessarily to produce the same result as would have been produced had the words been "find a purchaser." I am not saying what would be the precise

F result if a firm offer had been made here and for one reason or another the contract so confirmed had broken down at a later stage. I certainly do not, as at present advised, assent to the view that the construction I put on this document makes this formula synonymous with the other formulae I have mentioned.

- G If I am right so far, then plainly the document of Jan. 17 lacked the essential characteristic. It has been also said that, notwithstanding the form of the document of Jan. 17, Mrs. Anderson, by her own evidence, showed that right up to a stage when, through the uncertainty in the mind of the vendor which was communicated to her, the bargain went off, she was perfectly ready, willing, and, indeed, anxious, to complete the purchase on the terms which she proposed. It may be that she was, but that does not affect the question the court has to
- H determine. We are not here considering whether and to what extent Mrs. Anderson was a willing buyer, but whether the essential event had occurred of a firm offer having been made. Nothing which Mrs. Anderson said in the witness box at the trial converts what had occurred in January, 1949, from a mere proposal into a firm offer. I should add, in reference to the authorities, that the industry of counsel for the defendant has failed to find any case where this formula of securing an offer or its equivalent has come before the courts save one case, and a rather unsatisfactory one, of *Dennis Reed, Ltd. v. Nicholls* (4).

There the bargain contained as part of the formula the mystic symbol, "o.n.o." which, being interpreted, means "or near offer." The decision was one of LYNSEY, J., but it is not clear from the report whether the offer which was in fact made, was, or was not, subject to contract. In *Dennis Reed, Ltd. v. Goody* (2) it was treated as though the offer was subject to contract, and on that footing the conclusion arrived at, which was favourable to the estate agent, was later disapproved. I am not at all satisfied that that does justice to LYNSEY, J., but it does not help us in the present case, where there is no doubt that the so-called offer was subject to contract.

For the reasons I have stated it seems to me that the inevitable conclusion, in the present case must be adverse to the plaintiffs. In the county court by far the greater part of the notes of the judgment are devoted to the other question, namely: What were the terms of the contract of agency, if any? On the matter with which we have been concerned all that the learned county court judge is recorded as having said is:

"It is unnecessary to deal with the other arguments. I cannot agree to introduce a condition that the offer must be by a person who does not afterwards withdraw it."

At the time of the judgment the learned county court judge had not had the advantage of the more recent decisions to which I have alluded, but I do not think, with all respect, that any question arises of implying or introducing any such condition as the learned county court judge mentioned. There is nothing further in the judgment which throws any light on the grounds on which he based his conclusion on this point. Had the two cases mentioned been available before him I think it is more than probable the form of his judgment would have been different. However that may be, I think in the circumstances this appeal must be allowed and the action must be dismissed.

ASQUITH, L.J.: I agree both with the reasoning and conclusions of the Master of the Rolls.

JENKINS, L.J.: I agree.

Appeal allowed with costs.

Solicitors: *Hamilton-Hill & Evershed* (for the plaintiffs); *Robinson & Bradley* (for the defendant).

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

Explained and Distinguished. R. v.
FULHAM ETC. RENT TRIBUNAL. *Ex p.*
ZEREK. [1951] 1 All E.R. 482.

R. v. HACKNEY, ISLINGTON AND STOKE NEWINGTON RENT TRIBUNAL. *Ex parte* KEATS.

[KING'S BENCH DIVISION (Lord Goddard, C.J., Humphreys and Morris, JJ.), May 11, 1950.]

Rent Control—Powers of rent tribunal—Rectification of written tenancy agreement—Landlord and Tenant (Rent Control) Act, 1949 (c. 40), s. 1.

Premises were let on a tenancy for one year at a rent of £169, the tenant agreeing to use them for the purpose of tailoring only. The tenant applied to a rent tribunal under the Landlord and Tenant (Rent Control) Act, 1949, which refers to dwelling-houses only, and the tribunal, notwithstanding objections by the applicant made on the ground that the premises were not a dwelling-house, decided that the provision in the agreement was a sham and determined the reasonable rent of the premises under the Act.

HELD: the tribunal had no jurisdiction to determine whether or not the agreement was genuine, and its order must be quashed.

[FOR THE LANDLORD AND TENANT (RENT CONTROL) ACT, 1949, see HALSBURY'S STATUTES, Second Edn., Vol. 13, pp. 1094-1110.]

MOTION for *certiorari*.

The applicant was the landlord of premises let to the tenant under a tenancy agreement which provided for the premises to be used for the purpose of tailoring only. On an application by the tenant a rent tribunal held that certain provisions of the agreement were a sham and proceeded to determine a reasonable rent for the premises under the Landlord and Tenant (Rent Control) Act, 1949, which applied to dwelling-houses only. For the respondents, the rent tribunal, it was submitted that the application for an order of *certiorari* should be adjourned pending the determination of the Chancery Division with respect to the agreement.

Marshall, K.C., and *F. R. McQuown* for the applicant.
J. P. Ashworth for the respondents.

LORD GODDARD, C.J.: Counsel for the applicant has moved for an order of *certiorari* to bring up and quash a determination of the Hackney, Islington, and Stoke Newington Rent Tribunal made on Mar. 17, 1950, whereby the tribunal purported to determine the reasonable rent of premises consisting of the first floor of 127 Southgate Road, London, N.1. The premises are the subject of a written tenancy agreement made on Dec. 17, 1949, between the applicant, the landlord, and the tenant, by which a tenancy thereof was granted for a term of one year beginning on Dec. 17, 1949, at the yearly rent of £169. There was a provision with regard to repairs and so forth, and the tenant agreed to use the premises for the purposes of tailoring only. The agreement contained this declaration:

"It is hereby declared that no warranty is given in the granting of this agreement that the premises will not attract a development charge or require permission under any statutory instrument. The landlord will in no circumstances indemnify the tenant against any charges, actions or proceedings directly or indirectly arising out of statutory instruments."

The significance of that passage is that under the Town and Country Planning Act, 1947, a development charge might become payable if a dwelling-house were turned into commercial premises, as it would be if used for tailoring operations. The premises having been previously used as a dwelling-house, the applicant was protecting herself by saying: "If a development charge becomes payable owing to your use of the premises for tailoring, I am not going to pay it. You must take your own precautions or make your own arrangements about that." This is clearly an agreement to use the premises, not as a dwelling-house, but for tailoring only, and so long as it stands, the tribunal has no jurisdiction to interfere with the rent or other of its terms. The Landlord and Tenant Act, 1949, relates to dwelling-houses only.

As soon as the tenant's application became known by the applicant her solicitors suggested to the tribunal that they had no jurisdiction to entertain the proceedings and stated that the applicant was not going to take any part in them, but when the tribunal sat, counsel for the applicant attended and very properly took this point. The applicant did not attend to give evidence. Why should she? There was the written agreement between the parties. The tribunal, who have no power to take evidence on oath, proceeded to invest themselves with the power of deciding whether this was a genuine agreement or not. A more dangerous usurpation of power by one of these tribunals it is impossible to imagine. As soon as this agreement was put forward, the chairman said that he was well aware of the rule of law that one cannot contradict a written agreement by parol evidence, but the tribunal had formed the view that the provision in the lease that the premises were to be used for tailoring was a sham. If they

formed that view, they formed it on unsworn evidence, but, in any event, it was not a matter for them to decide and they should have told the tenant that they declined to enter on the case, and, if he said that the agreement was not a true agreement or did not truly represent the bargain made, he must go to a court of equity and get it rectified. The tribunal had no jurisdiction to proceed unless and until that agreement had been found to be a sham or not properly and truly to contain the terms of the bargain made. The tribunal, however, without being able to take sworn evidence or have any pleadings before them, or, for all I know, without being able to understand the doctrines on which the court of equity proceeds when it has to exercise this very delicate jurisdiction of rectifying written agreements, proceeded to rectify this document themselves in the sense that they held that it did not represent the terms of the contract between the parties. They had no power for a moment to decide that question.

This order has been made without jurisdiction. It is an order which has many repercussions and far-reaching effects. If an order has been made by a tribunal without jurisdiction, it is the plain duty of this court to issue its order of *certiorari* to bring up the order and quash it. In my opinion, this is a clear case where the order of *certiorari* must go, and the order of the tribunal will be quashed.

HUMPHREYS, J.: I agree.

MORRIS, J.: I agree.

Order of certiorari issued, applicant to have costs.

Solicitors: *J. C. Fox, Gamble & Son* (for the applicant); *The Solicitor*, Ministry of Health (for the respondents).

[*Reported by F. A. AMIES, Esq., Barrister-at-Law.*]

Applied. PERRY v. DEMBOWSKI.
[1951] 2 All E.R. 50.

GAMMANS v. EKINS.

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Asquith and Jenkins, L.JJ.), May 15, 1950.]

Rent Restriction—Death of tenant—“Member of the tenant’s family”—Reputed husband of tenant—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (c. 17), s. 12 (1) (g) (as amended by Rent and Mortgage Interest Restrictions (Amendment) Act, 1933 (c. 32), s. 13, and Increase of Rent and Mortgage Interest (Restrictions) Act, 1935 (c. 13), s. 1).

For some twenty years the defendant had lived with the tenant of a dwelling-house to which the Rent Restrictions Acts applied. He had never been married to her, but he had adopted her name and had posed as her husband, and he remained in the house after her death. In an action by the landlord for possession of the house, the defendant claimed the protection of the Rent Restrictions Acts on the ground that he was a “member of the tenant’s family” within the meaning of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 12 (1) (g) (as amended by the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, s. 13, and the Increase of Rent and Mortgage Interest (Restrictions) Act, 1935, s. 1).

HELD: the word “family” in s. 12 (1) (g) of the Act of 1920 was used in the ordinary, popular, sense of the word, and it was impossible to say that the defendant was a “member of the tenant’s family” within the meaning of the section.

Brock v. Wollams ([1949] 1 All E.R. 715), *applied*.

Per JENKINS, L.J. If there are children of two parties living as husband and wife, or of one of them, there may be said to be *de facto* an actual

family consisting of children and their natural parent or parents. It is possible that in such a case either of the *de facto* parents could properly be held to be a member of the other's family.

[AS TO STATUTORY TENANTS, see HALSBURY, Hailsham Edn., Vol. 20, pp. 334, 335, paras. 400, 401, and 1950 Supplement; and FOR CASES, see DIGEST, Vol. 31, pp. 575, 576, Nos. 7226-7255, and Supplements.]

A Cases referred to :

- (1) *Brock v. Wollams*, [1949] 1 All E.R. 715; [1949] 2 K.B. 388.
- (2) *Jones v. Truman*, [1949] C.L.Y. 3385.

APPEAL by the landlord from an order of His Honour JUDGE TYLOR, K.C., made at Portsmouth County Court, and dated Mar. 2, 1950, dismissing an action for possession of premises to which the Rent Restrictions Acts applied.

B The county court judge held that the defendant, who had been living with the statutory tenant of the premises, a Mrs. Smith, as her husband up to the date of her death, was a member of her family within the meaning of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 12 (1) (g). The facts appear in the judgment of ASQUITH, L.J.

L. A. Blundell for the landlord.

C *Seymour Collins* for the defendant.

ASQUITH, L.J.: This is a landlord's appeal against a refusal of an order for possession, the learned judge holding that the defendant was a member of the tenant's "family" within s. 12 (1) (g) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 [as amended by s. 13 of the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, and s. 1 of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1935]. That provision, so far as material, reads thus:

E "... the expression 'tenant' includes the widow of a tenant who was residing with him at the time of his death, or, where a tenant leaves no widow or is a woman, such member of the tenant's family so residing as aforesaid as may be decided in default of agreement by the county court for not less than six months immediately before the death."

The defendant had lived for some twenty years in close, but unmarried, association with a Mrs. Smith. He adopted her name and posed as her husband. They shared the premises involved. She died. He was sued for possession, and he set up s. 12 (1) (g) of the Act of 1920, claiming that he was a member of the deceased woman's family. In that contention he has been supported by the learned county court judge.

H It has been held that "family" in the sub-section should be given its popular meaning: see *Brock v. Wollams* (1). Consanguinity is not a pre-requisite of membership of the same family. On the authorities not only are children members of their parents' family, but a husband is a member of his wife's family, an adopted child is a member of the adoptive parents' family, and a husband, on unusual facts, has been held to be a member of the same family as his wife's niece. Counsel for the landlord was right in saying that the material decisions limit membership of the same family to three relationships—first, that of children; secondly, those constituted by way of legitimate marriage between husband and wife; and, thirdly, relationships whereby one person becomes *in loco parentis* to another. Beyond that point the law has not gone. I do not think we should be justified in saying that the defendant was a member of Mrs. Smith's family. If the relations between them had been platonic I can see no principle on which one could say that they were members of the same family which would not require the court to predicate the same of two old cronies of the same sex innocently sharing a flat. If, on the other hand, the relationship involves sexual relations, it seems to me anomalous that a person can acquire a "status of irremovability" by having lived in

sin, even if the liaison has been, not a mere casual encounter, but one protracted in time and conclusive in character. I would, however, decide the case on a simpler view. To say of two people masquerading, as these two were, as husband and wife—there being no children to complicate the picture—that they were members of the same family, seems to me an abuse of the English language, and I would, accordingly, allow the appeal.

JENKINS, L.J.: I agree. If the matter were free from authority, I would have little hesitation in holding that the defendant was not a member of Mrs. Smith's family within any ordinary accepted use of that expression or within the meaning of s. 12 (1) (g) of the Act of 1920. There have, however, been a series of decisions, each of them addressed to the particular facts of the case before the court, which, taken together, have so extended the meaning of the word "family" for the purposes of the sub-section as to make it possible to argue with a considerable degree of plausibility that there is no reason why the benefit of the sub-section should not be extended also to the defendant. When the cases are examined, it will be found, however, that none of them goes so far as we are invited to go in the present case. The defendant was not, in my view, a member of Mrs. Smith's family in any reasonable sense whatever. The parties, for reasons of convenience, had chosen to live together, and the defendant had taken the name of Smith. The neighbours assumed that they were husband and wife and accepted them as such. I cannot regard this as giving the defendant the same claim to be considered a member of Mrs. Smith's family as if they had been lawfully man and wife.

The point has been taken that, if it be right that an adopted child may be a member of a statutory tenant's family, or that even an illegitimate child may be such a member, it would be illogical to exclude a reputed husband, or, in other words, a man living with a woman as his wife without having gone through a legal ceremony of marriage. I do not agree. It seems to me that as soon as children of two such parties, or one of them, come into question, there may be said to be *de facto* an actual family consisting of children and the natural parent or parents of those children. It is then easy to see how the children could properly be brought within the expression "family" according to the ordinary and popular meaning of the word. It is possible, but it is a matter for decision when it arises, that in such a case either of the *de facto* parents could properly be held to be a member of the other's family, because, although there is no legal tie in such a case, nevertheless, it might be said that the so-called husband was a member of the so-called wife's family as being the father of her children, and *vice versa*. The situation assumed would present *de facto* what might be described as the equivalent of a marriage with the natural consequences of a marriage. Cases of that kind, it seems to me, must provide far stronger ground for the view that the man or woman, as the case may be, should be considered as a member of the woman's or the man's family than a case where there is no more than liaison between two elderly people who choose to pose as a married couple when they in fact are not. In my judgment, that would be extending this section beyond all reason and I am not disposed to allow such an extension. If the learned county court judge's decision were to stand, it seems to me an alarming vista would be opened up. If, for instance, brothers and sisters are members of the tenant's family, I see no reason why two friends should not set up house together, one changing his or her name to that of the other, and then to give out that they were sisters or brothers or brother and sister as the case might be, in which event, provided they were accepted as such in the neighbourhood, there would, by parity of reasoning, be no ground why, when one of them, being a statutory tenant of the house in which they both resided, died, the other should not claim to be a member of the statutory tenant's family on account of the artificial relationship they had chosen for their own purposes to adopt. I agree that the appeal should be allowed.

SIR RAYMOND EVERSHED, M.R.: At first the problem presented by this appeal seemed to me not very difficult for, applying the test laid down by COHEN, L.J. ([1949] 1 All E.R. 718), in *Brock v. Wollams* (1) (*viz.*, would an ordinary man, addressing his mind to the question whether the defendant was a member of the tenant's family, answer it "yes" or "no") it appeared that the answer must be "no," and it was, indeed, difficult to imagine any context in which, by the proper use of the English language, such a man living in such a relationship with the tenant could be described as of her family. The language of the Act is, however, peculiar in that the husband of a female tenant must, I think, be intended to be covered by the word "family." In the case of a childless marriage I should certainly not have thought it natural to refer to the husband as a member of the wife's family.

As my brethren have indicated, the decisions under s. 12 (1) (g) of the Act of 1920 have made it clear that, when one leaves the parents and looks further afield to find an answer to the question I have already mentioned, the phrase is certainly not to be taken as confined to children born in wedlock. The contention of counsel for the landlord that there is a distinction in favour of persons to whom the tenant stood *in loco parentis* may or may not be right, though I wonder whether it would be exhaustive of every case. If, however, children who are not children born in wedlock, whether illegitimate or adopted, are covered by the phrase, the question arises whether the word can also extend to a consort, even though that consort is not joined in matrimony to the tenant. Counsel for the defendant did not suggest that where a man and woman had lived more or less casually together the intention of Parliament could be to give protection to the survivor of the two of them, but in the present case, as he emphasised, the two persons had lived as man and wife for some considerable time and had been accepted by the neighbourhood as such. In those circumstances, counsel said, there is no ground for expecting the section to avail the defendant, or any ground of public policy compelling the court to hold that it does.

I think that there is considerable force in this argument, and I have felt greater difficulty than my brethren in arriving at an answer. On the whole, I have come to the conclusion that the right test is that laid down by COHEN, L.J., in *Brock v. Wollams* (1), which has commended itself to my brethren, namely, to ask whether in the ordinary use of language the defendant had been a member of the family of the late tenant. As it seems to me, the answer remains

negative after allowing for all the very forcible arguments which have been put on the other side. In *Jones v. Truman* (2) the position was the other way round. There a man and woman had lived together as man and wife and they had had children, but they were never married. According to the very brief report, the county court judge came to the conclusion that, the man having been the tenant, the woman was entitled to the protection of the Rent Acts as being a member of his family, or, that, if he were wrong in that, one or other of the children was entitled to that protection. It is unnecessary to say whether that decision was rightly decided or not, but certainly where there are children of such a union the considerations may not be the same as are applicable in the case of a childless union. In the present case, as ASQUITH, L.J., observed, we are not beset by any complication of that character. It may not be a bad thing that it is shown by this decision that in the Christian society in which we live one, at any rate, of the privileges which may be derived from marriage is not equally enjoyed by those who are not married.

Appeal allowed with costs.

Solicitors: *Bower, Cotton & Bower*, agents for *H. Morgan Gammans*, Portsmouth (for the landlord); *Kingsford, Dorman & Co.*, agents for *Blake, Laphorn, Roberts & Rea*, Portsmouth (for the defendant).

[Reported by F. GUTTMAN, ESQ., Barrister-at-Law.]

ROGERSON *v.* STEPHENS.

[KING'S BENCH DIVISION (Lord Goddard, C.J., Humphreys and Parker, JJ.), May 17, 1950.]

Street Traffic—Insurance against third party risks—Charge of using motor vehicle and trailer while uninsured—Wrong description of offence—Charge not amended—Road Traffic Act, 1930 (c. 43), s. 35 (1).

The respondent was charged with using a motor vehicle and trailer on a road without having in force in relation to the user thereof a policy of insurance or security in respect of third-party risks, contrary to the Road Traffic Act, 1930, s. 35 (1). The respondent's insurance policy covered the use by him of a motor car in connection with his business or profession.

HELD: it was an offence against s. 35 (1) of the Act of 1930 to use a motor car, but was not an offence to use a motor car and a trailer, on a road without there being in force in relation to its user a policy of insurance in respect of third-party risks. The information, therefore, disclosed an offence which was not known to the law and was bad.

[FOR THE ROAD TRAFFIC ACT, 1930, s. 35 (1), see HALSBURY'S STATUTES, Vol. 23, p. 636.]

CASE STATED by Cambridge justices.

At a court of summary jurisdiction sitting at Cambridge an information was preferred by the appellant against the respondent charging him with using a motor vehicle and trailer on a road without having in force, in relation to the user thereof, such policy of insurance or such security in respect of third-party risks as complied with Part II of the Road Traffic Act, 1930, contrary to s. 35 (1) of the said Act. On Nov. 10, 1949, a motor car, owned and driven by the respondent and drawing a trailer, the property of his employers, collided with a motor van. The respondent's insurance policy covered the use by him of the motor car in connection with his business or profession. The trailer was covered by a policy of insurance issued to the respondent's employers, but the policy covered the trailer only while it was being drawn by a motor car belonging to the employers. The respondent contended (*inter alia*) (i) that the charge as laid was bad in that (a) there was no offence known to the law in using a motor vehicle and trailer in the manner charged, (b) the motor vehicle and trailer did not together form a single entity, (c) the law did not require a policy of insurance in respect of a trailer; and (ii) that the respondent's policy covered him in respect of the motor car, and the said policy was not invalidated by reason of the fact that at the material time the motor car was drawing a trailer. The appellant did not apply to have the information amended by striking out the words "and trailer." The justices, being of opinion that the charge as laid in the information was good, overruled the respondent's contentions on this point. They took the view, however, that, as there was nothing in the respondent's insurance policy specifically prohibiting the use of a trailer with the motor car, the insurance was not invalidated by the fact that the trailer had been attached, and dismissed the information. The appellant appealed.

Malcolm J. Morris for the appellant.

The respondent did not appear.

LORD GODDARD, C.J.: This is a Case stated by justices for the borough of Cambridge before whom the respondent was charged with

"using a motor vehicle and trailer on a road without having in force a policy of insurance or security in respect of third-party risks, contrary to the Road Traffic Act, 1930, s. 35."

The particulars of offence stated:

"On Nov. 10, 1949, at and in the said borough [the respondent] did use a motor vehicle, to wit, a motor car and trailer, on a certain road there,

named Newmarket Road, without having in force in relation to the user of such vehicle . . . such a policy of insurance."

A It is clear that a trailer is not a motor car. There is also no doubt that a motor car and trailer attached are not one vehicle but two, one of which has to be licensed and on which duties have to be paid under the Finance Act, 1920, s. 13 (1), while the other has not to be licensed. In the course of the case objection was taken by counsel for the respondent that the charge as laid was bad in that (a) there was no offence known to the law in using a motor vehicle and trailer in the manner charged, (b) the motor vehicle and trailer did not together form a single entity, (c) the law did not require a policy of insurance in respect of a trailer. The justices were of the opinion that the charge as laid in the information was good, and overruled the respondent's objection on this point. The case then proceeded on the question whether the respondent's policy of insurance covered the use of his motor car with a trailer attached, and the justices found that it covered that use. On that, I intend to express no opinion, because, in my view, the justices were wrong in overruling the objection which was taken to the information. I can only read the information as alleging that it is an offence under the Road Traffic Act, 1930, s. 35 (1), to use a motor vehicle and trailer on a road without having in force a policy of insurance. It is contrary to s. 35 (1) to use a motor vehicle, but it is not contrary to that section to use a motor vehicle and trailer, and, if the use of the trailer is to be regarded as a constituent of the offence, both the statement of the offence and the particulars of the offence seem to me to allege that it is an offence to use a motor vehicle and trailer unless there is in force in relation to their user a policy of insurance. The offence is using a motor vehicle, not using a motor vehicle and trailer. Therefore, I think the information discloses an offence which is not known to the law. The appellant could have asked the justices to amend the information by striking out the words "and trailer", but he chose to rely on the information as it stood, and the justices ruled that it was good. In my opinion, it was bad, and the justices ought to have indicated that they would be prepared to amend it if they were asked. We cannot now send this case back with directions to amend, because the justices have heard and determined the matter, have dismissed the summons, and have asked us whether their determination was right. The dismissal of the summons was right, although for different reasons from those which the justices gave. In my opinion, therefore, this appeal fails.

F **HUMPHREYS, J.:** Having heard the grounds on which my Lord is of opinion that this information should be dismissed, I am disposed to agree with his view. At first sight it seemed to me that to hold that the information was bad was so highly technical that I was not inclined to allow the case to be concluded on such a ground. On the peculiar facts of this case, however, it seems to me that the question which arose is not altogether technical.

G The respondent took the point that the information was bad on the ground that it charged an offence not known to the law. It is essential that those who prosecute in these cases should follow the words of the statute where they are charging a person with a statutory offence, and that they should not add or subtract anything from the words of the statute. In this case the obvious answer to the objection was that, if the words "and trailer" were thought to be unnecessary, they should be struck out. The appellant, however, took the view that the motor vehicle and trailer could form one single entity, and, therefore, that the entity in respect of which he was prosecuting was rightly described as a motor car and trailer. That being so, one of the questions which the justices had to decide was: Is a motor car and trailer one vehicle, or are they two vehicles? That was a matter of substance which was seriously argued before the justices.

I would not like to say anything which would lead to the idea that the con-

cluding words of the second proviso to s. 1 of the Summary Jurisdiction Act, 1848, are to be lightly disregarded. They provide, first, that

"... no objection shall be taken or allowed to any information, complaint, or summons, for any alleged defect therein in substance or in form ..."

The second proviso then deals with the question of variance between the information and the evidence, concluding with

"... but if any such variance shall appear to the justice or justices present and acting at such hearing to be such that the party so summoned and appearing has been thereby deceived or misled, it shall be lawful for such justice or justices ... to adjourn the hearing ..."

Those words indicate that words which are mere surplusage may be disregarded unless they have misled the party summoned—which they have clearly not in this case—in which case the justices may not dismiss the information but may adjourn. Here, it is not so much a variance between the information and the evidence, nor is it an objection in substance. The objection which was made was that the respondent was summoned for an offence which does not exist. On those special grounds I think that the justices ought to have told the appellant that, unless the words "and trailer" were struck out, they would have to consider whether the use of a "motor car and trailer" was an offence. In effect, they have decided that there is such an offence in law as using a motor car and trailer. In that, I think, they were wrong.

PARKER, J.: I agree.

Appeal dismissed.

Solicitors: *Blyth, Dutton, Wright & Bennett*, agents for *King, Metters & Harrison*, Cambridge (for the appellant).

[*Reported by F. GUTTMAN, Esq., Barrister-at-Law.*]

ABDUL KARIM BASMA *v.* WEEKES AND OTHERS.

[PRIVY COUNCIL (Lord Simonds, Lord MacDermott, Lord Reid, Sir John Beaumont and Sir Lionel Leach), March 23, 27, May 3, 1950.]

Sale of Land—Memorandum of contract—Parties—Agent of purchaser contracting in own name—Knowledge of agency by vendor—Right of purchaser to maintain action for specific performance—Vendors tenants in common—One vendor having no power to convey interest—Right of purchaser to order against other vendors in respect of their shares.

By an agreement, dated Nov. 29, 1946, the first three respondents agreed to sell two houses in Freetown, Sierra Leone, of which they were tenants in common, to W., who was acting, with the knowledge of the respondents, as agent for the appellant, but the agreement contained no reference to the appellant or to the fact that W. was purchasing as an agent. On Dec. 2, 1946, the first three respondents, with the concurrence of the first respondent's husband, conveyed the property to the fourth respondent, who already had notice of the agreement of Nov. 29. In an action by the appellant for specific performance of the agreement of Nov. 29, the first three respondents contended *inter alia* (a) that the appellant had no right of action against them as the agreement was not a sufficient memorandum within the Statute of Frauds, 1677, s. 4, and (b) that, under the law of Sierra Leone, the first respondent, being a married woman, had no power to enter into a contract without the concurrence of her husband, and, therefore, as

the contract could not be performed in its entirety, there could be no order for specific performance against the other respondents.

HELD: (i) an agent, who contracted in his own name, did not cease to be contractually bound because it was proved that the other party knew, when the contract was made, that he was acting as agent, and the agreement which was made in his name did not cease, in that event, to contain the names of the contracting parties so as to satisfy the Statute of Frauds; the terms of the agreement of Nov. 29, 1946, were such that W. was contractually bound; and, therefore, the agreement satisfied s. 4 of the Statute of Frauds, and, as W. could have sued thereon, so could the appellant, as his principal.

Higgins v. Senior (1841) (11 L.J.Ex. 199) and *Calder v. Dobell* (1871) (L.R. 6 C.P. 486), *applied*.

Dictum of LUXMOORE, L.J., in *Smith-Bird v. Blower* ([1939] 2 All E.R. 407), *disapproved*.

(ii) although the first respondent had no power to convey her interest, there were no special circumstances which would make it wrong to grant specific performance of the contract in regard to the interests which belonged to the second and third respondents, and, therefore, the appellant was entitled to enforce the contract against the second and third respondents so as to require conveyance to him of their two one-third shares, with abatement of the purchase price in respect of the interest of the first respondent.

Horrocks v. Rigby (1878) (9 Ch.D. 180), *applied*.

Lumley v. Ravenscroft ([1895] 1 Q.B. 683), *distinguished*.

[AS TO SUFFICIENCY OF MEMORANDUM IN REGARD TO DESCRIPTION OF PARTIES, see HALSBURY, Hailsham Edn., Vol. 7, pp. 118-120, paras. 166-169; and FOR CASES, see DIGEST, Vol. 12, pp. 146-148, Nos. 991-1014.]

Cases referred to:

(1) *Smith-Bird v. Blower*, [1939] 2 All E.R. 406; Digest Supp.

(2) *Higgins v. Senior*, (1841), 8 M. & W. 834; 11 L.J.Ex. 199; 151 E.R. 1278; 1 Digest 639, 2599.

(3) *Jones v. Littledale*, (1837), 6 Ad. & El. 486; 1 Nev. & P.K.B. 677; Will. Woll. & Dav. 240; 6 L.J.K.B. 169; 112 E.R. 186; 1 Digest 629, 2527.

(4) *Magee v. Atkinson and Townley*, (1837), 2 M. & W. 440; Murph. & H. 115; 6 L.J. Ex. 115; 150 E.R. 830; 1 Digest 628, 2526.

(5) *Calder v. Dobell*, (1871), L.R. 6 C.P. 486; 40 L.J.C.P. 224; 25 L.T. 129; 1 Digest 577, 2188.

(6) *Lovesy v. Palmer*, [1916] 2 Ch. 233; 85 L.J.Ch. 481; 114 L.T. 1033; 12 Digest 144, 984.

(7) *Filby v. Hounsell*, [1896] 2 Ch. 737; 65 L.J.Ch. 852; 75 L.T. 270; 12 Digest 144, 983.

(8) *Rossiter v. Miller*, (1878), 3 App. Cas 1124; 48 L.J.Ch. 10; 39 L.T. 173; 42 J.P. 804; 12 Digest 147, 1002.

(9) *Jarrett v. Hunter*, (1886), 34 Ch.D. 182; 56 L.J.Ch. 141; 55 L.T. 727; 51 J.P. 165; 12 Digest 146, 991.

(10) *Horrocks v. Rigby*, (1878), 9 Ch.D. 180; 47 L.J.Ch. 800; 38 L.T. 782; 42 Digest 579, 1452.

(11) *A.-G. v. Day*, (1749), 1 Ves. Sen. 218; 27 E.R. 992; 42 Digest 519, 833.

(12) *Lumley v. Ravenscroft*, [1895] 1 Q.B. 683; 64 L.J.Q.B. 441; 72 L.T. 382; 59 J.P. 277; 28 Digest 162, 199.

(13) *Price v. Griffith*, (1851), 1 Do. G.M. & G. 80; 21 L.J.Ch. 78; 18 L.T.O.S. 190; 42 E.R. 482; 42 Digest 453, 236.

(14) *Thomas v. Dering*, (1837), 1 Keen 729; 6 L.J.Ch. 267; 48 E.R. 488; 42 Digest 471, 395.

(15) *Hexter v. Pearce*, [1900] 1 Ch. 341; 69 L.J.Ch. 146; 82 L.T. 109; 42 Digest 473, 403.

APPEAL by the plaintiff from an order, dated Apr. 8, 1948, of the West African Court of Appeal (LUCIE-SMITH, C.J., BEOKU-BETTES, J., and KINGSLEY, J., Sierra Leone), setting aside an order, dated May 24, 1947, of WRIGHT, J., in the Supreme Court of Sierra Leone, in an action for specific performance of an agreement, dated Nov. 29, 1946, for the sale of property of which the first three defendants were tenants in common, the property having been conveyed by them to the fourth defendant on Dec. 2, 1946. The first three defendants contended *inter alia* (a) that the agreement was not a sufficient memorandum within the Statute of Frauds, 1677, s. 4, to enable the plaintiff to sue on the contract, and (b) that the contract could not be performed in its entirety as, under the Law of Sierra Leone, the first defendant, being a married woman, was unable to convey her share without the concurrence of her husband, and, therefore, there could be no order for specific performance against the other defendants. The learned judge found on the oral evidence that there was sufficient proof of a contract with the plaintiff, and held that the plaintiff was entitled to specific performance of the agreement to the extent of the interests of the second and third defendants, with an abatement of one-third of the purchase price in respect of the interest of the first defendant. The second, third and fourth defendants appealed, and the West African Court of Appeal held that the first three defendants knew before entering into the agreement that the purchaser named in the agreement was acting as agent for the plaintiff, and that, as the agreement failed to identify the plaintiff in any way, it was not a sufficient memorandum within the Statute of Frauds, and they allowed the appeal. The facts appear in the judgment of the Board delivered by LORD REID.

R. O. Wilberforce for the appellant.

Patrick O'Connor for the respondents.

The Board took time for consideration.

May 3. The following judgment of the Board was delivered by

LORD REID: This is an appeal from a judgment of the West African Court of Appeal, dated Apr. 8, 1948, which set aside a judgment of WRIGHT, J., in the Supreme Court of Sierra Leone, dated May 24, 1947. The appellant, who was plaintiff in the action, alleged that by an agreement, dated Nov. 29, 1946, the first, second and third respondents agreed to sell to him two houses in Freetown for £1,900 and that thereupon the sum of £633 6s. 8d. was paid to each of these respondents in full satisfaction of the purchase price. The appellant further alleged that by deed of conveyance, dated Dec. 2, 1946, these respondents purported to convey the two houses to the fourth respondent. The appellant's claim was to have specific performance of his agreement with the first three respondents. The defence was a denial of this agreement. At the opening of the trial the respondents were allowed without objection to amend their defence by adding the words:

"If at all there was such an agreement, which is not admitted, the alleged agreement does not comply with the requirements of the Statute of Frauds."

Evidence was then led and the appellant's case closed. At that stage counsel for the respondents, after having made an unsuccessful submission that there was no evidence of the alleged agreement, sought to amend the defence further by adding: "The defendant Gladys Muriel Weekes and the defendant Ettie Spaine are married women." Objection was taken, but the amendment was allowed and the respondents' evidence was then led.

The appellant's case was based on a document in the following terms:

"No. 2 and 2A, Kissy Street, Freetown. We, the undersigned, the owners of the above premises hereby agree that we have to-day sold the above premises Nos. 2 and 2A, Kissy Street, Freetown, to Mr. C. B. Rogers Wright, of 27, Liverpool Street, Freetown, at the price of £1,900, which he has

completely paid in three separate sums of £633 6s. 8d. to each of us. We also hereby agree that we will execute the deed of conveyance to the said premises whenever it is prepared and that in the meantime Mr. Wright shall be in possession of the said premises as from the date hereof. Dated Nov. 29, 1946. (Sgd.) Gladys Weekes, Henrietta Spaine, John Kabia Williams."

Their Lordships will refer to this document as the agreement of Nov. 29.

- A The first three respondents did not deny that they had signed this document. They relied on three different defences: (i) that the property had already been sold by them to the fourth respondent before Nov. 29; (ii) that the agreement of Nov. 29 was not a sufficient memorandum to enable the appellant to sue on the contract; and (iii) that the first respondent, Mrs. Weekes, had no power to enter into the contract, and that, as the contract could, therefore, not be performed in its entirety, there could be no order for specific performance against the other respondents. The first of these defences is not now maintained. On this matter WRIGHT, J., did not accept the respondents' evidence. He held that the agreement of Nov. 29 had been made and signed before the first three respondents agreed to sell the property to the fourth respondent and that, when this agreement was made, the fourth respondent had notice of the earlier agreement to sell to the appellant. These findings have not been challenged. With regard to the second defence, it appears from the judgment of WRIGHT, J., that it was argued for the respondents that the only agreement proved was an agreement between Mr. Wright and the first three respondents. WRIGHT, J., rejected this argument, holding that oral evidence had sufficiently proved that Mr. Wright was acting as agent for the appellant and that there was, therefore, sufficient proof of a contract with the appellant. The third defence was founded on the fact that before 1932 the law of Sierra Leone with regard to the capacity of a married woman was the same as the law was in England before the passing of the Married Women's Property Act, 1882, and that the Imperial Statutes (Law of Property) Adoption Ordinance, 1932 (No. 44 of 1932), preserved any right which a husband had acquired before that date. WRIGHT, J., found himself unable to deal with this defence because the evidence was insufficient and he, therefore, allowed further evidence to be called. In fact, no further evidence was called. It is not clear what further submissions were made by the parties at that stage, but in his reasons for his final judgment WRIGHT, J., said:
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"Counsel for the plaintiff having agreed to accept judgment for specific performance, the court, therefore, declares that the plaintiff is entitled to specific performance of the agreement, dated Nov. 29, 1946, mentioned in the pleadings, to the extent of the interests of Mrs. Spaine and John Williams with an abatement of one-third of the purchase price in respect of the interest of Mrs. Weekes."

- The argument before their Lordships proceeded on the footing that the respondents, Mrs. Weekes, Mrs. Spaine and John Williams, were tenants in common of the property in question, that Mrs. Weekes, who was married in 1931, had no power to enter into the agreement of Nov. 29, but that Mrs. Spaine, who was not married until 1944, was under no such disability. It was admitted that the sums paid to these three respondents by the appellant had been repaid to him and that, if the appellant is to have specific performance of the agreement to the extent of the interests of Mrs. Spaine and John Williams, he must pay the sum of £1,266 13s. 4d. It was not disputed that this sum should in that event be paid to the fourth respondent who has taken a conveyance of the property from the first three respondents with the concurrence of Mrs. Weekes' husband, and has paid to them the price of the property. The second, third and fourth respondents appealed to the West African Court of Appeal. That court allowed the appeal on the ground that the agreement of Nov. 29, was not a sufficient memorandum within the Statute of Frauds, 1677, s. 4. Against that decision the present appeal is taken.
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The agreement of Nov. 29 apparently satisfies the requirements of the Statute of Frauds. It names the vendors and the purchaser, it specifies the subjects sold and the price, and it is signed by the vendors, the parties to be charged. Further, it states that Mr. Wright, who is named as the purchaser, has paid the price and is entitled to immediate possession. Mr. Wright is a solicitor and, admittedly, it was proved by oral evidence that he was acting in this matter as agent for the appellant. There is, however, nothing in the document to suggest that Mr. Wright was acting otherwise than as principal. The first question in this case is whether it is relevant to inquire whether the vendors, when they made the agreement, knew that Mr. Wright was acting as agent for the appellant, and whether, if such knowledge is proved, the fact that the agreement does not identify the appellant as purchaser makes it insufficient to satisfy the Statute of Frauds. WRIGHT, J., did not deal with this question—probably the point was not taken before him—but the West African Court of Appeal held that the vendors were aware that Mr. Wright was purchasing as agent for the appellant. There is evidence to support this finding and their Lordships will assume that it is correct. After so holding, the judgment of the Court of Appeal proceeds:

“It follows, therefore, that the memorandum to enable the respondent [now the appellant] to sue on it must have contained his name either as a principal or in some other way to identify him. As it clearly fails to do so, we hold that the document was not a sufficient memorandum within the Statute of Frauds.”

The authority on which the Court of Appeal rely is the judgment of LUXMOORE, L.J., in *Smith-Bird v. Blower* (1), and there is in that judgment a passage which is directly applicable to the present case. Before proceeding to examine that judgment, however, their Lordships must refer to certain earlier cases, the authority of which has never been doubted, but which do not appear to have been cited to LUXMOORE, L.J.

In *Higgins v. Senior* (2), there was an agreement in writing for the sale of goods above the value of £10, which purported on the face of it to be made by the defendant and was subscribed by him, but the defendant sought to avoid liability by proving that he made the agreement as agent for a third person and that this was known at the time to the plaintiff. It was held that this did not enable the defendant to escape liability. PARKE, B., in delivering the judgment of the court, stated the principle as follows (8 M. & W. 844):

“There is no doubt, that where such an agreement is made, it is competent to show that one or both of the contracting parties were agents for other persons, and acted as such agents in making the contract, so as to give the benefit of the contract on the one hand to, and charge with liability on the other, the unnamed principals: and this, whether the agreement be or be not required to be in writing by the Statute of Frauds: and this evidence in no way contradicts the written agreement. It does not deny that it is binding on those whom, on the face of it, it purports to bind; but shows that it also binds another, by reason that the act of the agent, in signing the agreement, in pursuance of his authority, is in law the act of the principal. But, on the other hand, to allow evidence to be given that the party who appears on the face of the instrument to be personally a contracting party, is not such, would be to allow parol evidence to contradict the written agreement; which cannot be done. And this view of the law accords with the decisions, not merely as to bills of exchange signed by a person, without stating his agency on the face of the bill; but as to other written contracts, namely, the cases of *Jones v. Littledale* (3), and *Magee v. Atkinson* (4). It is true that the case of *Jones v. Littledale* (3) might be supported on the ground that the agent really intended to contract as principal: but LORD DENMAN, in delivering the judgment of the court, lays down this as a general proposition [6 Ad. & El. 490], ‘that if the agent contracts in such a form as to make

himself personally responsible, he cannot afterwards, whether his principal were or were not known at the time of the contract, relieve himself from that responsibility.' And this is also laid down in *STORY ON AGENCY*, s. 269."

- In *Calder v. Dobell* (5), Cherry, a broker, contracted in his own name to buy goods from the plaintiffs, having previously disclosed to them that he was acting as agent for the defendant. It was held unanimously by the Court of Common Pleas and in the Exchequer Chamber that the plaintiffs were entitled to sue the defendant on this contract. It was argued for the defendant that there is a distinction between the case where one party is not aware, when making the contract, that the other is acting as an agent and the case where he is aware of that fact but, nevertheless, the contract is made by the agent in his own name, and that the principal could be sued in the former case but not in the latter.
- This argument was rejected. It was held that in this respect there is no distinction between the two cases, and the authority of *Higgins v. Senior* (2) was fully recognised. KELLY, C.B., said (L.R. 6 C.P. 499):

- "The contract was made in the name of Cherry, the agent: but the case shows that it was made on behalf of a principal who was named at the time. I think the plaintiffs had a right to sue either the agent or the principal, at their election."

- The circumstances in *Smith-Bird's* case (1) were that the defendant wished to sell two houses, that a certain Mr. Brown, who had been authorised by the plaintiffs to buy the houses, was introduced to the defendant and after some negotiation agreed to buy the houses for £510, and that the document relied on as a memorandum of this agreement contained nothing to indicate that the plaintiffs were the purchasers or that Mr. Brown was acting otherwise than on his own behalf. LUXMOORE, L.J., having held that there was an oral contract to sell the houses, said ([1939] 2 All E.R. 407):

- "... the further question arises whether there is a sufficient memorandum of that contract to comply with the requirements of the statute. In this connection, it is necessary to determine whether the defendant was aware that Mr. Brown was acting as agent only, and not as principal, for, if the defendant knew that Mr. Brown was only an agent, the memorandum, in order to comply with the statutory requirements, must either contain the names of the plaintiffs as principals or otherwise identify them, whereas, if the defendant was not aware of the fact that Mr. Brown was acting as agent for anyone, but considered that Mr. Brown was contracting on his own behalf, the position is different, and the plaintiffs as undisclosed principals can rely on any sufficient memorandum in which Mr. Brown's name appears as principal, although there is no reference therein to the plaintiffs."

- The learned lord justice cited as authority for this proposition *Lovesy v. Palmer* (6) and *Filby v. Hounsell* (7).

- In *Lovesy v. Palmer* (6) the plaintiff claimed a declaration that there was a binding contract between the defendants and himself with regard to the lease of a theatre. One question was whether there was any memorandum of the alleged agreement sufficient to satisfy the Statute of Frauds. The facts were complicated and a number of documents were alleged to form together such a memorandum.
- In these documents the plaintiff's solicitor was named, but he only purported to contract on behalf of unnamed "clients." YOUNGER, J., held ([1916] 2 Ch. 242) that at no time could this solicitor have sued or been sued on the contract. There was no reference in the documents to the plaintiff as a contracting party, and, therefore, it was impossible to identify from the documents any person who could sue the defendants or be sued by them on the alleged contract, and YOUNGER, J., held, rightly in their Lordships' judgment, that there was no memorandum sufficient to satisfy the Statute of Frauds. It had been argued for

the plaintiff that *Filby v. Hounsell* (7) had decided that it was enough that the solicitor purported to act on behalf of "clients" and that the "clients" were identified by parol evidence. With regard to this case YOUNGER, J., said ([1916] 2 Ch. 244:

"... if it was in fact decided in *Filby v. Hounsell* (7) that there could within the statute be a sufficient memorandum of an agreement where the principal was not named and the agent was not bound, then I do not think that the decision can stand with the other authorities, such as *Rossiter v. Miller* (8) and *Jarrett v. Hunter* (9), or with the statute as I read it. But I think, when one looks carefully at the case of *Filby v. Hounsell* (7), that ROMER, J., really gave the judgment he did because he assumed that the agent was liable on the contract. I cannot myself see for reasons I have given that the assumption was well founded, but if that was the basis of the learned judge's decision, then the case presents no further difficulty and is in entire harmony with all the authorities."

Their Lordships agree with this interpretation of *Filby v. Hounsell* (7) and they are unable to find either in that case, so interpreted, or in *Lovesy v. Palmer* (6) anything to justify the distinction stated in the passage quoted from the judgment in *Smith-Bird v. Blower* (1). Those cases decide that to satisfy the statute the agreement or memorandum must name or identify two parties who are contractually bound to each other. They do not decide that, where two such parties are named or identified, the statute ceases to be satisfied if it is proved that one of them was known by the other, when the contract was made, to be acting as agent for a third party. No doubt, that result would follow if it were the law that an agent who contracts in his own name is not contractually bound if the other party knew at the time that he was acting as agent. If that were so, the agreement or memorandum would, on proof of such knowledge, cease to contain the names of two contracting parties and would, therefore, cease to satisfy the statute. It is, however, clear from *Higgins v. Senior* (2) and *Calder v. Dobell* (5) that that is not the law. An agent who contracts in his own name does not cease to be contractually bound because it is proved that the other party knew, when the contract was made, that he was acting as agent. So the agreement which is made in his name does not cease in that event to contain the names of contracting parties and, therefore, does not cease to satisfy the statute. Their Lordships are satisfied that in the present case the terms of the agreement of Nov. 29 are such that Mr. Wright was contractually bound, and, therefore, the agreement satisfies the Statute of Frauds. Therefore, Mr. Wright could have sued on the agreement and, if he could sue, so can his principal, the appellant.

The other question in this appeal is whether the appellant is entitled to have specific performance of a part of his contract. He agreed to buy two houses which were owned by the first, second and third respondents as tenants in common. He cannot enforce this contract against the first respondent because she had no power to make the contract. Can he enforce it against the second and third respondents so as to require conveyance to him of the two one-third shares which belonged to these respondents? Cases have not infrequently arisen where a single vendor has been unable to give a good title to all that he has contracted to sell. The general rule in such a case has been stated by LORD ST. LEONARDS thus (SUGDEN ON VENDORS AND PURCHASERS, 14th ed., p. 317, and p. 316):

"... a purchaser generally, although not universally, may take what he can get, with compensation for what he cannot have ... In regard to the limits of the rule, that a purchaser may elect to take the part to which a title can be made at a proportionate price, it has not been determined whether under any circumstances of deterioration to the remaining property, the vendor could be exempted from the obligation of conveying that part to which a title could be made; but the proposition is untenable, that if there

is a considerable part to which no title could be made, the vendor was therefore exempted from the necessity of conveying any part."

In the present case there are three vendors. One of them cannot convey her interest, but there is nothing to prevent the conveyance of the interests which belonged to the others. This type of case is less common, but one example is *Horrocks v. Rigby* (10), where two persons agreed to sell a public house and it was found on investigation that one of them had no interest in it, but that a moiety belonged to the other. In an action by the purchaser against the latter vendor for specific performance, FRY, J., said (9 Ch.D. 182):

"I think that where an agreement is entered into by A and B with C and it afterwards appears that B has no interest in the property, A may nevertheless be compelled to convey his interest to C. I should have come to that conclusion upon principle, for I do not see why a purchaser is to lose his right against a vendor who can complete, because from a circumstance of which the purchaser had no knowledge, he has no right against persons who cannot complete. But I am very much fortified in that conclusion by a passage in the judgment of LORD HARDWICKE in *A.-G. v. Day* (11)."

In this passage, which is quoted by FRY, J. (9 Ch.D. 182), LORD HARDWICKE, L.C., said (1 Ves. Sen. 224):

"On the other hand; if on the death of one of the tenants in common, who contracted for a sale of the estate, the purchaser brings a bill against the survivor, desiring to take a moiety of the estate only, the interest in the money being divided by the interest in the estate, I should think (though I give no absolute opinion as to that) in the case of a common person he might have a conveyance of a moiety from the survivor, although the contract cannot be executed against the heir of the other."

Their Lordships would have no hesitation in following these authorities but for the judgment of LINDLEY, L.J., in *Lumley v. Ravenscroft* (12). In that case the two defendants, who appear to have been tenants in common, had agreed through their agent to grant a lease of certain premises to the plaintiff. The plaintiff brought an action for specific performance or, alternatively, for damages, and applied for an injunction to restrain the defendants until after the trial of the action from leasing the premises to any other person. It appeared that one of the defendants was an infant. DAY, J., granted an injunction, but an appeal from this order was allowed. LINDLEY, L.J., in the leading judgment of the Court of Appeal, said ([1895] 1 Q.B. 684):

"Specific performance is out of the question. You cannot get specific performance against an infant; and upon the evidence before us no case is made out for specific performance against the other defendant either. This case is not within the exception as to misrepresentation or misconduct stated in *Price v. Griffith* (13) and *Thomas v. Dering* (14), but comes within the general rule that where a person is jointly interested in an estate with another person and purports to deal with the entirety specific performance will not be granted against him as to his share. The plaintiff's only remedy is by way of damages."

Neither *Horrocks v. Rigby* (10) nor *A.-G. v. Day* (11) was cited to the court. Indeed, *Price v. Griffith* (13) and *Thomas v. Dering* (14) appear to have been the only authorities cited in argument, the argument for the plaintiff, as reported, being very meagre. Both *Price v. Griffith* (13) and *Thomas v. Dering* (14) were cases of an unusual character. *Price v. Griffith* (13) was discussed and explained by FARWELL, J., in *Hexter v. Pearce* (15). In *Price v. Griffith* (13) two tenants in common were alleged to have agreed to grant a mineral lease. The plaintiff failed to prove any agreement at all with one of them and, as FARWELL, J., points out ([1900] 1 Ch. 345) in *Hexter v. Pearce* (15), the case was really decided

on the ground that the agreement with the other was void for uncertainty. But KNIGHT BRUCE, L.J., said (1 De. G.M. & G. 84) with regard to the claim of the plaintiff to have specific performance against only one of the two tenants in common:

"If he [the tenant in common] intended to contract at all, he intended to contract for a lease of the whole colliery. Cases may be conceived where a person, who has contracted to convey more than it is in his power to convey, ought to be decreed to convey what he can, either with or without compensation to the vendee for such part of the subject-matter of the contract as the vendor is unable to convey. But a lease of an undivided moiety of a colliery is a very different thing from a lease of a whole colliery . . ."

That passage might be read as affording support for the general rule stated by LINDLEY, L.J., in *Lumley v. Ravenscroft* (12), but in *Hexter v. Pearce* (15) FARWELL, J., read it in a narrower sense. He said with regard to it ([1900] 1 Ch. 345):

"In a sense, with great deference to the lord justice, that is a truism; but the meaning, I think, is that in that case the intention of the lessor was to grant a lease of the entirety and nothing else. There would have been a certain hardship in compelling him to grant a lease of a moiety only when he did not intend it, having regard to the fact that it was a lease of mineral property. I think that is all the lord justice meant."

So interpreted, *Price v. Griffith* (13) is not an authority for any general rule. In *Thomas v. Dering* (14) there was only one vendor, and their Lordships do not think it helpful to examine the case closely, as they have found nothing in it to throw light on the position where there are more than one vendor and one of the vendors cannot complete the contract. Their Lordships have reached the conclusion that the weight which must otherwise be given to a judgment of LINDLEY, L.J., is in this case seriously diminished by the circumstances to which they have adverted, and that the decision in *Lumley v. Ravenscroft* (12) cannot be regarded as having impaired the authority of *Horrocks v. Rigby* (10) or of the opinion of LORD HARDWICKE in *A.-G. v. Day* (11). In the present case there appear to be no special circumstances which would make it wrong to grant specific performance, and their Lordships hold that the decision of WRIGHT, J., was correct in principle. It was not argued that the form of the order made by WRIGHT, J., should be altered in any way. Their Lordships will humbly advise His Majesty that this appeal should be allowed and the order of WRIGHT, J., restored. The respondents, other than the respondent Mrs. Weekes, will pay the costs of this appeal and in the West African Court of Appeal.

Appeal allowed.

Solicitors: *Lawrence Jones & Co.* (for the appellant); *Cree, Godfrey & Wood* (for the respondents).

[Reported by H. Mc.L. MORRISON, Esq., Barrister-at-Law.]

Re CHAPLIN (*deceased*). ROYAL BANK OF SCOTLAND
v. CHAPLIN AND OTHERS.

[CHANCERY DIVISION (Vaisey, J.), May 11, 1950.]

Will—"Personal chattels as defined by Administration of Estates Act, 1925"—
"Article of personal use"—Motor yacht, bought and used entirely for pleasure
cruises—Administration of Estates Act, 1925 (c. 23), s. 55 (1) (x).

By his will, made on Nov. 25, 1947, the testator, who died on Sept. 12, 1949, gave "all the residue of my personal chattels as defined by Administration of Estates Act, 1925," to his wife absolutely. In August, 1948, the testator bought a sixty-foot motor yacht, which he used entirely for pleasure cruises.

HELD: the yacht was an "article of personal use," within the definition of "personal chattels" in s. 55 (1) (x) of the Act of 1925, and, therefore, passed to the testator's wife under the specific bequest.

[FOR THE ADMINISTRATION OF ESTATES ACT, 1925, s. 55 (1) (x), see HALSBURY'S STATUTES, Second Edn., Vol. 9, p. 762.]

Cases referred to:

(1) *Palmer's Shipbuilding and Iron Co. v. Chaytor*, (1869), L.R. 4 Q.B. 209; 10 B. & S. 177; 38 L.J.M.C. 63; 19 L.T. 638; 33 J.P. 327; 24 Digest 900, 21.

(2) *Re White*, [1916] 1 Ch. 172; 85 L.J.Ch. 368; 114 L.T. 353; 44 Digest 714, 5625.

ADJOURNED SUMMONS to determine whether, on the true construction of the testator's will, a gift to his widow of the residue of his "personal chattels as defined by Administration of Estates Act, 1925," included a sixty-foot motor yacht, which was bought and used by the testator entirely for pleasure cruises.

E. G. Wright for the executors.

Droop for the widow.

Teague for the other beneficiaries.

VAISEY, J.: The testator, the second Viscount Chaplin, made his will on Nov. 25, 1947, and died on Sept. 12, 1949. The question which I have to decide arises under cl. 4 of the will, which is in the following terms:

"I make the following specific bequests free of duty: (a) all my family pictures and portraits and all my furniture to my trustees to hold the same on trust for my wife for life and after her death on trust for my son Anthony Freskin Charles Hamby Chaplin absolutely (b) all the residue of my personal chattels as defined by Administration of Estates Act, 1925, to my wife absolutely."

The will contains a residuary bequest under which the testator's widow is tenant for life and the other defendants are interested in remainder after her death. After the date of the will, *i.e.*, in or about August, 1948, the testator bought a motor yacht, the Mount Robson, a sixty-foot Viking craft, for which he paid £12,500. He bought it, and used it, entirely for pleasure cruises. He had a paid crew and entertained on the yacht members of his family and, no doubt, his friends. The question is whether the vessel is within the definition of "personal chattels," as defined by the Administration of Estates Act, 1925, s. 55 (1) (x), whereby:

"'Personal chattels' mean carriages, horses ... (not used for business purposes), motor cars and accessories (not used for business purposes), garden effects, domestic animals, plate ... linen, china ... articles of household or personal use or ornament ..."

Is this small vessel "an article of personal use" within the meaning of s. 55 (1) (x)? That is a curious way of describing it, but in such an "omnium

gatherum" it would not be surprising if it were included. The enumeration of specific articles in the definition is neither happy nor clear, but the testator has incorporated the definition in his will, and it seems to me a sufficient description to include the vessel as an article of personal use.

The authorities are not of much assistance. In *Palmer's Shipbuilding and Iron Co. v. Chaytor* (1), which was a prosecution under the Factory Acts, COCKBURN, C.J., said (L.R. 4 Q.B. 212) that in a section defining "manufacturing process" by reference to "the making any article or part of an article" [the Factory Acts Extension Act, 1867, s. 3], "article" could not be meant to apply to a ship, and, therefore, he would hesitate very much to hold that "a boy was employed in a 'factory' merely because he was employed in some department of shipbuilding," but he went on to hold that an iron plate forming part of a ship was an "article of metal," within the meaning of the section, and the boy was, therefore, employed in a factory, within the definition of "factory" in the section. That, however, was a case under the criminal law, to which different considerations apply. In *Re White* (2), YOUNGER, J., held that a motor car did not pass under a gift of "carriages," but passed under a gift of "furniture and all other articles of personal, domestic, or household use." If a motor car could pass under those words in 1916, I do not see why, in 1950, a small motor yacht should not pass under the words "articles of household or personal use." Therefore, although the matter is not as clear as it might be, I shall declare that on the true construction of the will the motor yacht, the Mount Robson, passed under the specific bequest, contained in cl. 4 (b) of the will, of the residue of the testator's "personal chattles as defined by Administration of Estates Act, 1925."

Declaration accordingly.

Solicitors: *Taylor and Humbert* (for all parties).

[Reported by R. D. H. OSBORNE, Esq., Barrister-at-Law.]

BURROWS v. HALL.

[KING'S BENCH DIVISION (Lord Goddard, C.J., Humphreys and Morris, JJ.), May 11, 19, 1950.]

Street Traffic—Insurance against third-party risks—Driving uninsured motor vehicle—Disqualification—Power to limit disqualification to driving of vehicle in relation to which offence committed—Road Traffic Act, 1930 (c. 43), s. 6 (1), s. 35 (2).

A lorry driver was convicted of having used his private motor car on a road, there not being in force in relation to such user a policy of insurance or security against third-party risks, contrary to the Road Traffic Act, 1930, s. 35 (1), and was disqualified for holding or obtaining a driving licence for twelve months. On appeal to quarter sessions the recorder, under s. 6 (1) of the Act, limited the disqualification to the driving of a vehicle of the same class or description as that in relation to which the offence was committed, *viz.*, a private motor vehicle, in order not to prevent the lorry driver from following his occupation.

HELD: the recorder was entitled so to limit the disqualification under s. 6 (1) which applied to disqualifications under the Act generally (except under Part IV).

[FOR THE ROAD TRAFFIC ACT, 1930, s. 6 (1) and s. 35 (2), see HALSBURY'S STATUTES, Vol. 23, pp. 614, 615, 636.]

CASE STATED by the recorder of Rotherham.

The respondent, who had been a motor lorry driver for eighteen years, had been convicted by Rotherham justices of having used an uninsured motor car on a road contrary to the Road Traffic Act, 1930, s. 35 (1). He was fined £5 and disqualified for holding or obtaining a driving licence for twelve months. On an appeal by him to quarter sessions, the recorder held that there were no special reasons to justify revoking the disqualification, but, having regard to the fact that the uninsured car had no relationship to the goods vehicle which the respondent drove for a living, he ordered that the disqualification be limited to "the driving of a motor vehicle of the same class or description as the vehicle in relation to which the offence was committed" under the Road Traffic Act, 1930, s. 6 (1). The appellant, the chief constable, appealed.

A. B. Boyle for the appellant.

The respondent did not appear.

Cur. adv. vult.

May. 19. **LORD GODDARD, C.J.**, read the following judgment: This is a Case stated by the recorder of Rotherham arising out of an appeal by the respondent, Richard James Burrows, who was convicted by a court of summary jurisdiction of using an uninsured motor car on a road, contrary to the Road Traffic Act, 1930, s. 35 (1). The respondent was fined £5, and was disqualified for holding or obtaining a driving licence for a period of twelve months. It was in substance against the disqualification that the appeal was brought, and on the hearing of the appeal it was not contended that special reasons existed which would entitle the justices or quarter sessions to refrain from imposing disqualification. The whole point of the case turned on whether the recorder had power to limit the disqualification to the driving of a motor vehicle of the same class or description as the vehicle in relation to which the offence was committed.

The respondent is a lorry driver by occupation, but he was also the owner of a small private car, and it was in respect of that car that the prosecution was brought. The recorder held that, although the court was bound to impose disqualification under s. 35, he had power under s. 6 of the Act to limit the disqualification to the driving of a private motor vehicle, and that would not prevent the respondent from following his occupation as a lorry driver. The appellant, the chief constable, contended that there was no room for applying s. 6 where the disqualification had to be imposed under s. 35, and it was at his instance that this Case was stated.

Section 35 (2) obliges a court, in the absence of special reasons, to impose the penalty of disqualification for a period of twelve months, and goes on to say:

"A person disqualified by virtue of a conviction under this section or of an order made thereunder for holding or obtaining a licence shall, for the purposes of Part I of this Act, be deemed to be disqualified by virtue of a conviction under the provisions of that Part."

Turning to Part I of the Act, one finds that it deals, first, with the classification of motor vehicles; secondly, with the licensing of drivers, including provisions as to disqualification and endorsement of licences; and, thirdly, it contains provisions as to driving and offences in connection therewith. Section 35 is contained in Part II of the Act. The provisions of Part I appear to the court to deal with disqualification and endorsement generally, and also with certain offences, such as reckless and careless driving, for which disqualification in some cases must, or in others may, be imposed, and there are other offences for which the endorsement of a licence must be imposed, and in which disqualification need not, but may, follow. The important section is s. 6 which provides:

"(1) Any court before which a person is convicted of any criminal offence in connection with the driving of a motor vehicle (not being an offence under Part IV of this Act)—(a) may in any case, except where otherwise expressly provided by this Part of this Act, and shall where so required by this Part

of this Act, order him to be disqualified for holding or obtaining a licence for such period as the court thinks fit; and (b) may in any case, and shall where a person is by virtue of a conviction disqualified for holding or obtaining a licence, or where an order so disqualifying any person is made or where so required by this Part of this Act, order that particulars of the conviction and of any disqualification to which the convicted person has become subject shall be endorsed on any licence held by the offender: Provided that, if the court thinks fit, any disqualification imposed under this section may be limited to the driving of a motor vehicle of the same class or description as the vehicle in relation to which the offence was committed."

A

Sub-section (2) gives a right of appeal against disqualification. Section 7 contains other provisions as to disqualification and suspension, and enables a disqualified person to apply to the court at any time after the expiration of six months from the date of the conviction to remove any remaining period of disqualification. It also makes it a specific offence for a disqualified person to drive during the period of disqualification. There is no doubt, therefore, that if a person is convicted, say for the dangerous driving of a private motor vehicle, the disqualification can be limited to that class of motor car, and the court need not disqualify him from driving a lorry, that is to say, a commercial vehicle.

B

C

By s. 35 (2), which is in Part II, it is provided:

"... a person disqualified by virtue of a conviction under this section or of an order made thereunder for holding or obtaining a licence shall, for the purposes of Part I of this Act, be deemed to be disqualified by virtue of a conviction under the provisions of that Part."

D

This seems to us to make the provisions of Part I dealing with disqualification generally applicable to disqualification imposed under s. 35. It is a criminal offence in connection with the driving of a motor vehicle, and although this particular offence is included in Part II of the Act, which is that Part which deals with the compulsory insurance of motor vehicles, we think it is quite clear that the legislature intended that a disqualification for an offence against that Part of the Act should be treated in all respects in the same way as disqualification imposed for offences against Part I. For these reasons, we are of opinion that the recorder was right in the view that he took and that he could limit the disqualification to the driving of a private motor vehicle only. Having that power, it cannot be doubted that this was a very proper case in which to exercise it. The appeal is dismissed.

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Appeal dismissed.

Solicitors: *Hosking & Berkeley*, agents for *J. P. Crehan*, Rotherham (for the appellant prosecutor).

[Reported by F. A. AMIES, ESQ., Barrister-at-Law.]

Re S. (An Infant).

[CHANCERY DIVISION (Roxburgh, J.), May 9, 23, 1950.]

Infant—Application to make ward of court—Need for infant to be made respondent to originating summons—Law Reform (Miscellaneous Provisions) Act, 1949 (c. 100), s. 9.

A

An infant should not be made a respondent to an originating summons for an order making the infant a ward of court under the Law Reform (Miscellaneous Provisions) Act, 1949, s. 9, unless the master or a judge so directs.

B

Case referred to:

(1) *Brown v. Collins*, (1883), 25 Ch.D. 56; 53 L.J.Ch. 368; 49 L.T. 329; 28 Digest 335, 2017.

PROCEDURE SUMMONS to determine whether the infant was a necessary party to proceedings by the father to have the infant constituted a ward of court under the Law Reform (Miscellaneous Provisions) Act, 1949, s. 9.

C

R. L. Edwards for the applicant, the father.

F. B. Alcock for the respondent, the mother.

Cur. adv. vult.

May 23. **ROXBURGH, J.**, read the following judgment. This is an application for an order that an infant be made a ward of court under the Law Reform (Miscellaneous Provisions) Act, 1949, s. 9. The infant might, of course, have herself applied by her next friend for such an order, but this is an application by her father, to which her mother has been made respondent. The question is whether the infant is also a necessary party.

D

The Act itself does not supply the answer. At first sight it might seem strange to make an order about a person who is not a party to the proceedings. On the other hand, the infant is generally very young and the appointment of a guardian *ad litem* and service on him or her involves expense which usually results in no corresponding benefit. The court would, of course, not make the order if in doubt whether it was for the infant's benefit, and it has indisputable jurisdiction to order the infant to be made a respondent if it desires to do so. For example, the infant might be approaching full age, or the parties might be so wrapped up in matrimonial disputes that they cared nothing for the infant. The court has an unfettered discretion, but I propose to express the view, after consultation with my brethren of the Chancery Division, that an infant should not be made a respondent to an originating summons under the Act unless the master or a judge so directs, and I give no such direction in the present case.

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Order accordingly. Costs to be costs in the cause.

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Solicitors: *Warren, Murton & Co.* (for the applicant); *Tuck & Mann*, agents for *Wallace Robinson & Morgan*, Birmingham (for the respondent).

[Reported by H. Mc.L. MORRISON, Esq., Barrister-at-Law.]

Re STERN. STERN *v.* STERN.

[CHANCERY DIVISION (Romer, J.), May 5, 12, 1950.]

Infant—Maintenance—Justices' order enforcing previous maintenance order—'Right of appeal to High Court—Guardianship of Infants Act, 1925 (c. 45), s. 7 (3).

On Nov. 30, 1945, a court of summary jurisdiction made an order under the Guardianship of Infants Acts, 1886 and 1925, by consent of the parties, under which the custody of an infant was ordered to be given to the mother and the father was ordered to pay £1 a week for its maintenance. The father fell into arrears with the payments; on Feb. 25, 1950, the mother issued a summons against him in respect of them; and on Mar. 18, 1950, the court of summary jurisdiction ordered the father to pay the arrears, which then amounted to £128, within six months. The father appealed against the order of Mar. 18, 1950.

HELD: the orders against which, under the Guardianship of Infants Act, 1925, s. 7 (3), an appeal lay to the High Court were orders made by a court of summary jurisdiction under the express provisions of the Guardianship of Infants Acts, 1886 and 1925; the order under appeal was not such an order, but was made under the power conferred by the Children Act, 1948, s. 53, on a court of summary jurisdiction to enforce compliance with an order previously made by that court in such a case as the present; and, therefore, the court had no jurisdiction to hear the appeal.

Re Queskey ([1946] 1 All E.R. 717), *Ruther v. Ruther* ([1903] 2 K.B. 270), and *Griffiths v. Griffiths* (1909) 25 T.L.R. 544, *applied*.

[AS TO APPEALS TO HIGH COURT FROM COURTS OF SUMMARY JURISDICTION, see HALSBURY, Hailsham Edn., Vol. 21, pp. 722-726, paras. 1251-1256; and FOR CASES, see DIGEST, Vol. 33, pp. 407-409, Nos. 1169-1172, 1183-1185.]

Cases referred to:

- (1) *Re Queskey*, [1946] 1 All E.R. 717; [1946] Ch. 250; [1947] L.J.R. 182; 175 L.T. 107; 110 J.P. 272; 2nd Digest Supp.
- (2) *Ruther v. Ruther*, [1903] 2 K.B. 270; 72 L.J.K.B. 826; 67 J.P. 359; 27 Digest 566, 6250.
- (3) *Griffiths v. Griffiths*, (1909), 25 T.L.R. 544; 73 J.P. 391; 27 Digest 569, 6274.

APPEAL by the father from an order of the Carmarthen justices, dated Mar. 18, 1950, ordering him to pay to the mother £128, being arrears of a weekly payment which he had been ordered by the justices on Nov. 30, 1945, to make to the mother in respect of the maintenance of their infant child.

H. T. Evans for the father.

Edmund Davies, K.C., and *J. Verdi Jenkins* for the mother.

ROMER, J.: This is an appeal by the father of a certain infant against an order made by justices at Carmarthen on Mar. 18, 1950, under which he was ordered to pay to the respondent, the mother of the infant, a sum of £128 odd, being arrears of maintenance which the father was liable to pay for the benefit of the infant under an order made on Nov. 30, 1945. I am told that the order of Nov. 30, 1945, which was made under the Guardianship of Infants Acts, 1886 and 1925, was a consent order, by which the custody of the child was given to the mother and the father was ordered to pay the sum of £1 a week for the maintenance of the infant in the manner therein directed. The father fell into arrears in respect of those weekly payments, and, accordingly, on Feb. 25, 1950, the mother issued a summons against the father complaining of those arrears. When the matter came before the justices, they went into certain evidence which was called before them, and eventually they made the order from which this appeal has been brought. That order recites the

mother's complaint, adjudges that the complaint is true, and orders that the father do pay to the mother the amount of the arrears within six months of the date of the order. Then it is provided that the order shall not be enforced until after the expiration of fourteen days from the date thereof.

When this appeal was opened it suggested itself to me that this court had no jurisdiction to entertain an appeal from an order made by justices simply enforcing an order previously made by them under the Guardianship of Infants Acts for the maintenance of an infant, and I asked that the matter should be further looked into. That has been done, and it has been argued before me today. Counsel for the father has contended that this court has jurisdiction to entertain the appeal. It is, of course, clear that litigants have no inherent rights of appeal, and unless a right of appeal is expressly conferred *prima facie* no appeal will lie. While accepting that as a true proposition, counsel says that the father's right to appeal is a statutory right conferred by the Guardianship of Infants Act, 1925, s. 7 (3), which provides:

"Where on an application to a court of summary jurisdiction under the Guardianship of Infants Act, 1886, as amended by this Act, the court makes or refuses to make an order, an appeal shall, in accordance with rules of court, lie to the High Court."

It appears to me to be relevant to inquire what orders are authorised by the Guardianship of Infants Acts, 1886 and 1925. Under s. 5 of the Act of 1886 it is provided that the court may make orders as to the custody of infants and the right of access thereto of either parent on the application of the infant's mother

". . . and may alter, vary, or discharge such order . . ."

Under s. 6, the court has power to remove guardians, and under s. 7 it may in certain events declare that the parent is a person unfit to have the custody of the children of the marriage. Those are the orders which what is left of the Guardianship of Infants Act, 1886, expressly authorises the court to make, and s. 9, which defines what is meant by "the court," does not include courts of summary jurisdiction. Section 10 provides:

"In England and Ireland an appeal shall lie to the High Court from any order made by a county court under this Act; and, subject to any rules of court made after the passing of this Act, any such appeal shall be heard by a judge of the Chancery Division . . ."

It would appear to me that the words "an appeal shall lie . . . from any order made by a county court under this Act" refer to any of the orders to which I have referred, including an order under s. 5 altering, varying or discharging a previous order.

By the Act of 1925 certain further powers are conferred on the courts, and s. 7 of the Act extends the definition of "court" by providing:

"(1) For the purposes of the Guardianship of Infants Act, 1886, as amended by this Act, the expression 'the court' shall include a court of summary jurisdiction."

That sub-section then qualifies the powers of that court in manner therein indicated. Section 3 of the Act of 1925 provides:

"(1) The power of the court under s. 5 of the Guardianship of Infants Act, 1886, to make an order as to the custody of an infant and the right of access thereto may be exercised notwithstanding that the mother of the infant is then residing with the father of the infant. (2) Where the court under the said section as so amended makes an order giving the custody of the infant to the mother, then, whether or not the mother is then residing with the father, the court may further order that the father shall pay to the mother towards the maintenance of the infant such weekly or other periodical

sum as the court, having regard to the means of the father, may think reasonable . . . (4) Any order so made may, on the application either of the father or the mother of the infant, be varied or discharged by a subsequent order."

The order of Nov. 30, 1945, was made under s. 3 (2). Section 4 empowers the court in certain cases to appoint a guardian on the death of the father or the mother of the infant, and s. 5 confers a power on the court to make orders with regard to testamentary guardians, including the power to order that the mother or father shall pay to the guardian certain sums towards the maintenance of the infant concerned. Section 6 empowers the court to make orders if disputes arise between joint guardians. Sub-section (3) of s. 7 I have already read. Sub-section (4) provides:

"An order of a court of summary jurisdiction for the payment of money under the Guardianship of Infants Act, 1886, as amended by this Act, shall be enforceable in like manner as an order for the payment of a civil debt recoverable summarily."

That sub-section was repealed by the Children Act, 1948, s. 59 and sched. IV, and it was replaced by s. 53 of the latter Act, which provides:

"An order of a court of summary jurisdiction for the payment of money under the Guardianship of Infants Act, 1886, whether made before or after the commencement of this Act, may be enforced, varied or revoked in like manner as an affiliation order, and the enactments relating to affiliation orders shall apply accordingly, with the necessary modifications."

Returning to the Guardianship of Infants Act, 1925, s. 8 provides for the enforcement of orders for the payment of money, and by sub-s. (1) it enacts that persons who are ordered to make payments of money shall give notice of change of address and so on. Sub-section (2) provides:

"Where the court has made any such order [for the payment of money under the Guardianship of Infants Acts] the court shall, in addition to any other powers for enforcing compliance with the order, have power . . ."

and then it sets out that the power is, in effect, to attach, in proper cases, a pension or income of the person liable. Section 9 deals with the consents required to the marriage of infants.

It would appear to me that among the orders made by a court of summary jurisdiction from which an appeal would lie to this court by virtue of s. 7 (3) of the Act of 1925 would be a refusal by the court to vary or discharge a previous order when a proper application had been made to the court asking it so to do, because that is one of the matters in which the court of summary jurisdiction is expressly authorised to make an order under the provisions of this Act. The only question, however, which I have to decide at the moment is whether an order by the justices simply enforcing a previous order for maintenance is an order from which an appeal will lie under s. 7 (3). In my judgment, the answer is in the negative. It appears to me that the orders to which s. 7 (3) relates are orders made by a court of summary jurisdiction under the express provisions of the Act of 1886, as amended by the Act of 1925, that is to say, that it has to be established that the court was asked to make one of the orders which the court is expressly authorised to make under these Acts, and that the court made such an order, on the one hand, or refused to make such an order, on the other, and, provided that is established, then an appeal will lie to this court under the express right of appeal conferred by s. 7. In my view, s. 7 (3) does not extend to any orders other than those which I have attempted to define. It appears to me that that is the logical result of the whole framework of the Acts and also of the opening words of s. 7 (3), which are:

“Where on an application to a court of summary jurisdiction under the Guardianship of Infants Act, 1886 . . .”

A The order under appeal was not made under or by virtue of the Guardianship of Infants Acts. It was made under the power which the court of summary jurisdiction had for enforcing compliance with its previous order. A court has an inherent jurisdiction to enforce the orders that it makes, but, apart from that, prior to 1948 the order of a court of summary jurisdiction for the payment of money was, by virtue of s. 7 (4), which was repealed, “enforceable in like manner as an order for the payment of a civil debt recoverable summarily.” In other words, the appropriate machinery up to 1948 was that to which the Summary Jurisdiction Act, 1879, s. 35, relates. That was the position until the passing of the Children Act, 1948, when in its place was introduced the machinery applicable to affiliation orders.

B That is the position now, and that was the position when the order under appeal was made, and it seems to me that, whether the justices were acting under some inherent jurisdiction, or whether they were acting under s. 53 of the Act of 1948, or how otherwise they were acting in making this order, they certainly were not exercising any powers which were conferred on them by the C Guardianship of Infants Acts, but, on the contrary, they were exercising the powers the existence of which is recognised by the legislature in s. 8 (2), where it provides:

“Where the court has made any such order [to make payments] the court shall, in addition to any other powers for enforcing compliance with the order, have power . . .”

D to attach a pension or income. So, if I am right in thinking that s. 7 (3) only refers to orders made under the authority of the Guardianship of Infants Acts, then this order was not made under the authority of those Acts, but was made either under the inherent authority or under the Children Act, 1948, and, consequently, no appeal lies under s. 7 (3). It is not suggested that any other right of appeal exists.

E Those would have been the views at which I should have arrived had the matter been free from authority, but it is not wholly free from authority. The right of appeal under the Guardianship of Infants Acts was considered (although for another purpose) by VAISEY, J., in *Re Queskey* (1). That was an appeal to this court from a refusal by justices to give their authority to the marriage of the applicant. VAISEY, J., held that the application was made to the justices, F not under the Act of 1886, as amended by the Act of 1925, but under the Act of 1925 alone, and, accordingly, it was outside the scope of the appellate section, namely, s. 7. In the course of his judgment he said ([1946] All E.R. 718):

G “In the present case the application was made to the justices owing to the refusal of consent by the appellant’s parents. The only provision in the Act of 1925 which deals with appeals is s. 7 (3), which provides, ‘where on an application to a court of summary jurisdiction under [the Act of 1886], as amended by this Act, the court makes or refuses to make an order, an appeal shall . . . lie to the High Court.’ The difficulty in the appellant’s way is that that from which she seeks to appeal is the making or refusal of an order, not on an application under the Act of 1886 as amended by the H Act of 1925, but on an application under the Act of 1925 only. It seems to me plain that s. 7 (3) relates solely to those matters of guardianship and custody to which both the Acts extend.”

It is, I think, clear that the learned judge, when saying that “s. 7 (3) relates solely to those matters of guardianship and custody to which both the Acts extend,” did not mean strictly to confine himself to those matters without more, but was intending to include in them such ancillary matters as, for example, access or maintenance. Subject to that qualification, which, as I say, is implicit

in what the learned judge said, I think that his view of the Act was that the right of appeal was so confined, and to that extent that supports the view which I have formed that it does not extend to an order made by the justices in the exercise of a jurisdiction which is not conferred by the Guardianship of Infants Acts themselves.

Counsel for the father very properly referred me to two cases, which were not under the Guardianship of Infants Acts, but which are, I think, of some assistance. The first was *Ruther v. Ruther* (2). The headnote there is:

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"Where an order for a weekly payment by a husband to his wife is made under the Summary Jurisdiction (Married Women) Act, 1895, and the wife subsequently commits adultery, the husband is entitled under s. 7 of the Act, on proof thereof before a court of summary jurisdiction, to have the order discharged in spite of a finding by the court that he has been guilty of conduct conducing to the adultery; and he is not liable to make any further payments to his wife, although the order may not have been in terms discharged by the adjudication as to the wife's adultery. The decision of a court of summary jurisdiction upon an information or complaint by a married woman alleging that payments due to her from her husband under an order made under the Act of 1895 are in arrear, is not a matter in respect of which an appeal lies under s. 11 of that Act to the Probate, Divorce, and Admiralty Division; but the court has power to state a Case for the opinion of the King's Bench Division upon a point of law arising on the information."

LORD ALVERSTONE, C.J., said that he was clearly of opinion that in the circumstances of that case an appeal by way of Case Stated lay to that Division of the High Court. Then he said ([1903] 2 K.B. 274):

"The Act of 1895 provided a new and amended procedure for making orders for the maintenance of wives, and by s. 9 it is enacted that the payment of any sum of money directed to be paid by an order under the Act may be enforced in the same manner as the payment of money is enforced under an order of affiliation."

He goes on to say what that procedure is, and then deals with the facts of the case, as he had indicated that the court would before hearing the preliminary objection to their jurisdiction. WILLS, J., said (*ibid.*, 275):

"With regard to the preliminary objection the matter stands thus. Orders for payment made under the Act of 1895 are by s. 9 to be enforced in the same way as affiliation orders; and on looking at s. 4 of the Bastardy Laws Amendment Act, 1872, one sees what the procedure is. Therefore an order of committal for non-payment is not an order made under the Act of 1895, and is not one to which s. 11 of that Act applies. It stands on the same footing as an order of committal made in an ordinary affiliation case. That order is of course subject to the Summary Jurisdiction Act, 1857, s. 2, and to the Summary Jurisdiction Act, 1879, s. 33, which give justices power to state a Case after the determination of any information or complaint. These provisions are by s. 54 of the latter Act made specifically applicable to sums due on affiliation orders or on orders enforceable as affiliation orders. The magistrate therefore had jurisdiction to state this Case."

The topic was rather more fully discussed, perhaps, in the second case, *Griffiths v. Griffiths* (3). The headnote there is:

"An appeal does not lie to a Divisional Court of the Probate, Divorce, and Admiralty Division from an order merely enforcing the payment of arrears of maintenance due under a separation order made under the Summary Jurisdiction (Married Women) Act, 1895."

The appeal was by a man against a ruling or decision of the metropolitan magistrate sitting at the Thames Police Court whereby he was ordered to pay his wife a certain sum representing eighty-three weeks' arrears of maintenance payable and due to her under an order dated Sept. 28, 1903, and made on the ground of his desertion. Counsel for the wife took the preliminary objection that no appeal lay to the Divisional Court against the magistrate's ruling. He developed that argument and referred to *Ruther v. Ruther* (2). In the course of the argument, BIGHAM, P., said (25 T.L.R. 544):

"But this is not an 'order' for payment at all—that was made in 1903.

What this woman is now asking for is that the order should be enforced by payment of the arrears."

BARGRAVE DEANE, J., asked the husband's counsel what he suggested the magistrate had said or done which was wrong, and the President said (*ibid.*):

"There has been no appeal against the original order, not even to vary it.

All you are now objecting to is that the magistrate has decided that if your client does not pay he must go to prison."

Then the President said he was not satisfied that they had jurisdiction to hear the case and asked what records had been drawn up. He was told (*ibid.*, 545):

"No 'order,' but the entry in the court records is as follows:—'£59 5s. and £3 3s. costs d.d. three months'—namely, that failing payment of the amount of arrears and costs, and in default of distress, the husband should go to prison for three months."

The report continues (*ibid.*):

"The President, in the course of his judgment, said that in 1903 the wife obtained an order for maintenance on the ground of her husband's desertion. He paid for some considerable time—down to June, 1907—when he fell into arrears now amounting to £59 5s., representing eighty-three weeks. In these circumstances the wife applied to the magistrate to enforce payment, and the husband having appeared before the magistrate, and the wife stated her case, the magistrate made what (for want of a better expression) he (the learned President) would call an 'order,' directing payment of the arrears, or distress, or in default imprisonment in the terms of s. 4 of the Bastardy Laws Amendment Act, 1872, as provided for by s. 9 of the Act of 1895. That order the magistrate had jurisdiction to make, as the original order of 1903 had never been appealed against, nor had any attempt been made to vary or rescind it, and the order which it was now sought to appeal against was merely one enforcing payment of the sums due under the order of Sept. 28, 1903. This court was not, under s. 11 of the Act of 1895, in such circumstances the proper tribunal to appeal to, and the judgments of the Lord Chief Justice and of WILLS, J., in *Ruther v. Ruther* (2) ([1903] 2 K.B. 274, 275), were conclusive on that point, and that case was a distinct authority for the proposition that an appeal does not lie to the Divorce Divisional Court from an order merely enforcing payment of money."

and the court allowed the preliminary objection.

Counsel for the father says that those cases are distinguishable, because they deal with separate statutes and orders which the justices had made for committal under the Bastardy Laws Amendment Act, 1872, and also suggested that in *Griffiths v. Griffiths* (3), the President's views were to some extent coloured by the impression he had formed on the merits. It is true that neither of these cases arose out of the Guardianship of Infants Acts, but it appears to me that they afford considerable guidance as to the attitude which this court ought to adopt, especially having regard to the fact that the affiliation machinery has now been incorporated in the Guardianship of Infants Acts by the Children Act, 1948,

s. 53, for the purpose of enforcing orders which have been made for maintenance, and I think they bear out strongly the views which I have already formed and which I have attempted to express. Counsel for the father also says that there clearly ought to be a right of appeal from the order which the justices have made, and that, as matters relating to infants have always been assigned to this Division or to its predecessor, the Court of Chancery, this court is the proper court to hear such an appeal. As I say, there is no right of appeal unless it is expressly conferred by statutory authority, and I have already explained that, in my view, this appeal is not within the only statutory authority to which the father can point, namely, s. 7 (3) of the Act of 1925.

That is enough to conclude this case, and it is not necessary, I think, for me to express any further views as to what rights, if any, the present appellant may have, but I should point out that, on the assumption that he has no right of appeal to any other court from the order which the justices have made, it does not result in the hardship which is suggested, because he himself made an application to the justices to deal with the order of 1945 by varying or discharging it. In other words, he made an application to the justices asking them to exercise the statutory jurisdiction conferred by the Guardianship of Infants Acts on courts of summary jurisdiction by s. 3 (4) of the Act of 1925 and s. 5 of the Act of 1886, and as the court, although appealed to in that way to exercise that jurisdiction, refused to make an order, it appears to me, though I do not decide it because it is not before me, that this court would have power to maintain an appeal from such refusal under the provisions of s. 7 (3) of the Act of 1925. Accordingly, a man in the position of the father could make such an application at any time, and if it failed he could have the matter brought before this court for review. But what he cannot do, as I hold, is to ask this court to review, by way of appeal, an order made by the justices merely to enforce an order previously made for maintenance, an order enforcing it in the sense that it is an order compelling the man against whom the previous order has been made to comply with its terms. Accordingly, I hold that I have no jurisdiction to entertain this appeal and I dismiss it with costs.

Appeal dismissed with costs.
Solicitors: *Lynch, Hall & Son* (for the father); *Helder, Roberts, Giles & Co.*, agents for *W. H. Rogers & Rogers*, Carmarthen (for the mother).

[Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.]

YOUNG v. RANK AND OTHERS.

[KING'S BENCH DIVISION (Devlin, J., with a City of London Special Jury), May 15, 16, 17, 18, 1950.]

Practice Trial by jury—Submission of no case to answer—Defendants not put to election whether to call evidence—Discretion of judge.

In an action for damages for breach of warranty, for wrongful dismissal, and for conspiracy, before a judge and a city of London special jury, counsel for the defendants submitted at the close of the plaintiff's case that on the issues of breach of warranty and conspiracy there was no evidence to go to the jury. This submission the judge acceded to without putting counsel to election whether he was, or was not, going to call evidence, and, consequently, no election was made.

HELD: in a jury action, as distinct from a trial before a judge alone, the judge had a discretion whether he would require counsel to elect either to stand on his submission or to call his evidence.

Dictum of the court in Alexander v. Rayson ([1936] 1 K.B. 178), *followed*.

Dicta of GODDARD, L.J., in Parry v. Aluminium Corpn., Ltd. (1940) (162 L.T. 237) and of LORD GREENE, M.R., in *Laurie v. Raglan Building Co., Ltd.* ([1941] 3 All E.R. 337), *not followed*.

Observations on the considerations which should be taken into account in the exercise of the discretion of the judge whether, on a submission of no case to answer, a ruling should be given at the close of the plaintiff's case or after taking the verdict of the jury.

[AS TO SUBMISSION OF NO CASE, see ANNUAL PRACTICE OF THE SUPREME COURT, 1949, Vol. 1, p. 658.]

Cases referred to:

- (1) *Parry v. Aluminium Corpn., Ltd.*, (1940), 162 L.T. 236; Digest Supp.
- (2) *Marbe v. George Edwardes (Daly's Theatre), Ltd.*, [1928] 1 K.B. 269; 96 L.J.K.B. 980; 138 L.T. 51; 42 Digest 911, 71.
- (3) *Alexander v. Rayson*, [1936] 1 K.B. 169; 105 L.J.K.B. 148; 154 L.T. 205; Digest Supp.
- (4) *Laurie v. Raglan Building Co., Ltd.*, [1941] 3 All E.R. 332; [1942] 1 K.B. 152; 111 L.J.K.B. 292; 166 L.T. 63; 2nd Digest Supp.
- (5) *Turner (otherwise Robertson) v. Metro-Goldwyn-Mayer Pictures, Ltd.*, [1950] 1 All E.R. 449.

ACTION for damages for breach of warranty, wrongful dismissal, and conspiracy, brought by a former employee of a limited company against the chairman and managing director of the company and others.

At the close of the plaintiff's case counsel for the defendants submitted that on the issues of breach of warranty and conspiracy there was no evidence to go to the jury. The case is reported on the issue only whether in a jury action counsel, having made a submission of no case to answer, should be called on to elect to stand on the submission or to call his evidence before a ruling on the submission is given.

Fearnley-Whittingstall, K.C., Clive Burt and Ian Warren for the plaintiff.
Sir Walter Monckton, K.C., and T. G. Roche for the defendants.

DEVLIN, J.: In this case I have acceded to the submission made to me by counsel for the defendants that I should withdraw a large part of it from the consideration of the jury. Part of that submission, at any rate, was based on a contention that there was no evidence on certain aspects of the case fit to go to the jury. I did not, when counsel made that submission, put him to election whether he would or would not call any evidence, and, consequently, he made no election. He submitted to me, and I think he was right, that I had a discretion and was not obliged to put him to his election. But for a *dictum* of GODDARD, L.J., in *Parry v. Aluminium Corpn., Ltd.* (1) there would be no doubt as to the position on the authorities. Having regard to that *dictum*, however, I think it right to review the authorities shortly and state my reasons for the course I took.

In *Marbe v. George Edwardes (Daly's Theatre), Ltd.* (2) BANKES, L.J., said ([1928] 1 K.B. 277):

"But Mr. Neilson for the defendants contended that at the end of the plaintiff's case there was no evidence that the defendants in publishing the letter were actuated by malice; that it was for the judge to rule at that stage whether there was evidence to go to the jury, and that if he had done that the plaintiff must have failed. That argument has been addressed to the court on several occasions and it has been held, and I repeat now, that according to the present practice the judge has a discretion whether he will rule on the matter at the close of the plaintiff's case or whether he will defer ruling until the whole of the evidence has been called."

That practice appears to have been fully recognised in *Alexander v. Rayson* (3), which laid down the rule to be followed in cases which are tried by a judge alone—that the judge is bound to put counsel who makes the submission to his election. ROMER, L.J., delivering the judgment of the court, dealt with the point as follows ([1936] 1 K.B. 178):

“At the conclusion of the defendant’s evidence the plaintiff’s counsel submitted that there was no case to answer upon the two issues which at that stage had alone been presented to the court, that is to say, the issues of no consideration and of illegality. Where an action is being heard by a jury it is, of course, quite usual and often very convenient at the end of the case of the plaintiff, or of the party having the onus of proof, as the defendant had here, for the opposing party to ask for the ruling of the judge whether there is any case to go to the jury, who are the only judges of fact. It also seems to be not unusual in the King’s Bench Division to ask for a similar ruling in actions tried by a judge alone. We think, however, that this is highly inconvenient. For the judge in such cases is also the judge of fact, and we cannot think it right that the judge of fact should be asked to express any opinion on the evidence until the evidence is completed. Certainly no one would ever dream of asking a jury at the end of a plaintiff’s case to say what verdict they would be prepared to give if the defendant called no evidence, and we fail to see why a judge should be asked such a question in cases where he and not a jury is the judge that has to determine the facts.”

In *Parry v. Aluminium Corpn., Ltd.* (1) the Court of Appeal had to consider the same sort of point in relation to a case of negligence determined by a judge alone. Having set out the rule in the same terms in which it was set out by the Court of Appeal in *Alexander v. Rayson* (3), GODDARD, L.J., went on to say (162 L.T. 237):

“... in negligence cases the right course is for the judge to refuse to rule unless counsel says that he is going to call no evidence. HORRIDGE, J., used to say, if he was sitting with a jury: ‘Are you going to call any evidence; or are you going to let the case stay where it is?’ If counsel said: ‘I am not going to say whether I am going to call any evidence,’ then he would say: ‘You must call your evidence, and then I will rule whether or not, on the whole of the case, there is a case to go to the jury or not.’ If a judge was sitting without a jury, he does not have to say that, because he can say he will decide at the end of the case. I think that that is the proper course to take in these cases. I do not say that it is the right course in every kind of action, because in defamation cases, for instance, I believe there is authority for saying that, if it is submitted that there is no evidence of malice, the judge is bound to rule. Also in slander cases the judge must rule if the submission is made that the words are not actionable without proof of special damage and no special damage is alleged. But I think that the old practice, which I believe most judges adopted, is a sound practice, because it does prevent the chance of a defendant, unsuccessful in this court, asking that the case should go back for a new trial to have his evidence heard.”

The way in which GODDARD, L.J., stated the rule was apparently accepted by the Court of Appeal in *Laurie v. Raglan Building Co., Ltd.* (4). The leading judgment of the court was that of LORD GREENE, M.R., with which GODDARD and DU PARCQ, L.J.J., concurred. Again, it was a case where there was no jury, and in the course of his judgment the Master of the Rolls said ([1941] 3 All E.R. 337):

“That must be regarded as the proper practice to follow, and it is to be found very lucidly set out, if I may say so, in the judgment of GODDARD, L.J., in *Parry v. Aluminium Corpn., Ltd.* (1).”

I have given careful consideration to the *dictum* of GODDARD, L.J., which might seem to be in sufficiently wide terms to apply the rule to cases tried with a jury. He sets out certain exceptions—in defamation cases—and then he says that subject to such exceptions he thinks that the rule ought to apply. It was not a considered judgment, and I do not think that the learned lord justice can have been intending to overrule what had previously been held to be the practice, and one which had been fully recognised in *Alexander v. Rayson* (3). I come to the conclusion, therefore, that I have a discretion which I can properly exercise, and which I did exercise in the present case by not putting counsel for the defendants to his election.

In addition to the distinction drawn in *Alexander v. Rayson* (3) between cases tried by a judge alone and those tried by a jury, there is a further matter which I think is of some importance. In a case tried by a judge alone the Court of Appeal has a complete power of re-hearing, and if evidence for the defendant has not been taken and the court disagrees with the ruling of the trial judge, it is, in effect, prevented from exercising its power of re-hearing and has no alternative but to send the case back for re-trial, which will result in additional costs to the parties. In cases of trial by jury, the Court of Appeal has no power of re-hearing, and if the verdict of the jury is set aside for any reason, the court has no power except to send it back for re-trial. Accordingly, it appears to me that one of the advantages which flows from the practice on submission of no case in a trial before a judge alone does not arise in the case of a trial by jury.

It is, of course, always possible for the judge to postpone giving a ruling until he has taken the verdict of the jury, and that sometimes avoids the necessity of coming back for a new trial, but it seems to me that it would logically follow that, if a judge is not going to rule at the end of the plaintiff's case, there is no advantage in ruling at the end of all the evidence, for the reason that, if his ruling were held to be wrong, there would still have to be a new trial. The logical result which follows is that, if he wants to avoid expense, he must take the verdict of the jury, and there can be no question but that it lies in the discretion of the judge whether or not he will take the verdict of the jury and rule afterwards or whether he will rule first. That discretion was clearly recognised in *Turner (otherwise Robertson) v. Metro-Goldwyn-Mayer Pictures, Ltd.* (5), in which LORD PORTER pointed out ([1950] 1 All E.R. 453) some of the disadvantages which arise when the verdict of the jury is taken before the ruling is given.

Accordingly, I came to the conclusion that I had a discretion in this matter, and I exercised it in the way I have stated. The considerations which operated on my mind were these. One has to bear in mind—and it is always an anxious question for the trial judge to determine—that if his ruling is wrong it may result in additional expense to the parties. On the other hand, I think it is not irrelevant to bear in mind that to rule after taking the verdict of the jury is an illogical and sometimes unsatisfactory course, particularly when the questions involved are questions whether or not there is sufficient evidence to go to the jury. The whole reason why that question is retained in the hands of the judge as a matter of law is that a jury, not being trained by a lifetime of experience to weigh evidence, may easily be misled on matters of that sort. It seems to me it may be undesirable to leave a point of that sort to a jury, to sum up to them on the basis that there is some evidence to be considered on both sides (and the case cannot be summed up on any other basis), and then, when they have returned a verdict, to overrule it by holding that there was no such evidence. It is not a very satisfactory result for one party to feel that he has got the verdict of the jury, but that it is being overruled. I think also that a party who feels that no *prima facie* case has been made out against him ought, unless there is weighty consideration to the contrary, to be entitled to make that submission and have it dealt with, and not be obliged to submit himself or his witnesses to cross-examination in order that the plaintiff may, if he can, make out

a case in that way. Overriding all those matters, there is always the question of costs to the parties, and, on balance, in the present case I came to the conclusion that in all probability—and it is a matter about which I must speculate—the costs would be less by taking the course I did rather than the alternative course.

I observed the number of persons against whom allegations are made in the statement of claim or who are suggested to have been concerned in overt acts of conspiracy. In the statement of claim there are three conspirators alleged and a number of other persons who obviously played some part, and it seemed to me that, if the defence were fully developed, it would have taken some considerable time. If I am right in my ruling, expense will have been saved, and if I am wrong, at any rate whoever conducts a re-trial will have the benefit of knowing exactly what the law on the matter is. It is always a question also whether the point is doubtful or whether it is reasonably clear, and I am clear in my mind that the submission of the defendants was right.

Solicitors: Warren & Warren (for the plaintiff); Richards, Butler & Co. (for the defendants).

[Reported by F. A. AMIES, ESQ., Barrister-at-Law.]

R. v. TAYLOR.

[COURT OF CRIMINAL APPEAL (Lord Goddard, C.J., Humphreys, Stable, Cassels, Hallett, Morris and Parker, JJ.), May 22, 1950.]

Criminal Law—Bigamy—Defence—Absence for seven years—“Marrying a second time”—More than one bigamy—Availability of statutory defence in respect of third and subsequent bigamies—Offences against the Person Act, 1861 (c. 100), s. 57.

Criminal Law—Appeal—Power to overrule previous decisions of court—Court of Criminal Appeal—Stare decisis—Rule not applicable where liberty of subject concerned.

The appellant married his lawful wife in 1925, but he had not seen or heard from her since 1927 and did not know her to be living within that time. He contracted bigamous marriages in 1927 and 1942. In 1944 he was charged with bigamy in respect of the marriage in 1942, based on the belief that the 1927 marriage was lawful, and was acquitted when it was found that the 1927 marriage was bigamous. He was also acquitted in respect of the bigamy in 1927, as the prosecution could not prove that he knew his wife was alive when he contracted that marriage. In March, 1950, he was charged with committing further bigamies in 1946 and 1948, and being under the impression that the decision in *R. v. Treanor (or McAvoy)* ([1939] 1 All E.R. 330) prevented him from relying on the defence afforded by the proviso to s. 57 of the Offences against the Person Act, 1861, of seven years' absence and lack of knowledge that his wife was alive within that time, he pleaded Guilty and was sentenced on both charges. He appealed against sentence, and the court, on learning that he had not seen his wife for over twenty years and in 1946 and 1948 did not know that she was alive, gave him leave to appeal against conviction in order to consider whether the plea of seven years' absence was available to him despite the decision in *Treanor's* case.

HELD: (i) the words “marrying a second time” in the proviso to s. 57 related to the second or bigamous “marriage” in respect of which a defendant was charged, and it was immaterial that in the period between the lawful marriage and the bigamous ceremony he had gone through other

bigamous ceremonies, and, therefore, the defence afforded by the proviso was open to the appellant.

R. v. Treanor (or McAvoy) ([1939] 1 All E.R. 330), *overruled*.

(ii) although in civil matters under the rule of *stare decisis* a court of appeal considered itself bound by its own decisions, the same rule did not apply in criminal appeals where the liberty of the subject was concerned, and, consequently, if, in the opinion of the full court, the law had been misapplied or misunderstood in an earlier case, the court would re-consider the matter.

[AS TO ABSENCE FOR SEVEN YEARS, see HALSBURY, Hailsham Edn., Vol. 9, pp. 389, 390, para. 657; and FOR CASES, see DIGEST, Vol. 15, pp. 741-743, Nos. 8007-8019, and Digest Supp.]

Cases referred to:

- (1) *R. v. Treanor (or McAvoy)*, [1939] 1 All E.R. 330; 160 L.T. 286; Digest Supp.
- (2) *R. v. Lumley*, (1869), 1 C.C.R. 196; 38 L.J.M.C. 86; 20 L.T. 454; 33 J.P. 597; 15 Digest 739, 7990.

APPEAL against conviction and sentence.

The appellant pleaded Guilty at the Central Criminal Court to two counts in an indictment charging him with bigamy. He had not heard from his wife for over twenty years and did not know if she were alive at the time of the bigamous marriages, but he pleaded Guilty in the belief that, by reason of the decision in *R. v. Treanor (or McAvoy)* (1), it was not possible for him to rely on the defence of seven years' absence. The facts appear in the judgment of the court delivered by LORD GODDARD, C.J.

R. M. Havers for the appellant.

Elam for the Crown.

LORD GODDARD, C.J., delivered the following judgment of the court.

The appellant pleaded Guilty before the recorder at the Central Criminal Court to an indictment containing two counts. In the first count he was charged that on Dec. 18, 1946, he married Lilian Smithers during the lifetime of his wife, Alice Julie Taylor, and in the second count it was alleged that on Dec. 24, 1948, he married Olive Briggs during the lifetime of his said wife.

The appellant was lawfully married to his wife, who is still alive, in 1925. In April, 1927, he went through a form of marriage with another woman. In November, 1942, having left that second woman, he went through another form of marriage. In respect of that marriage he was charged at Maidstone Assizes in November, 1944, with bigamy, but the indictment charged him with committing bigamy during the lifetime of the woman with whom he had gone through the first bigamous marriage, who was then believed to be his lawful wife. When it was shown that she was not, a verdict of Not Guilty was returned. In 1945 he was charged at the Central Criminal Court in respect of the bigamy he had committed in April, 1927, but that charge failed because there was no evidence given by the prosecution that when he went through the second ceremony of marriage in 1927 his first wife was alive. He was, however, convicted on a count in the indictment of making a false declaration for the purpose of the marriage register, and for that offence he was bound over. His habit of contracting marriages continued because he went through another ceremony of marriage in 1946 and a fourth ceremony in 1948, and it was in respect of those two marriages that he was charged at the Central Criminal Court last March and pleaded Guilty.

He appealed against his sentence, and he would not have got leave to appeal against it if he had been properly convicted, but when this court saw the papers with a view to considering whether leave to appeal against sentence should be given, it at once appeared that at the time when he went through the bigamous

ceremonies in 1946 and 1948 he had not seen his wife for very many years. The wife had said that the last time she saw him was in 1925, and it was either in 1925 or 1927 that these spouses had last seen each other. We, therefore, inquired how it was that the appellant pleaded Guilty, and his counsel (who had appeared for him at the trial) told us that he felt unable to advise him to take any other course because of the decision of this court in *R. v. Treanor (or McAvoy)* (1). In that case, in somewhat similar circumstances, the court held that, where more than one bigamous ceremony was shown, in respect of any second or subsequent bigamous ceremony, the prisoner was deprived of the defence that he had not seen his wife for seven years and not known that she was alive. That case seemed to the court to need further consideration, and, accordingly, we gave leave to the appellant to appeal against his conviction so that a full court might assemble to consider the decision in that case.

I should like to say one word about the re-consideration of a case by this court. A court of appeal usually considers itself bound by its own decisions or by decisions of a court of co-ordinate jurisdiction. For instance, the Court of Appeal in civil matters considers itself bound by its own decisions or by the decisions of the Exchequer Chamber, and, as is well known, the House of Lords always considers itself bound by its own decisions. In civil matters it is essential in order to preserve the rule of *stare decisis* that that should be so, but this court has to deal with the liberty of the subject and if, on re-consideration, in the opinion of a full court the law has been either mis-applied or misunderstood and a man has been sentenced for an offence, it will be the duty of the court to consider whether he has been properly convicted. The practice observed in civil cases ought not to be applied in such a case, and in the present case the full court of seven judges is unanimously of opinion that *R. v. Treanor (or McAvoy)* (1) was wrongly decided.

The offence of bigamy, so far as it is a temporal offence, was created in the first place by the statute 1 James 1, c. 11, where it is provided by s. 1:

"... if any person or persons within his Majesty's Dominions of England and Wales, being married, or which hereafter shall marry, do at any time after the end of the session of this present Parliament, marry any person or persons, the former husband or wife being alive... then every such offence shall be felony..."

It is clear that what is aimed at there is not merely bigamy, a second illegal ceremony, but what I may call polygamy—any number of marriages, because the words are: "shall marry any person or persons." There is a proviso:

"Provided always, that this Act, nor any thing therein contained, shall extend to any person or persons whose husband or wife shall be continually remaining beyond the seas by the space of seven years together, or whose husband or wife shall absent him or herself the one from the other by the space of seven years together, in any parts within his Majesty's Dominions, the one of them not knowing the other to be living within that time."

It is clear that under that statute the defence of absence for seven years without knowledge of the spouse being alive was a defence however many times the ceremony of marriage had taken place. I need not take up time by reading the next statute, the Offences against the Person Act, 1828, because s. 57 of the Offences against the Person Act, 1861, with which we are immediately concerned, is in substance in the same form. The section provides:

"Whosoever, being married, shall marry any other person during the life of the former husband or wife, whether the second marriage shall have taken place in England or Ireland or elsewhere, shall be guilty of felony... Provided, that nothing in this section contained shall extend to any second marriage contracted elsewhere than in England and Ireland by any

other than a subject of her Majesty, or to any person marrying a second time whose husband or wife shall have been continually absent from such person for the space of seven years then last past, and shall not have been known by such person to be living within that time, or shall extend to any person who, at the time of such second marriage, shall have been divorced from the bond of the first marriage . . . ”

A It is obvious that the words “second marriage” in the enacting part of the section must be given the same construction as must be given to those words when they appear in the proviso. It is clear that by limiting the words in the enacting part of the section which constitutes the felony to the second ceremony and not to a third and subsequent ceremonies, a man could be convicted only if he had married twice and not if he had gone through a third, fourth, or fifth subsequent ceremony. In *R. v. Treanor (or McAvoy)* (1), however, it was held that ([1939] 1 All E.R. 332):

“This proviso means precisely what it says, nothing more or less—any second marriage, and not any second or subsequent marriage.”

The court went on to say that the proviso was not to be artificially expanded into applying to a second or subsequent marriage.

C The short point on which this court can decide this case, and it seems to me to be the true way of deciding it, is this. A charge of bigamy is an allegation that on a particular day the person charged went through a ceremony of marriage when his lawful wife was alive. The court, therefore, is dealing with two ceremonies of marriage only and no more—the lawful marriage and the polygamous marriage. When the polygamous marriage is proved, it is open to the defendant to show that at the time of that polygamous marriage he had not heard of his wife for seven years, and it does not seem to this court that it is then open to the prosecution to say: “You cannot avail yourself of that defence because there have been other ceremonies of marriage between the lawful marriage and the ceremony in respect of which you are charged.” The offence committed which is charged is the offence of going through the ceremony alleged at a time when the lawful wife was alive. Therefore, a defendant has a defence if it is shown that at the time he went through the marriage which is charged against him as a felony he had not seen his wife for seven years and had not known her to be living within that time. Any other construction would lead to very astonishing results. If a man went through a form of marriage when he had not seen his wife for seven years and had not known her to be living—
D in which case he would have a good defence under the proviso—and the woman who he had married secondly died and he went through a third form of marriage, still not having known that his first wife was alive, could it be said that he could not plead absence of knowledge? It is enough to say that, while we do not differ from the opinion the court expressed in *R. v. Treanor (or McAvoy)* (1) that
E “second marriage” must be strictly construed, the second marriage which has to be considered is the second marriage charged in the indictment and no other. Therefore, for those reasons, although we do not differ from the construction put on the section in *R. v. Treanor (or McAvoy)* (1), we do differ from the result that the court there held followed from that construction. Accordingly, we hold in the present case that, although the appellant might have been charged with other offences, he should not have been convicted of the offence of bigamy, and,
F therefore, these convictions must be quashed.

Appeal allowed.

Solicitors: *Registrar of the Court of Criminal Appeal* (for the appellant);
Director of Public Prosecutions (for the Crown).

[Reported by H. McL. MORRISON, Esq., Barrister-at-Law.]

CAPITAL & PROVINCIAL PROPERTY TRUST, LTD. *v.* RICE.
RICE *v.* CAPITAL & PROVINCIAL PROPERTY TRUST, LTD.

[COURT OF APPEAL (Bucknill and Denning, L.J.J., and Hodson, J.), March 28, 29, 30, May 15, 1950.]

Rent Restriction—Standard rent—Apportionment—Flat let with another flat—Whole dwelling outside Rent Acts—Flat first let as separate dwelling subsequently—Increase of Rent & Mortgage Interest (Restrictions) Act, 1920 (c. 17), s. 12 (1) (3).

From 1934 until 1942 a flat, the rateable value of which brought it within the Rent Restrictions Acts, was let together with another flat as one dwelling, the whole, by reason of its rateable value, being outside the limits of the Acts. In 1946 the flat was first let as a separate dwelling. On an application to determine the standard rent of the flat the landlords contended that the standard rent was the rent at which the flat was let in 1946. The tenants contended that to determine the standard rent it was necessary to apportion the rent at which the two flats were let as a whole on Sept. 1, 1939.

HELD (DENNING, L.J., *dissenting*): although the flat was not let separately on Sept. 1, 1939, it was "let" within the meaning of s. 12 (1) (a) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, and to ascertain the standard rent it was necessary to apportion the rent as at that date as provided by s. 12 (3) of the Act.

Upsons, Ltd. v. Herne ([1946] 2 All E.R. 309) and *Sutton v. Begley* ([1923] 2 K.B. 694), *applied*.

[AS TO STANDARD RENT, see HALSBURY, Hailsham Edn., Vol. 20, pp. 312-314, para. 369 and 1950 Supp. ; and FOR CASES, see DIGEST, Vol. 31, pp. 564-566, Nos. 7117-7132.]

Cases referred to:

- (1) *Upsons, Ltd. v. Herne*, [1946] 2 All E.R. 309; [1946] K.B. 591; 115 L.J.K.B. 433; 175 L.T. 350; 2nd Digest Supp.
- (2) *Sutton v. Begley*, [1923] 2 K.B. 694; 92 L.J.K.B. 1086; 129 L.T. 773; 31 Digest 571, 7195.
- (3) *Marchbank v. Campbell*, [1923] 1 K.B. 245; 92 L.J.K.B. 137; 128 L.T. 283; 31 Digest 571, 7192.
- (4) *Woodhead v. Putnam*, [1923] 1 K.B. 252; 92 L.J.K.B. 137; 128 L.T. 281; 31 Digest 572, 7196.
- (5) *R. v. Marylebone County Court Judge*, [1923] 1 K.B. 365; 92 L.J.K.B. 367; *sub. nom.*, *R. v. Scully*, *Ex p. Boon*, 128 L.T. 364; 31 Digest 570, 7183.
- (6) *Barrett v. Hardy Brothers (Alnwick), Ltd.*, [1925] 2 K.B. 220; 94 L.J.K.B. 665; 133 L.T. 249; 31 Digest 561, 7090.
- (7) *Phillips v. Potter*, (1925), 94 L.J.K.B. 819; 133 L.T. 256; 31 Digest 570, 7182.
- (8) *Lindop v. Quaipe*, [1949] 1 All E.R. 456.
- (9) *Gover v. Field*, [1944] 1 All E.R. 151, 417, n; 113 L.J.K.B. 129; 170 L.T. 73 ; *sub. nom.*, *Field v. Gover*, [1944] K.B. 200; 2nd Digest Supp.
- (10) *Mitchell v. Barnes*, [1949] 2 All E.R. 719; [1950] 1 K.B. 448.
- (11) *Signy v. Abbey National Building Society*, [1944] 1 All E.R. 448; [1944] K.B. 449; 113 L.J.K.B. 486; 170 L.T. 238; 2nd Digest Supp.
- (12) *Platman v. Frohman*, [1929] 1 K.B. 376; 98 L.J.K.B. 351; 140 L.T. 405; 93 J.P. 134; Digest Supp.

APPEALS by the landlords from an order of His Honour JUDGE DALE at Bloomsbury County Court, made on Jan. 27, 1950, whereby he apportioned the rent of a flat at £171 5s. a year.

The landlords contended that the standard rent should be fixed at £250 a

year, the rent at which the flat was first let as a separate dwelling, and not, as the county court judge decided, by apportionment of the rent of the whole dwelling consisting of the two flats together.

L. A. Blundell for the landlords.

Fortune for the tenant.

Cur. adv. vult.

A May 15. The following judgments were read.

BUCKNILL, L.J.: These two appeals were heard together and concern flat No. 28, on the first floor of a building called West Hill Court, Millfield Lane, Highgate. In one case the tenant of the flat, Mr. J. M. Rice, applied to the court to apportion the rent of the flat. In the other case the landlords, the Capital & Provincial Property Trust, Ltd., applied for the standard rent of the flat to be determined. The parties agreed that, if apportionment was necessary, the rent would be £171 5s. and that, on the other hand, if there was to be no apportionment, the standard rent would be £250.

B There was no dispute as to the material facts. West Hill Court was built in about 1933, and in 1934 the present landlords bought the property. On the first floor of the building there were two flats, No. 27 and No. 28. Each flat was completely self-contained with its own front door leading on to the same landing, a kitchen, w.c. and bathroom, two bedrooms, a dining-room and a sitting-room. The judge found as a fact that the two flats were constructed as separate dwellings, having a rateable value each of an amount (*viz.*, £79) which would bring them both within the control of the Rent Restrictions Acts. The first tenant of the two flats was a Dr. Davis. He wished to use them both as one dwelling for his family, and he entered into one lease for the two flats at a rental of £430 per annum. At his request, and before he signed the lease, the partition wall in No. 28 between the dining and the sitting-room was taken down, so as to make one large room, and a communicating door was cut in the wall between this room and the adjacent room in No. 27. After the expiration of Dr. Davis' lease, in February, 1939, a Mr. Stephenson took a similar lease of the same premises at a rental of £342 10s. per annum. During the war the premises were damaged by enemy action. Mr. Stephenson vacated them and his tenancy ended. In 1942 the damage to flat No. 27 was repaired, the doorway which had been cut between the two flats was blocked up, and it was then let as a separate flat at an annual rent of £195. In 1946 No. 28 was also repaired. The partition wall between the two sitting-rooms, which had been taken down before Dr. Davis became tenant of the premises, was not replaced, and it was then let as a separate flat to Mr. Rice at an annual rent of £250.

E The question for the decision of the court was whether the standard rent of No. 28 was to be obtained by halving the rent of the two flats of £342 10s. or whether the standard rent was that at which the flat was first let as a separate flat, namely, £250. The judge held, to quote from the note of his judgment, F that:

G " . . . although occupied as one dwelling, these two flats were, in fact, let on Sept. 1, 1939, within the meaning of s. 12 (1) (a) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, as amended, and to ascertain the standard rent of each it was necessary to apportion the rent as at that date as provided for by s. 12 (3) of the said Act."

H Before considering the relevant sections and decisions, and whether they are inconsistent with the judgment of the learned judge, I would point out that in September, 1939, flat No. 28 (whether one considers it as a separate dwelling-house at that time or not) was, in fact, earning an income for the landlord which he was quite free to fix and which was presumably the market rental value. If the landlord had let flat No. 28 to Mr. Stephenson under a separate lease, the flat would clearly be a controlled flat by reason of its rateable value of £79,

and its standard rent today would be the rent then fixed. It is true that no separate rent was fixed in 1939, but I see no reason to doubt that the rent then fixed by the landlord and charged for these two identical flats was approximately double the rent which would have been charged for each individual flat, that is, £171 5s., which is the rent fixed by the judge as the standard rent. It seems to me, therefore, that his judgment is in accordance with one of the main objects of the Rent Restrictions Acts as set out in the preamble to the Increase of Rent and Mortgage Interest (War Restrictions) Act, 1915, namely: "... to restrict ... the increase of the rent of small dwelling-houses ..."

The first question to be decided, however, is whether flat No. 28, which at all material times was a dwelling-house or part of a dwelling-house, was, in fact, "let" on Sept. 1, 1939. I think that if anyone had asked the landlord in 1939 whether flat No. 28 was let, he would have answered "Yes." I know of no decided case which has laid down that a flat is not let because it has been let with another flat under one lease. On the contrary, the decision of the Court of Appeal in *Upsons, Ltd. v. Herne* (1) clearly decides the opposite. The relevant facts in that case, in so far as they resemble the facts in the present case, were that until after 1914 two flats, one of which was called flat 2A, together with a shop, were let to one Klein under a single lease at an annual single rent of £150. The three buildings were covered by one roof, but were in all other respects separate. In 1925 flat 2A, the rateable value of which had at all material times been below the limits fixed by the Rent Acts, was let separately to another person, and the question at issue was whether the standard rent of flat 2A was the rent under the separate letting, or whether it was to be fixed by apportionment of the rent of the complex of premises. The Court of Appeal held that the rent was to be fixed by apportionment. MORTON, L.J., in his judgment, said ([1946] 2 All E.R. 311):

"This separate dwelling flat 2A was let to Woolf Klein in 1911 and it was still let to him on Aug. 3, 1914. True, two other premises were included in the letting and the three were let in one lease at one rent instead of in three separate leases at three separate rents, but I cannot see how that prevents flat 2A from being 'let' within the meaning of the Act of 1920. Presumably, the three premises were let at a rent which was thought by lessor and lessee to be the fair aggregate annual rental for the three; but, whether this is so or not, I see no escape from the view that if three properties, A, B and C, are let by X to Y under one and the same lease, then each one of them is let by X to Y."

The only material difference that I can see between the facts in that case and the present is that in the present case a doorway was cut in the wall which divided the two flats, but, in my opinion, the principle enunciated by MORTON, L.J., applies with equal force to the present case. The judgment in the Court of Appeal in *Upsons, Ltd. v. Herne* (1) accorded with the decision of the Court of Appeal in *Sutton v. Begley* (2). The relevant facts in *Sutton v. Begley* (2) were that a house consisting of nineteen rooms was let to the defendants at an annual rent of £100 (the standard rent). In June, 1921, the defendants sub-let to the plaintiff four rooms at a rent of £80 per annum, and the plaintiff afterwards applied to have the rent apportioned for the purpose of determining his standard rent. The Court of Appeal, affirming the Divisional Court and the trial judge, held that the standard rent was to be fixed by apportioning the rent of £100 and was not £80. The basis of their decision was that the four rooms first let separately to the plaintiff in June, 1921, had been, in fact, let (as part of the whole house) in August, 1914. BANKES, L.J., in his judgment ([1923] 2 K.B. 699), referred with approval to the decision of the Divisional Court in *Marchbank v. Campbell* (3), given on the same day as the decision in *Woodhead v. Putnam* (4). BANKES, L.J., also referred ([1923] 2 K.B. 701) with approval to

the decision of the Divisional Court in *R. v Marylebone County Court Judge* (5). In that case SALTER, J., delivering the judgment of the court, said ([1923] 1 K.B. 368):

"... the jurisdiction [to apportion under s. 12 (3) of the Act of 1920] is given subject to two conditions only. The applicant must prove that the dwelling-house, the subject of tenancy between the parties, is within the Act, and that it is necessary for the purpose of determining the standard rent of that dwelling-house to make an apportionment, at the appropriate date, of the rent of the property in which that dwelling-house is comprised. If these two things are proved, jurisdiction to make the apportionment is given in plain terms."

If the decision of the judge that flat No. 28 was let in September, 1939, is right, it seems to me that the question whether s. 12 (3) of the Act of 1920 applies in a case where the rateable value of the whole property exceeded £100 in September, 1939, is irrelevant, just as, in my opinion, the rental value of the whole property in the cases cited by me was irrelevant. The reasons given for the decisions to which I have referred seem to me the same as those which were stated by MORTON, L.J., in *Upsons, Ltd. v. Herne* (1). If the question is whether the rooms or the flat in question were "let" or not, it seems to me that the only relevance of the amount of the rateable value of the whole property is that it is a total sum which it is necessary to apportion in order to see whether the rateable value of the rooms or flat in question are within the limits of the Rent Restrictions Acts now in force. I am therefore in favour of dismissing the appeals.

DENNING, L.J.: Although these two flats were originally built as separate flats, they were knocked into one flat before they were let, and they were let as one separate dwelling from 1934 to 1942. That one flat, by reason of its rateable value, was outside the Rent Restrictions Acts. In 1942 it was made into two flats which were afterwards let separately. Each of the separate flats is, by reason of its rateable value, within the Acts.

The question is: What is the standard rent of each flat? Is it the rent at which each was first let, or is it an apportioned part of the 1939 rent of the one whole flat? The solution to this question cannot depend on the fact that they were originally built as separate flats. The problem would be just the same if there was one whole house, built for one family and let as one whole from 1934 to 1942, the whole house being outside the Rent Acts, and then, in 1942, it was turned into two flats let separately, each within the Acts. In such a case it is clear that the landlord could have let the whole house in 1942 at an unrestricted rent, not limited to the 1939 rent. Is he not entitled, then, to let the two flats on their first lettings in 1942 also at unrestricted rents so that the first rent of each is its standard rent? That is the question, and it is the question which I propose to consider.

On this question, I venture to think that the position under the new control is very different from what it was under the old control. Under the old control of houses which followed the 1914 war, it was eventually settled, after five years of controversy, that, although a whole house was outside the Acts by reason of its rent or rateable value, nevertheless, if it was subsequently let in parts, you could apportion the rent or rateable value of the whole so as to find what were the appropriate rents or rateable values for the various parts. It was always understood, however, that the only justification for this apportionment (where the whole house was outside the Acts) was because it was "necessary" to apportion in order to find out whether the various parts were within the Acts. The important thing to remember is that in those days the application of the Rent Restrictions Acts to any part depended, not only on the rateable value of the part, but also on its rent, and so one had to apportion both the rateable value and the rent of the whole house in order to find out whether the Act applied to

the part or not. That was decided as to rateable value by *Barrett v. Hardy Brothers (Alnwick), Ltd.* (6) where SCRUTTON, L.J., said ([1925] 2 K.B. 228):

"... it is necessary to read s. 12 (3) of the Act of 1920 as applying to cases where it is necessary to apportion to find out whether the case is within the Acts."

It was decided as to rent by *Phillips v. Potter* (7), where GREER, J., said (94 A L.J.K.B. 822):

"... apportionment of the rent at which the entire house was let on Aug. 3, 1914, is the only way in which it can be determined whether the Act applies to the respondent's dwelling-house or not ..."

Once the rent was apportioned, the appropriate portion became, of course, the standard rent of the part, but, nevertheless, the only justification for the apportionment was not to find the standard rent *simpliciter*, but to find if the part was within the Acts or not. B

Under the new control of houses which has followed the 1939 war, the application of the Rent Restrictions Acts depends only on the rateable value and not on the rent. It is, therefore, no longer "necessary" to apportion the rent of the whole in order to see whether the various parts are within the Acts, because the rent has no longer anything to do with it. It is only necessary to apportion the rateable value. The Rent and Mortgage Interest Restrictions Act, 1939, clearly recognises this because it contains an express provision in s. 7 (2) which shows that one can apportion the rateable value of the whole in order to find the rateable value of the part, even when the whole is outside the Acts, but, significantly enough, there is no such provision enabling one to apportion the rent. The reason is because it is no longer necessary to apportion the rent to find out whether the part is within the Acts or not. C D

Once the reason for apportioning the rent disappears, the right to it also disappears: *cessante ratione, cessat lex*. The only ground on which the tenant can now claim an apportionment of rent—where the whole house is outside the Acts and the part within them—is by saying that it is "necessary" to apportion the rent of the whole in order to find the standard rent of the parts. This is an entirely new ground which will not bear examination because there is, in truth, no such necessity. The standard rent of any part can be ascertained perfectly well by taking the rent at which it was first let after 1939. If the owner had occupied the whole house himself until 1942 and then let it in parts, the standard rent of each part would have been the rent at which it was first let. The fact that he let the whole house to a tenant occupier until 1942 can make no difference, seeing that the house was outside the Acts altogether. That letting only makes it possible to apportion. It does not make it "necessary" to do so, and it is only if it is necessary that the court has any jurisdiction to do it. E F

This view is strikingly confirmed by s. 5 of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1938. That is an express provision for finding the standard rent of parts of a house. It says that whenever the whole house is within the Acts, one apportions the standard rent of the whole in order to find the standard rent of the parts. The plain inference is that when the whole house is outside the Acts, one does not apportion. This is a very sensible distinction. The owner of a controlled house ought not to be allowed to get more rent for his house by letting it in parts instead of one whole, and a tenant of a controlled house ought not to be allowed to make a profit by sub-letting at a higher rent than he is paying himself, so one apportions the whole to find the rent of the parts. This does not apply, however, where the whole house is outside the Acts. The owner of an un-controlled house can let it at whatever rent a tenant is prepared to pay. Why, then, should he not be able to let it in parts at whatever rents the various tenants are prepared to pay? I see no reason why not, nor, G H

apparently, did the legislature when they passed the Acts of 1938 and 1939. In the Act of 1938 they provided for apportionment only in cases where the whole house was one "to which those Acts apply." The Act of 1938 was the first Act, be it noted, where the application of the Rent Restrictions Acts was made to depend on rateable value and not on the rent, and it was the first Act in which the legislature provided for an apportionment of rent although it was not "necessary." They said that there should be an apportionment whenever the whole house was within the Acts, but not when it was outside them. When the legislature introduced the new control in the Act of 1939, based solely on rateable value—so that there was no necessity to apportion the rent—they retained s. 5 of the Act of 1938 intact and made it applicable to the new control. Numerous minor amendments were made in the various Acts, but the important words "to which those Acts apply" were retained. If the legislature did not see fit to strike them out, I do not see why we should do so, but that, after all, is what the tenant asks us to do. In order to ascertain the standard rent of a part, he wants us to apportion the rent of the whole, whether the whole house is within the Acts or not, whereas s. 5 only authorises us to do it when it is within the Acts.

If the result of this case were to be that the landlord could charge an extortionate rent for these two flats on their first letting, I should, I expect, be tempted to depart from the interpretation which I have given to these Acts, just as the courts were tempted between 1920 and 1925. They succumbed to the temptation, and afterwards regretted it, as *BANKES, L.J.*, frankly acknowledged: see *Barrett v. Hardy* (6) ([1925] 2 K.B. 223). We, however, are not subjected to any such temptation. The Landlord and Tenant (Rent Control) Act, 1949, now provides an effective check against extortionate rents on first lettings. If the tenant considers the rent to be unreasonable, he can apply to the rent tribunal for a reduction, and they will reduce it to whatever is reasonable. That is a remedy which gives him justice, and I feel no inclination to give him more.

There are no cases which give any difficulty. All the cases under the old control are beside the mark for the reasons which I have stated. *Upsons, Ltd. v. Herne* (1), although decided in 1946, was a case of old control. It was one of the very rare cases in which a court of today had to find the standard rent of a flat just as a court sitting in 1925 would have had to do, and it did it by apportioning the 1914 rent of the property in which it was comprised. The case has no bearing whatever on cases under the new control. *Lindop v. Quaipe* (8) is distinguishable because, although that was a case of new control, the application was to apportion the rateable value and not the rent. In that case, as in the present case, the standard rent of the flats should be ascertained at the figures at which they were first let, subject to reduction by the tribunal if they were unreasonable. *Gover v. Field* (9) and *Mitchell v. Barnes* (10) were cases of new control when the whole house was, by reason of its rateable value, within the Acts, and where the rent had, therefore, to be apportioned under s. 5 of the Act of 1938.

My conclusion is that in cases under the new control—which means nearly all cases nowadays—the question of apportionment depends not only on s. 12 (3) of the Act of 1920, but also on s. 5 of the Act of 1938 and s. 7 (2) of the Act of 1939. These new sections throw much light on the obscurities of s. 12 (3) which perplexed a previous generation of judges. They show that rent—as distinct from rateable value—is only to be apportioned when the whole house is within the Acts. This one whole flat was not. It is not "necessary" to apportion the rent. The standard rent of each flat is the rent at which each was first let. In my opinion, therefore, the appeal of the landlords should be allowed.

HODSON, L.J.: In these two appeals the landlords appeal against the decision of JUDGE DALE by which he declared the standard rent of the flat No. 28, West Hill Court, Highgate, to be £171 5s. per annum. The landlords contend that the judge wrongly decided that apportionment was applicable, and that,

accordingly, the standard rent should have been fixed at £250 per annum, the rent at which the flat was first let as a separate dwelling.

The flat had previously been let together with another similar flat (No. 27) as a separate dwelling occupied by one family, and on Sept. 1, 1939, the whole, that is to say, flats 27 and 28, were let together at an annual rental of £342 10s. The whole was of a rateable value outside the Rent Restrictions Acts. On conversion there was no substantial reconstruction. On Sept. 26, 1946, flat No. 28 was first let as a separate dwelling. The landlords contend that when a house outside the Act in 1939 is sub-divided into separate dwellings the standard rent of those dwellings is not found by apportionment of the rent of the uncontrolled unit, but by taking the first rent at which the parts were let as giving their standard rent. The correct principle, it is said, is that a landlord cannot get more by letting the house piecemeal than by letting it as a whole, but, if the whole is uncontrolled, he should not be penalised because he splits it up. As a secondary principle, it is said one should not look at anything outside the Acts—business rent or furnished rent—but one should look at the rent of the character contemplated by the Acts: see *Signy v. Abbey National Building Society* (11). Therefore, it is argued, a controlled rent should not be calculated by reference to an uncontrolled rent. The standard rent should, accordingly, be fixed by reference to s. 12 (1) of the Act of 1920 (as amended) and no apportionment under s. 12 (3) is necessary. The tenant, on the other hand, argues that s. 12 (3) must be given its widest possible interpretation in favour of the tenant in accordance with the policy of the Acts, part of which is to protect tenants of small dwelling-houses from paying excessive rent.

The argument of the landlords is supported by reference to s. 5 of the Act of 1938 which is imperative in requiring apportionment in order to ascertain the standard rent of a controlled dwelling-house which forms part of another controlled dwelling-house. It reads:

“Where a dwelling-house to which the principal Acts apply is part of another dwelling-house to which those Acts apply, the standard rent of the first-mentioned dwelling-house as from Sept. 29, 1938, shall be a standard rent ascertained by apportioning the standard rent of the second-mentioned dwelling-house, and sub-s. (3) of s. 12 of the Act of 1920 shall apply accordingly notwithstanding that the first-mentioned dwelling-house was let as a separate dwelling on or before Aug. 1, 1914, or on or before the date on which the second-mentioned dwelling-house was first let.”

If the principle of apportionment is to apply in this case, the words “to which those Acts apply” are, it is said, otiose. It is contended that, reading s. 12 (3) of the Act of 1920 and s. 5 of the Act of 1938 together, the containing house, unless it is within the Acts, is not the basis of apportionment. Reliance is also placed on the *dictum* of SCOTT, L.J., in *Gover v. Field* (9) when he says ([1944] 1 All E.R. 153):

“... and I think (not without doubt) that s. 12 (3) of the 1920 Act is on that point to be construed on the same lines; that is to say, that there is not to be apportionment unless both houses—the containing and the contained—are within the Acts.”

It is at this point, however, that the difficulties in the way of the landlords' argument appear to begin.

In the first place, this *dictum* has been criticised by the Court of Appeal on more than one occasion: see *Upsons, Ltd. v. Herne* (1) ([1946] 2 All E.R. 312, 313), *per* SOMERVELL and MORTON, L.J.J., and *Lindop v. Quaipe* (8) ([1949] 1 All E.R. 458), *per* BUCKNILL, L.J. These criticisms were based on *Barrett v. Hardy Brothers (Alnwick), Ltd.* (6), a decision of the Divisional Court consisting of BANKES and SCRUTTON, L.J.J., which was concerned, not with fixing rent, but with apportionment of rateable value in order to ascertain whether a dwelling-

house came within the Acts or not. The decision in *Barrett's* case (6) is well established, although the wording of s. 12 (3) of the Act of 1920, as SCRUTTON, L.J., pointed out, is not really apt to cover such a case. He said ([1925] 2 K.B. 226):

"The statutory authority for apportionment is to be found, if at all, in s. 12 (3) of the Act of 1920. This begins: 'Where, for the purpose of determining the standard rent or rateable value of any dwelling-house to which this Act applies.' As whether a house is within the Act depends on whether its standard rent or rateable value exceeds a certain limit, this section literally read runs round in a useless circle. You cannot know whether the Act applies to the house till you know its standard rent or rateable value. If you have not determined these items, there is no proof that the Act applies to it. It is said that you must read the words as if they said: 'Where in order to determine the standard rent or rateable value of any dwelling-house for the purpose of seeing whether this Act applies to it, it is necessary to apportion,' etc. The words obviously do not say that in their ordinary meaning."

It is argued by the landlords that the *Barrett v. Hardy Brothers (Alnwick), Ltd.* (6) principle is only applicable when it is necessary to ascertain whether or not a house comes within the Acts. In this way it is sought to explain the wide language of SALTER, J., in *Woodhead v. Putnam* (4) when he said ([1923] 1 K.B. 256):

"To entitle a tenant to apportionment under s. 12 (3), it is not necessary that the 'property' in which the applicant's dwelling-house is 'comprised' should itself be a dwelling-house or should be subject to the Act."

This language, approved by BANKES, L.J., in *Barrett's* case (6), refers to apportionment of rent and not rateable value, and the landlords can only avoid their full implication by the argument that at that date not only rateable value, but rent also, were the basis of control, so that apportionment might be necessary at the date of the decision in both cases in order to ascertain whether or not a particular dwelling-house came within the purview of the Acts. Since 1938, on the other hand, rateable value only is the basis of control so the principle in *Barrett's* case (6) need only now be applied to rateable value. This argument is deserving of attention, and has the added attraction that it would seem to produce a result not inflicting unfair hardship on landlords. It is necessary, however, to recognise that the *dictum* of SCOTT, L.J., in *Gover v. Field* (9) was too wide, apart from consideration of *Barrett's* case (6). The words "to which those Acts apply" in s. 5 of the Act of 1938, are not otiose, but the converse of the section must be correctly appreciated. The converse is not that apportionment is not to be applied when the containing house is outside the Acts (as SCOTT, L.J., thought), but, in such a case, apportionment is to be applied only when it is necessary: see the express terms of s. 12 (3) of the Act of 1920 to that effect. This sub-section has never been repealed.

In *Upsons, Ltd. v. Herne* (1) it was necessary to apportion. The facts were as follows. By an agreement in writing, dated Apr. 4, 1938, the plaintiffs, Upsons, Ltd., let to the defendant, Henry Herne, a flat known as 2A Golders Way, Golders Green, for one year commencing on Apr. 11, 1938, and thereafter from year to year at the annual rent of £78. The rateable value of the flat was £33 and the Rent Restrictions Acts applied. This agreement contained a proviso for re-entry without giving notice to quit if the rent should be in arrears for twenty-one days or upwards. The defendant having fallen into arrears with the rent, the plaintiffs took proceedings for recovery of possession and arrears of rent, but an order in their favour was set aside by the Court of Appeal and a new trial ordered with fresh particulars of claim and defence before a different judge. The new trial came on Jan. 15, 1946, but was adjourned till Feb. 26, 1946, owing to the plaintiffs' failure, through a mistake, to attend. The plaintiffs claimed to recover possession and £289 19s. 6d. arrears of rent down to Oct. 4, 1945. The

defendant denied that he was indebted to the plaintiffs and relied on the Rent Restrictions Acts, contending that the standard rent of the flat did not exceed £45 per annum exclusive of rates. Alternatively, the defendant set up an alleged arrangement on Apr. 13, 1942, varying the terms of his tenancy, but this contention failed. There was evidence that the entire premises, consisting of flats 2A and 2B with a shop underneath them, were let to one Woolf Klein in September, 1911, for a term of twenty-one years at a rent of £150 per annum, that the two flats and the shop were completely separated from each other with separate entrances, and that in 1925 the plaintiffs, having become possessed of the premises, let flat 2A to one Curry at the rent of £100 per annum. On these facts the court had to determine what was the rent at which the flat in question was let on Aug. 3, 1914. It was not then let by a separate lease, but as part of a containing building let as one unit at a rental including a shop and another flat. Even though the containing building was outside the Acts, it was necessary, as the court pointed out, to find the standard rent by apportionment.

The *ratio decidendi* of that case is, in my opinion, that it was necessary to apportion because the containing unit had been previously let on the material date and had nothing to do with the question whether or not the larger unit was outside the Acts. This, I think, is apparent from the reference of MORTON, L.J., to *Sutton v. Begley* (2). In the latter case, as in the one now under consideration, there had been no substantial reconstruction or alteration and the rooms first separately let in June, 1921, had been let in the same condition in the previous March, but as part of a larger house. SCRUTTON, L.J., said ([1923] 2 K.B. 702):

"To hold that in these circumstances the rent at which the whole house was let is not to be regarded, but only the rent at which the room or rooms were first let, which is subject to no restriction except the agreement between the parties, would be entirely to defeat the operation of the Act. The Act was intended to protect small tenants without much regard to their landlords' interests. If a landlord who had let a house, say at £10 a year, was allowed immediately to let each separate room at £10 and to justify so doing on the plea that he was letting a room for the first time, whereas previously he had let the whole house, the Act would be reduced to a nullity. Therefore it appears to me impossible to give to the word 'dwelling-house' in s. 12 (1) (a) a meaning which, in the case I have just put, would include the one room subsequently let and exclude the rest of the house."

These two cases, which are binding on this court, lead me irresistibly to the conclusion that necessity to apportion depends on whether or not the dwelling-house which is the containing unit was let, irrespective of whether it is within or without the ambit of the Acts. I would only add that the argument put forward on behalf of the landlords based on s. 5 of the Act of 1938 loses much of its force when attention is drawn to the latter part, which reads:

"... s. 12 (3) of the Act of 1920 shall apply . . . notwithstanding that the first-mentioned dwelling-house [*i.e.*, the part] was let as a separate dwelling on or before Aug. 1, 1914, or on or before the date on which the second-mentioned dwelling-house [*i.e.*, the whole] was first let."

This section was clearly introduced to meet the anomalous case illustrated in *Platman v. Frohman* (12) which led to the conclusion that, if the part had been separately let before the whole on or before the material date, it would have had a standard rent of its own and there would have been no apportionment. In the present case the containing house was let at the material date, *viz.*, Sept. 1, 1939, at a rental of £342 10s. and flat No. 28 was also then let. In my judgment, apportionment is, accordingly, necessary, and I would dismiss the appeals.

Appeals dismissed with costs.

Solicitors: *Stephenson, Harwood & Tatham* (for the landlords); *Layton & Co.* (for the tenant).

[Reported by J. D. PENNINGTON, Esq., Barrister-at-Law.]

BOURNE AND ANOTHER v. McDONALD.

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Somervell and Asquith, L.JJ.), May 22, 1950.]

County Court—Jurisdiction—Specific performance—Agreement to erect fence—County Courts Act, 1934 (c. 53), s. 52 (1) (d), s. 71.

A The parties, who were neighbours, were involved in a dispute about the boundaries between their respective plots, and the plaintiffs started proceedings against the defendant in the county court. On Jan. 3, 1950, an agreement was made on behalf of the parties by their respective solicitors in settlement of the action, the defendant agreeing (a) to erect a new boundary fence at his own cost, and (b) to pay a sum of £30 to the plaintiffs as the agreed costs of the action. The plaintiffs, in performance of their part of the agreement, discontinued the existing proceedings, but the defendant repudiated the agreement. The plaintiffs thereupon commenced a second action in the county court, claiming *inter alia* specific performance of the agreement. It was contended by the defendant that the county court judge had no jurisdiction to entertain the claim for specific performance as the jurisdiction of the county court to award specific performance was limited by the County Courts Act, 1934, s. 52 (1) (d), to proceedings in regard to agreements for the sale, purchase or lease of property.

C HELD: as the cause of action, being based on a breach of contract, was covered by s. 40 of the County Courts Act, 1934, the county court judge could, under s. 71 of the Act, give any remedy which a judge of the High Court could give in a similar action, and, therefore, he could grant a mandatory injunction which would have the same effect as the order for specific performance of the agreement which the plaintiffs claimed; s. 52 (1) of the Act was directed, not to particular remedies, but to particular types of proceedings which were well-known and definable in the Chancery Courts, and s. 52 (1) (d), by giving a jurisdiction to grant specific performance of agreements for the sale, purchase or lease of property, did not limit the right of a county court judge under s. 71 to grant any remedy that justice might require in an action for breach of contract where there was a claim for specific performance which was not in regard to an agreement for the sale, purchase or lease of property, provided that the case was within the jurisdiction under s. 40; and, therefore, the county court judge had jurisdiction to grant the plaintiffs' claim.

F [FOR THE COUNTY COURTS ACT, 1934, s. 40, s. 52 and s. 71, see HALSBURY'S STATUTES, Second Edn., Vol. 5, pp. 35, 48, 49, 61 and 62.]

G APPEAL by the plaintiffs from an order of His Honour JUDGE TUCKER, at Hanley and Stoke-upon-Trent County Court, dated Mar. 23, 1950, in an action claiming (i) specific performance of an agreement by the defendant to erect a fence, the agreement having been entered into by the parties in settlement of a previous action started by the plaintiffs; (ii) a sum of £30, which the defendant had agreed to pay under the agreement; and (iii) damages for breach of the agreement. The county court judge gave judgment for the plaintiffs for the sum of £30 and £5 costs, but held that the only jurisdiction in the county court to award specific performance was under the County Courts Act, 1934, s. 52 (1) (d), and, therefore, as the agreement was not for the sale or lease of property, he had no jurisdiction to entertain the claim for specific performance. The facts appear in the judgment of SIR RAYMOND EVERSLED, M.R.

Brian Gibbens for the plaintiffs.

Norman Carr for the defendant.

SIR RAYMOND EVERSLED, M.R.: The present action arises out of previous proceedings between the same parties. The plaintiffs, on the one hand,

and the defendant, on the other, are neighbours in a street known as Emery Avenue, Stoke-on-Trent, and they had involved themselves in a dispute about the boundaries between their respective plots. It was alleged by the plaintiffs that the defendant had encroached on their land, which was the more serious, according to counsel for the plaintiffs, because it left the approach to the garage of the plaintiffs' premises too narrow for the passage of their motor car. The result was that proceedings began in the local county court between the plaintiffs and the defendant and another person of the name of Frost (who has since dropped out of the case and to whom it is unnecessary further to refer) to establish where the boundary lay. Shortly before the first action came on for trial the parties settled their differences. That settlement was achieved by the solicitors to the parties. On Jan 3, 1950, Mr. Rees T. C. Jones, solicitor for the defendant, wrote a letter to the plaintiffs' solicitor which begins: "Pursuant to our telephone conversation of even date, we would confirm the terms of the settlement arrived at herein," and then the body of the letter provides for two things, (i) the erection by the defendant in a new position (to satisfy, I gather, the requirements of the plaintiffs) of the boundary fence at his cost, and (ii) payment to the plaintiffs of a sum of £30, an agreed figure to cover the plaintiffs' costs of that action. Unhappily, the pacific sentiments of the solicitors were not entirely reflected by their clients, and very shortly afterwards the defendant stated that he regarded himself as not bound by this arrangement. The unhappy result was the commencement of a second action, namely, this action. The particulars of claim, after referring to the letter to which I have alluded, state, as is the fact, that the plaintiffs, in performance of the bargain made, discontinued their then existing proceedings, but it was alleged that the defendant declined to carry out his part of the bargain. The prayer is as follows:

"By reason of the premises the plaintiffs have suffered damage. And the plaintiffs claim (i) specific performance of the said agreement; (ii) the said sum of £30; (iii) damages limited to £10."

I would first observe that the second head of claim, "the said sum of £30," was really covered by the first, because the payment of £30 was part of the bargain and its recovery would amount in ordinary language to a specific carrying out by the defendant of that part of the bargain. No difficulty appears to have been entertained as regards that part of the claim, but at the hearing the judge came to the conclusion that he was unable to grant the specific relief claimed in the first part of the prayer, *i.e.*, that he could not order the defendant to carry out the agreement by erecting a fence because, the claim being one *ipsissimis verbis* for specific performance, the county court judge's jurisdiction was limited by the County Courts Act, 1934, s. 52 (1) (d), which, admittedly, does not cover this case.

Before I pass to the sections of the Act, I ought, I think, to refer briefly to the judgment, because, I think, it makes plain the view of the county court judge that, apart from the jurisdiction point, he would have thought it right, in the exercise of his equitable jurisdiction, to grant the remedy which the plaintiffs sought. He states it in this form:

"I considered carefully the evidence before me and the submissions made to me on both sides, and I was satisfied and found that on Jan. 3, 1950, the plaintiffs' solicitor and the solicitor then acting for the defendant, on behalf of their respective clients, entered into the agreement alleged by the plaintiffs, and that it was confirmed by letter from the defendant's then solicitor to the plaintiffs' solicitor dated Jan. 3, 1950, and that in pursuance of the said agreement the plaintiffs' solicitor took steps at once to withdraw the previous action. I was also of opinion and found that in making the said agreement on behalf of the defendant, the solicitor then acting for the defendant had the defendant's authority to make such agreement, and was

acting in accordance with his instructions, and that it was a binding agreement."

Although he does not in terms say so, I think it is reasonably clear from what we have been told that, as I have already said, the judge would have thought it a proper case in which to grant relief in the nature of specific performance if he had the jurisdiction to do so. The third item of claim, "damages limited to £10," was fixed on the footing that specific performance of the bargain to rebuild could be decreed, so that £10 represented only the damage suffered by the plaintiffs through delay. When it appeared to the plaintiffs that this point about jurisdiction was likely to be a serious stumbling block in their way, the plaintiffs, by their counsel, asked to amend the statement of claim by adding a separate prayer for damages at common law for breach of the agreement or by claiming damages under Lord Cairns' Act (Chancery Amendment Act, 1858) in lieu of specific performance. The judge in the exercise of his discretion thought it was too late to allow such an amendment. He thought that it would not be just to give an entirely new cause of action to the plaintiffs after the case had for practical purposes been heard and tried out. Counsel for the plaintiffs suggested that, alternatively, we might give him leave, even at this stage, to amend, but it seems to me that that was a matter in the discretion of the learned county court judge and we ought not to interfere.

It, therefore, remains a case in which the sole question is: Was the judge right in his conclusion that he had no jurisdiction to grant the relief which was sought? I have tried to be a little careful in my use of words. The prayer is for "specific performance of the said agreement." It was pointed out by counsel for the plaintiffs during the argument that precisely the same result might well have been achieved under another name if the order asked for had been a mandatory order, or, as it is now commonly called, a mandatory injunction, on the defendant to re-erect the wall in accordance with the terms of the contract. In truth, an injunction in that form would have been specific performance of the contract if by that phrase is meant a command of the court on the defendant to carry out specifically according to its terms the bargain that was made. I think that important, because, to my mind, there is, or may be, a distinction in the sense in which that common term "specific performance" is used.

With that preface, I turn to the three relevant sections of the County Courts Act, 1934. I take first, because it comes first, s. 40, which gives general jurisdiction in an ordinary action to a county court. Its cross heading is "Actions of contract and tort," and, strictly, the word "action" is appropriate only to an action at law. Section 40 (1), as amended by the Administration of Justice (Miscellaneous Provisions) Act, 1938, s. 19 (1), and sched. II, provides that the county court has jurisdiction

"...to hear and determine any action founded on contract or on tort where the debt, demand or damage claimed is not more than £200 ..."

Then there is a proviso that the county court is not to have jurisdiction in certain classes of cases, which include, save as provided elsewhere in the Act, actions in which the title to land is in issue, actions for the recovery of land, and also actions for libel, slander, seduction, or breach of promise of marriage, which are wholly excluded from the jurisdiction of the county court. Because of that method of defining the jurisdiction, a plaintiff who desires as the chief remedy to obtain an injunction must, nevertheless, frame his action as an action for damages and must make it clear that the sum claimed is such as to give jurisdiction to the county court.

It is next necessary to turn to s. 52. The cross-heading there, by way of contrast with "Actions of contract and tort," is "Equity proceedings," and the purpose of the section is to give to the county court again a limited jurisdiction in equity

proceedings, but the limit is defined, and necessarily defined, in a different way. That it has to be differently defined is obvious, if you consider the first of the equity proceedings, *viz.*, "(a) proceedings for the administration of the estate of a deceased person." Without pursuing what is obvious, the form of s. 52 (1) is:

"A county court shall have all the jurisdiction of the High Court to hear and determine any of the following proceedings . . ."

Then there follow paras. (a), (b), (c), (d), (e), (f) and (g), all beginning with the words "proceedings for," or corresponding words. The relevant paragraph here is (d), which is:

"Proceedings for the specific performance, or for the rectification, delivery up or cancellation, of any agreement for the sale, purchase or lease of any property, where, in the case of a sale or purchase, the purchase money, or, in the case of a lease, the value of the property, does not exceed the sum of £500."

It is to be observed that the general term "property" is there included. It is not confined to real property. The argument is that the provision in this paragraph (which extends, as I have just stated, to proceedings other than in relation to transactions in real estate) is confined precisely to contracts for sale or lease and is an exhaustive code defining the jurisdiction of the county court in any proceedings which can be properly described as proceedings for specific performance. Counsel for the defendant points out that the present proceedings are, in truth, proceedings for specific performance, but, not being proceedings for the specific performance of an agreement for the sale, purchase or lease of any property, he argues that they are, therefore, outside the jurisdiction of the county court. That would, I venture to think, have a somewhat strange result. It would appear capricious that, by giving a jurisdiction, and it may be a wide jurisdiction, in some cases to grant specific performance of some types of contract, the legislature is thereby preventing the county court judge from ordering the specific performance of any other type of contract. What I have said as regards specific performance will, of course, apply equally to rectification. Thus, if this argument is right, it would not be possible to obtain in the county court the rectification of a commercial agreement which did not comprehend, or would not be properly described as an agreement for, the "sale, purchase or lease of any property," even though the claim in damages in a suit on the contract, as rectified or not rectified, was within the ambit of s. 40.

Section 52 (2) provides:

"In all such proceedings as aforesaid the judge shall, in addition to any other powers and authorities possessed by him, have all the powers and authorities for the purposes of this Act of a judge of the Chancery Division of the High Court."

That, of course, gives to the county court judge, in specific performance proceedings, the same right under Lord Cairns' Act, for example, as a Chancery judge would have in a proceeding in the Chancery courts.

The third section to which I must refer is s. 71, which comes under the cross-heading "Exercise of jurisdiction and ancillary jurisdiction," *i.e.*, it appears to be directed to the way in which the jurisdiction already conferred can be exercised and to giving ancillary jurisdiction. The section reads thus:

"Every county court, as regards any cause of action for the time being within its jurisdiction, shall in any proceedings before it (a) grant such relief, redress or remedy or combination of remedies, either absolute or conditional . . . as ought to be granted or given in the like case by the High Court and in as full and ample a manner."

Paragraph (b) deals with defences and counterclaims. It seems to me that the apparently capricious result that might arise, if s. 52 stood alone and was not followed by s. 71, and if it has as a consequence to be construed in the way which counsel for the defendant suggests, is avoided by reading s. 71 together with those which precede it. It is, for example, by virtue of this section that a court, if asked in an action for breach of contract in the ordinary way to grant an injunction against, it may be, repeated breaches, is empowered to do so. It, therefore, seems to me that in any case in which the cause of action is brought within s. 40, then *prima facie* the court can, under s. 71, give any remedy that a high court judge could give in a similar action. It seems to me, further, that, if it can grant an ordinary injunction, the court can also make a mandatory order. As I have already said, the making of a mandatory order on a party to do a particular act which he has contracted to do is, in ordinary language and in the common sense of it, "specific performance" as it was prayed in this action. The possible conflict with s. 52 (1) (d) which that statement creates is, to my mind, resolved by having regard to the fact that s. 52 (1) is directed, not to particular remedies, but to particular types of proceedings which are well-known and definable in the Chancery courts, *viz.*, proceedings for the administration of an estate or for the execution of a trust, the dissolution of a partnership and so forth, and for the specific performance of contracts for sale or lease. For some reason mortgages are not referred to, but I pass that over. "Proceedings for . . . the sale . . . of any property" in this context, I think, is clearly intended to relate to the type of proceeding, familiar in the old equity court, which gave rise to the old, and, it is true, somewhat complex, specific performance decree. Since that type of case is one in which, *ex hypothesi*, there would be no sum of damages claimed, it becomes necessary to provide a different means of defining the jurisdiction. It is for that purpose that reference is made to specific performance proceedings in s. 52 (1) (d). Though there may be overlap, it leaves the general proposition that, if you have an action for breach of contract in the ordinary way, not being a specific performance proceeding of the kind I have mentioned, then there is nothing which limits the right of the court under s. 71, provided the case is within the jurisdiction by virtue of s. 40, to grant any other kind of remedy that justice may require, including injunctions, whether such relief is sought in that form or by use of the term "specific performance."

I have tried to explain the way in which it seems to me these sections fit in together and, for the reasons I have stated, I think that the learned county court judge had the jurisdiction which he thought he had not got. Reading his judgment, as I do, as indicating that in the exercise of his discretion, though the act to be performed was that of doing a certain type of work, he would have granted the necessary order, had he the jurisdiction to do so, I think that the appeal should succeed and the necessary order should be made.

SOMERVELL, L.J.: I agree.

ASQUITH, L.J.: I also agree.

Appeal allowed with costs.

Solicitors: Gibson & Weldon, agents for W. B. Whitehead, Newcastle-under-Lyme (for the plaintiffs); Doyle, Devonshire & Co., agents for Abberley & Walker, Burslem (for the defendant).

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

Re FIELD'S WILL TRUSTS. PARRY-JONES AND ANOTHER
v. HILLMAN AND OTHERS.

[CHANCERY DIVISION (Harman, J.), May 23, 1950.]

Will—Condition—Certainty—To J. “if he shall occupy my freehold property.”

A testatrix, who died in 1935, by her will devised her freehold house, “Saint Johns,” to W. during his life and after his death to J. if he should survive her and attain the age of twenty-five years. She also bequeathed certain chattels on trust to permit W. to have the use thereof during his life and, on his death, in trust for J. “if he shall attain the age of twenty-five years and shall occupy my freehold property ‘Saint Johns’ . . .” The testatrix also bequeathed a fund for the upkeep of “Saint Johns” on trusts similar to those to which the chattels were made subject. In September, 1944, J. died, having attained the age of twenty-five years, but never having occupied “Saint Johns.” In December, 1948, W. died.

HELD: the requirement that J. “shall occupy my freehold property” was a condition which was void for uncertainty, because it was impossible to ascertain the nature of the occupation necessary to fulfil it.

Re Coxen ([1948] 2 All E.R. 492), distinguished.

[AS TO UNCERTAINTY IN A WILL, see HALSBURY, Hailsham Edn., Vol. 34, pp. 109, 219-222, paras. 143, 274-277; and FOR CASES, see DIGEST, Vol. 44, pp. 440-444, 609-613, Nos. 2667-2687, 4366-4385, 4393-4400.]

Cases referred to:

- (1) *Maclaren v. Stainton*, (1858), 27 L.J.Ch. 442; 30 L.T.O.S. 331; 44 Digest 958, 8109.
- (2) *Martin Estates Co., Ltd. v. Watt & Hunter*, [1925] N.I. 79; 31 Digest 557, 7045i.
- (3) *Re Coxen*, [1948] 2 All E.R. 492; [1948] Ch. 747; [1948] L.J.R. 1590; 2nd Digest Supp.
- (4) *Re Wilkinson*, [1926] Ch. 842; 95 L.J.Ch. 528; 135 L.T. 736; 44 Digest 442, 2678.
- (5) *Sifton v. Sifton*, [1938] 3 All E.R. 435; [1938] A.C. 656; 107 L.J.P.C. 97; 159 L.T. 289; Digest Supp.
- (6) *Fillingham v. Bromley*, (1823), Turn. & R. 530; 37 E.R. 1204; 44 Digest 442, 2675.

ADJOURNED SUMMONS to determine whether, on the true construction of the will of Henrietta Frances Field and in the events which had happened, certain chattels and a fund of £6,000 bequeathed for the maintenance of the testatrix's dwelling-house were effectively bequeathed to John Popplewell Royle notwithstanding that he had not complied with a condition that he should occupy the said dwelling-house. It was argued on behalf of persons claiming through the said John Popplewell Royle that the condition was void for uncertainty. The facts and the relevant parts of the will are set out in the judgment.

Wilfrid Hunt for the plaintiffs, the trustees of the will.

Humphrey H. King for the first and second defendants, the trustees of a settlement made by John Popplewell Royle of the property in question.

E. B. Stamp for the third defendant, interested in remainder.

A. F. M. Berkeley for the fourth defendant, representing the residuary legatees.

HARMAN, J.: This is a question which arises on the will of Henrietta Frances Field who died in 1935. The plaintiffs are the trustees of her will, her estate having been fully administered. The first and second defendants are the assignees of one John Popplewell Royle, who was a beneficiary under the will. The third defendant, John Reginald Collett Stock, claims to be entitled under the will to certain property, which I will mention in a moment, on failure of a condition which, he says, was binding on John Popplewell Royle. The last

defendant represents the residuary legatees under the will of the testatrix who will take in the event of the condition being good and not having been fulfilled and in the event of the failure of the bequest to Mr. Stock.

It is convenient to refer first to a specific devise in cl. 15 of the will whereby the testatrix gives her freehold house and grounds known as "Saint Johns," Haslemere, to her nephew, William Collett Royle, during his life—William Collett Royle duly inherited under that devise, and he lived until December, 1948—

"and from and after the death of my said nephew I devise the said house and grounds to the said John Popplewell Royle if he shall (1) survive me and have attained or shall attain the age of twenty-five years or (2) die in my lifetime leaving lawful issue who shall survive me or (3) survive me and die under the age of twenty-five years leaving such issue."

John Popplewell Royle died in September, 1944, having attained the age of twenty-nine years. He, therefore, fulfilled the first condition, which was that he should survive the testatrix and attain the age of twenty-five years, and his assignees take "Saint Johns," Haslemere on the death of his uncle William Collett Royle, notwithstanding that he died leaving that uncle surviving.

The bequest in cl. 2 of the will is of a number of chattels of a personal or domestic or garden use, belonging to the testatrix—and it is to be noted that she was resident, when she made her will, at "Saint Johns," so, presumably, they are the contents of "Saint Johns" and its grounds—except, she says, articles which, by reason of their trifling or perishable nature, the trustees shall consider unsuitable. In other words, she is making a bequest of chattels to go with the house,

"upon trust to permit my nephew William Collett Royle to have the use and enjoyment of the articles during his life and upon the death of my nephew in trust for my great nephew John Popplewell Royle if he shall attain the age of twenty-five years and shall occupy my freehold property 'Saint Johns' referred to in cl. 15 of this my will and if he shall die under the age of twenty-five leaving a child or children who shall attain twenty-one years then in trust for such child or children and if more than one in equal shares and if there shall be no such child then in trust for my great nephew John Reginald Collett Stock absolutely."

Clause 6 of the will contains a gift of a fund in these terms:

"In order to provide a fund for the upkeep of my freehold house 'Saint Johns' I bequeath to my trustees a legacy of £6,000 upon trust to invest the same in their names in some of the investments authorised by law and to hold the legacy and the investments upon trust to pay the income to William Collett Royle during his life and after his death as to both capital and income thereof in trust for my great nephew John Popplewell Royle if he shall attain the age of twenty-five years and shall occupy 'Saint Johns' and if the said John Popplewell Royle shall die under that age leaving a child or children who shall attain twenty-one then in trust for such child or children and if more than one in equal shares"

but if there shall be no such child, for Mr. Stock.

So the chattels to go with "Saint Johns" and the fund are both left on the like conditions. There is no doubt that John Popplewell Royle satisfied the first, because he attained the age of twenty-five years; equally there is no doubt that he never was, in any sense of the word, in occupation of the property. Therefore, if the condition be a good one, he has failed to satisfy it and the property will go over, but it is said that the condition is a condition subsequent, and is too uncertain and so is void. It is said, on the other hand, that there is no doubt on the facts that John Popplewell Royle did not occupy this property because his uncle was alive during the whole of his life and his uncle was in

occupation, and that one need not look any further, even though there might, in some other circumstances, have been doubts or difficulties about the exact nature of the condition which he had to fulfil. It is said that "occupation" means either rateable occupation or some kind of personal occupation entailing keeping the house furnished and occupied by agents or servants, and not let.

I am referred for that purpose to *Maclaren v. Stainton* (1). I am also referred to *Martin Estates Co., Ltd. v. Watt & Hunter* (2), but as that is a case under the Rent Restrictions Acts, I do not think I need bother with it. I am also referred to a recent decision of JENKINS, J., in *Re Coxen* (3) where he discussed at some length conditions of residence. The decision in that case depended on a condition that there should be a defeasance of the lady's estate if, in the opinion of the trustees, she had ceased to reside, and the judge, I think, in the end had no difficulty in finding that that was certain enough, because the court could tell what the opinion of the trustees was. It was not the court's opinion, but theirs, which mattered. Therefore, that case does not trouble me, except for certain observations which the learned judge made. He cites a case before TOMLIN, J., *Re Wilkinson* (4), where these words appear ([1926] Ch. 849):

"The fact that the language of the will is not uncertain has, of course, no necessary bearing upon the question whether when particular events have happened there may not be some difficulty in saying whether or not they fall within that which is contemplated by the will; but that is not a matter with which I have anything to do."

Is this a case, then, in which I can say that the event is certain enough, and that the fact that, in other circumstances, there might have been difficult questions to decide whether the event had happened or not, is not my concern? In my judgment, that is not this case. I think it is the event which is uncertain. What is meant, I ask myself, by the words "and shall occupy my freehold property"? Must it be a rateable occupation, must it be an occupation as a freeholder, as a lessee, as a weekly tenant, as a tenant at will, or as a sojourner overnight? Counsel for the residuary legatee says it must be occupied for a substantial period. There, as it seems to me, he points to the defect in his own case. What is "substantial"? This seems to me like the decision in *Sifton v. Sifton* (5) in the Privy Council, where LORD ROMER observed that the testator undoubtedly intended that his daughter should reside for a substantial portion of each year in Canada, but omitted to say how much he meant by "substantial." Here I feel that, this not being a condition that the estate shall last so long as the occupation lasts, but being a condition which, once there is occupation, is satisfied and the chattels and the money belong absolutely to the person who fulfils the condition, there must be a certainty *ab initio* as to what he must do in order to fulfil it. I am quite unable to say what, on the true construction of this will, would have been a sufficient occupation to entitle him to call on the trustees to hand over the chattels and the fund to him. That being so, and the condition being a condition subsequent, it seems to me that the condition is void and, as he attained twenty-five years, he became entitled both to the chattels and to the maintenance fund.

Declaration accordingly. Costs of all parties as between solicitor and client to be paid out of the fund of £6,000 bequeathed for the maintenance of the house.

Solicitors: Preston, Lane-Claypon & O'Kelly, agents for Reynolds, Parry-Jones & Crawford, High Wycombe (for the plaintiffs); Barnes & Butler, agents for Hillman & Sons, Salford (for the first and second defendants); Warren, Murton & Co., agents for Newman & Bond, Barnsley (for the third defendant); Field, Roscoe & Co. agents for Hallett & Co., Ashford, Kent (for the fourth defendant).

[Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.]

Re MANDER (deceased). WESTMINSTER BANK, LTD. *v.*
MANDER AND OTHERS.

[CHANCERY DIVISION (Vaisey, J.), May 24, 26, 1950.]

Perpetuities—Charitable gift dependent on future uncertain event—Trustees directed to retain fund until such time as a candidate for the priesthood comes forward from a certain church.

A By her will, dated Dec. 13, 1945, a testatrix provided: "I wish during my lifetime to pay for the training for the priesthood of a candidate when one comes forward from St. Saviour's Church, St. Albans, Herts . . . but should I die before I have been able to fulfil this wish I direct my trustees to invest such sum in trustee securities as would be sufficient to train a candidate for the priesthood until such time as a candidate comes forward from St. Saviour's Church, St. Albans, aforesaid." On June 7, 1946, the testatrix died without having paid for the training of an ordinate.

B HELD: even if the gift were charitable, it was limited to take effect on a future event so remote and indefinite as to transgress the rule against perpetuities, and, therefore, it failed *ab initio*.

C *Dictum of LORD SELBORNE, L.C., in Chamberlayne v. Brockett* (1872) (8 Ch. App. 211), and *Re Stratheden and Campbell* (Lord) ([1894] 3 Ch. 265), applied.

[AS TO APPLICATION OF THE RULE AGAINST PERPETUITIES TO CHARITIES, see HALSBURY, Hailsham Edn., Vol. 25, pp. 119-121, para. 215; and FOR CASES, see DIGEST, Vol. 8, pp. 325-327, Nos. 1078-1099.]

D Cases referred to:

- (1) *Chamberlayne v. Brockett*, (1872), 8 Ch. App. 206; 42 L.J.Ch. 368; 28 L.T. 248; 37 J.P. 261; 8 Digest 326, 1095.
- (2) *Re Stratheden and Campbell* (Lord), [1894] 3 Ch. 265; 63 L.J.Ch. 872; 71 L.T. 225; 8 Digest 257, 196.

E ADJOURNED SUMMONS to determine whether on the true construction of the will of Violet Elizabeth Mander a direction to the trustees to invest such a sum in trustee securities as should be "sufficient to train a candidate for the priesthood until such time as a candidate should come forward from St. Saviour's Church, St. Albans," was a good and valid charitable trust for the purposes of training a candidate for the priesthood when such candidate should come forward from St. Saviour's, or whether the said gift was void.

F *J. B. Richardson* for the trustees of the will.
R. H. Walton for the first defendant, tenant for life of the residuary estate.
J. V. Nesbitt for the second defendant, the society for the Propagation of the Gospel entitled to an expectant interest in the residuary estate.
Denys B. Buckley for the Attorney-General.

G *Cur. adv. vult.*

May 26. VAISEY, J., read the following judgment. The testatrix in this case, Miss Violet Elizabeth Mander, died on June 7, 1946. Her will, dated Dec. 13, 1945, proved on Dec. 16, 1946, contains the following clause:

H "In memory of my sister Mary Emily Mander I wish during my lifetime to pay for the training for the priesthood of a candidate when one comes forward from St. Saviour's Church, St. Albans, Herts, aforesaid, but should I die before I have been able to fulfil this wish I direct my trustees to invest such sum in trustee securities as would be sufficient to train a candidate for the priesthood until such time as a candidate comes forward from St. Saviour's Church, St. Albans, aforesaid."

The general intention of the testatrix as expressed in that clause is reasonably clear, and I regret that I cannot hold that effect can be given to it.

It is clear that the testatrix had not in her lifetime fulfilled the wish to which the prefatory words of the clause refer. That preliminary difficulty having been surmounted, what follows so far as words go? Nothing but a direction to her trustees to invest a sum of an amount sufficient for the purpose indicated. Before the word "until" I must, in order to make any sense of it at all, insert some such words as "and to keep the same invested." Having done that, I must next assume that, when the moment indicated by the word "until" arises, the trustees are to sell the investments and use the proceeds for the training of a candidate for the priesthood. I think I know what a candidate for the priesthood is, but the requirement that he must come forward from a particular church is decidedly strange, and not, in my judgment, free from uncertainty. I am inclined to think, though I do not decide, that the education of one ordinate is a charitable purpose for the promotion of the Christian religion.

The chief difficulty appears to me to be the perpetuity rule. The coming forward of a candidate from St. Saviour's Church is an event which might not happen for many years or at all. What is to happen to the income in the meantime? The gift could only be valid if, the charitable nature of it being assumed, the appropriation of the sum to the indicated purpose is immediate and final. I do not think the testatrix had any such thought, and I should rather suppose that she would have meant the interim income to fall into residue.

I was pressed to follow the well known case of *Chamberlayne v. Brockett* (1), but there a general charitable intention was inferred on grounds which do not exist here. It seems to me that a short paragraph in the judgment of LORD SELBORNE, L.C., applies to the present case (8 Ch. App. 211):

" . . . if the gift in trust for charity is itself conditional upon a future and uncertain event, it is subject . . . to the same rules and principles as any other estate depending for its coming into existence upon a condition precedent. If the condition is never fulfilled, the estate never arises; if it is so remote and indefinite as to transgress the limits of time prescribed by the rules of law against perpetuities, the gift fails *ab initio*."

I am also guided, and I think bound, by the decision in *Re Stratheden and Campbell* (Lord) (2), where there was a bequest of an annuity "to be provided to the Central London Rangers (a volunteer corps) on the appointment of the next lieutenant-colonel." It was held that, as the appointment of the next lieutenant-colonel was an event wholly uncertain, the gift was void because it infringed the rule against perpetuities. Here, too, the coming forward, whatever that may mean, of a candidate from the particular church is a completely uncertain event, which may happen at some future date, unascertained and unascertainable, and may never happen at all.

With a good deal of regret, similar to the regret expressed by the learned judge in the case to which I have last referred, I must assume, and will declare, that this extremely ill drawn clause is wholly inoperative. The costs of all parties as between solicitor and client must be paid out of the estate of the testatrix in due course of administration.

Order accordingly.

Solicitors: *Brash Wheeler, Chambers, Davies & Co.* (for the plaintiffs); *Smith & Hudson*, agents for *T. R. McCready*, Plymouth (for the first defendant); *Nicholl, Manisty, Few & Co.* (for the second defendant); *Treasury Solicitor*.

[Reported by R. D. H. OSBORNE, Esq., Barrister-at-Law.]

BUTTLE AND OTHERS v. SAUNDERS AND ANOTHER.

[CHANCERY DIVISION (Wynn-Parry, J.), April 27, 28, 1950.]

Trust and Trustee—Duty of trustee—Sale of property—Overriding duty to obtain best price—Negotiations in advanced stage—Higher purchase price offered by third party.

A When negotiations for the sale of property, which was held by trustees on the statutory trusts for sale, were in an advanced stage, the trustees received a higher offer from one of the beneficiaries, but they considered themselves bound by commercial morality to complete with the original purchaser, and, therefore, they refused the higher offer.

B HELD: although in such circumstances trustees had such a discretion as would allow them to act with prudence and it would redound to the credit of an ordinary vendor to close the deal with the original purchaser notwithstanding the receipt of a higher offer, trustees were not vested with such freedom, but had an overriding duty to obtain the best price for their beneficiaries; in the present case it was their duty to have probed the later offer and to have agreed to it on condition that the person making it bound himself immediately to complete the purchase at the higher price.

C [AS TO DUTY OF TRUSTEES ON SALE OF TRUST PROPERTY, see HALSBURY, Hailsham Edn., Vol. 33, pp. 260-263, para. 462; and FOR CASES, see DIGEST, Vol. 43, pp. 910, 911, Nos. 3507-3518.]

D ACTION claiming *inter alia* an injunction to restrain the trustees of certain property, which was held on the statutory trusts for sale, from selling or agreeing to sell the property for any sum less than £6,500, or any greater sum offered by the first plaintiff for the purchase of the property.

E The plaintiffs were among those who were beneficially interested under the statutory trusts. By their counterclaim the trustees asked for the directions of the court in the matter and joined some of the other beneficiaries as defendants to the counterclaim. The trustees were negotiating the sale of the property to a Mrs. Simpson, and, when the negotiations were at an advanced stage, the first plaintiff offered to purchase the property at a higher price. The trustees refused his offer, feeling that they were bound by commercial morality to complete the sale to Mrs. Simpson. The facts appear in the judgment.

Miss B. A. Bicknell for the plaintiffs.

F *Baden Fuller* for the trustees.

R. L. Stone for beneficiaries other than the plaintiffs.

G WYNN-PARRY, J.: The defendants in this action are the trustees of premises, known as 15, Montpelier Square, Brompton, in the county of London, which they hold on the statutory trusts for sale under the provisions of the Law of Property Act, 1925, and the action is brought by some of the beneficiaries interested under those trusts claiming, *inter alia*, an injunction preventing the trustees from selling that property for the sum of £6,142 (which was the amount offered by a Mrs. Simpson), or for any sum less than £6,500, which the first plaintiff, Canon Buttle, was at all material times, and still is, willing to pay for the premises.

H In the summer of 1949 Mrs. Simpson, who was acquiring the leasehold interest in the property, the term of which will expire in 1956, heard that there might be a possibility of acquiring the freehold reversion, and instructed her solicitors, Messrs. Child & Child, to negotiate for it. The negotiations proceeded smoothly up to the point when the purchase price was agreed at £6,000. A draft contract was prepared and passed to Mrs. Simpson's solicitors, and Mrs. Simpson and her solicitors were agreeable to all the terms, except cl. 13, which provided that she should pay the vendors' costs. On Oct. 7, 1949, the trustees' solicitors, Messrs. Pedley, May & Fletcher, wrote to the beneficiaries, informing them of

the proposed sale to Mrs. Simpson. On Oct. 19 Canon Buttle, one of the beneficiaries, called on Mr. Raisen, a partner in the firm of Pedley, May & Fletcher, and told him that he was interested, on behalf of a charity, in acquiring the premises in question. He was informed of the exact stage of the negotiations with Mrs. Simpson, and that the only difficulty was in regard to cl. 13 of the draft agreement dealing with the vendors' costs. Canon Buttle pressed Mr. Raisen to sell the property to him instead of to Mrs. Simpson, and, in the upshot, Mr. Raisen gave Canon Buttle a letter, which reads as follows:

A

"With reference to your call on us this afternoon, we confirm that we have received an application for the purchase of this house at the price of £6,000. If we receive an offer from you of £6,142 within forty-eight hours, we will advise our clients to accept it."

On Oct. 20 Mrs. Simpson's solicitors telephoned to Messrs. Pedley, May & Fletcher, saying that their client had now agreed to pay the vendors' costs. Later the same morning Canon Buttle called on Mr. Raisen, who informed him of that fact and expressed the view that the trustees could not very well withdraw from the negotiations with Mrs. Simpson, particularly as the amounts offered were equal and she had been first in the field. Canon Buttle made no suggestion at that meeting that he should offer any more for the property, although he continued to press that the house should be sold to him, and Mr. Raisen agreed to refer the matter to the trustees. On Oct. 26 Messrs. Pedley, May & Fletcher wrote to Canon Buttle informing him of the trustees' final decision in the matter, *viz.*, that they had decided to sell the property to Mrs. Simpson. Immediately on receiving that letter on Oct. 27, Canon Buttle telephoned to Mr. Raisen and offered £6,500 for the property. By that time the negotiations with Mrs. Simpson's solicitors had progressed up to the point where the contract and the counterpart were being engrossed. Mrs. Simpson had signed her part, and one trustee had signed the other part. The matter was almost ready for completion. In those circumstances Mr. Raisen and the trustees felt in a position of great embarrassment. They felt in honour bound to proceed with the proposed sale to Mrs. Simpson, and no other motive appears to have actuated them. They communicated the increased offer that had been made to them to Mrs. Simpson's solicitors in a letter, dated Oct. 27, in which they expressed their own feelings in these terms:

B

C

D

E

"We ourselves feel that the matter has gone too far with your client for us to turn down her offer."

F

They then suggested that, in view of Canon Buttle's desire to acquire the property, Mrs. Simpson might perhaps be willing to abandon the idea of purchasing and some compensation might be paid to her. Legal proceedings against the trustees were threatened by Canon Buttle's solicitors in a letter dated Oct. 27, and in a letter dated Oct. 28, Messrs. Pedley, May & Fletcher said:

G

"Although contracts have not been exchanged with Mrs. Simpson, as the draft contract has been agreed and engrossed for signature we do not feel that the sale to Mrs. Simpson can be properly cancelled."

That sentence is a reiteration of the view, which they had expressed previously, that they were in honour bound, and they felt that all considerations of commercial morality required that they should proceed with the contract. They then said:

H

"We have no objection, and we imagine that our clients will have no objection, to your making an application to the court, if you so desire, for the court's direction as to what should be done, but this would have to be at your client's expense."

I do not set any weight on that latter phrase as to the incidence of costs, because the writer of that letter was, in effect, assuming the burden which is placed on

the court to decide how the costs should be borne, but what I do extract from that paragraph is an intimation that the trustees could have no objection to the court's direction being sought. It was, however, taken as a threat, and the writ was issued on Nov. 1, 1949.

A The first claim in the statement of claim is for a declaration that the trustees are not entitled to sell the premises except for the best price reasonably obtainable. It is admitted by counsel for the trustees that that declaration, taken by itself, does no more than express the law, and it is not disputed that that is the duty cast on the trustees. The second claim is for a declaration that the trustees are bound to keep the plaintiffs informed of all offers to purchase the premises, and the third claim is for the injunction to which I have already referred. The trustees, by their defence, set out in some detail the events to which I have referred, and by para. 7 of their defence they say that they "do not now intend to sell the Montpelier premises except in such manner as the court may authorise." By their counterclaim they ask, in effect, for the directions of this court.

C It has been argued on behalf of the trustees that they were justified in the circumstances in not pursuing the offer made by Canon Buttle and in deciding to go forward with the transaction with Mrs. Simpson. It is true that persons who are not in the position of trustees are entitled, if they so desire, to accept a lesser price than that which they might obtain on the sale of property, and not infrequently a vendor, who has gone some lengths in negotiating with a prospective purchaser, decides to close the deal with that purchaser, notwithstanding that he is presented with a higher offer. It redounds to the credit of a man who acts like that in such circumstances. Trustees, however, are not vested with such complete freedom. They have an overriding duty to obtain the best price which they can for their beneficiaries. It would, however, be an unfortunate simplification of the problem if one were to take the view that the mere production of an increased offer at any stage, however late in the negotiations, should throw on the trustees a duty to accept the higher offer and resile from the existing offer. For myself, I think that trustees have such a discretion in the matter as will allow them to act with proper prudence. I can see no reason why trustees should not pray in aid the common-sense rule underlying the old proverb: "A bird in the hand is worth two in the bush." I can imagine cases where trustees could properly refuse a higher offer and proceed with a lower offer. Each case must, of necessity, depend on its own facts. In regard to the case now before me, my view is that the trustees and their solicitors acted on an incorrect principle.

F The only consideration which was present to their minds was that they had gone so far in the negotiations with Mrs. Simpson that they could not properly, from the point of view of commercial morality, resile from those negotiations. That being so, they did not, to any extent, probe Canon Buttle's offer as, in my view, they should have done. It was urged on me that, by pausing to probe his offer, they ran the risk of losing the contract with Mrs. Simpson. On the view of the facts which I take, I do not consider that that was much of a risk. Mrs. Simpson had bought the leasehold term, which was nearing its end, and she was a very anxious purchaser. Equally, Canon Buttle had demonstrated beyond a peradventure that he was a very anxious buyer, and, as it seems to me, the least the trustees should have done would have been to have said to him: "You have come on the scene at a late stage. You have made this offer well past the eleventh hour. We have advanced negotiations with Mrs. Simpson which can be concluded within a matter of hours. If you are really serious in your offer, you must submit in the circumstances to somewhat stringent terms, and you must be prepared to bind yourself at once to purchase the property for the sum of £6,500 on the terms, so far as applicable, of the draft contract which otherwise would be entered into with Mrs. Simpson." I have not the slightest doubt but that in the circumstances Canon Buttle would have agreed to those stringent terms and that the matter would have been carried out. The trustees, however,

perfectly *bona fide*, maintained their attitude, qualified to this very important extent, that, if the canon decided to take the matter to the court, they would have no objection to having the court's directions. As the counterclaim asks that directions should be given by the court to the trustees, and that appears to me to be the proper way of dealing with the difficulty which has arisen, I do not propose to make any order in the action under paras. 1, 2 or 3 of the claim, although I express the view that the plaintiffs were entitled to start proceedings to arrest the further progress of the transaction with Mrs. Simpson. It follows that, as they were entitled to do that, they are entitled to have their costs provided for. Therefore, it appears to me that the fair order to make in this somewhat tangled matter is that the trustees shall pay the plaintiffs' costs of the action and are entitled to be indemnified, both as regards their own costs and the costs ordered to be paid to the plaintiffs, out of the proceeds of the sale of the property.

[The hearing proceeded on the counterclaim, for the most part in chambers. His LORDSHIP then heard Mrs. Simpson in open court.]

WYNN-PARRY, J.: There being a serious purchaser, I shall give the trustees liberty to sell to Mrs. Simpson for £6,600, that being the highest price offered.

Order accordingly. Costs of all parties, as between party and party, to be paid out of the proceeds of the sale of the property.

Solicitors: *Stanley Wise & Co.*, agents for *John F. Buttle*, Woldingham (for the plaintiffs); *Pedley, May & Fletcher* (for the trustees and the beneficiaries other than the plaintiffs).

[Reported by R. D. H. OSBORNE, Esq., Barrister-at-Law.]

INLAND REVENUE COMMISSIONERS v. T. W. LAW, LTD.

[CHANCERY DIVISION (Romer, J.), May 16, 26, 1950.]

Excess Profits Tax—Computation of standard profits—"Working proprietors"—Director of company "owning" shares—Shareholding as joint owner—Finance (No. 2) Act, 1939 (c. 109), s. 13 (2) (b) (as substituted by Finance Act, 1940 (c. 29), s. 31 (1)).

The Finance (No. 2) Act, 1939, s. 13 (2), as substituted by the Finance Act, 1940, s. 31 (1), provides that, in computing standard profits for the purpose of excess profits tax in the case of a trade or business carried on by a company, a minimum standard can be adopted according to the number of "working proprietors," i.e., any full time working director who owns more than one-twentieth of the share capital of the company. The directors of the respondent company were the widow and the two sons of a testator, and they worked full time in the conduct or management of the company's business. The company's capital was £1,500 divided into fifteen hundred shares of £1 each, and each director held in his own right five shares, the remainder—1,485 shares—being held by them on trusts declared by the will of the testator and under a deed of family arrangement for the widow for her life and thereafter for the two sons in equal shares. The trust shares were registered in the joint names of the three directors, the widow's name appearing first on the register, and by the articles of the company the voting rights in respect of the trust shares were exercisable by the first-named of the joint shareholders to the exclusion of the votes of the others. The company claimed that each of the widow and the two sons was the

"owner" of the whole of the issued capital of the company, and that, therefore, the company was entitled to compute the standard profit on the basis of having three "working proprietors." The Crown did not admit that any of the three directors was a "working proprietor," but conceded that the widow should be so regarded.

A HELD: each of the sons owned an interest, commensurate with the interests of each of his co-trustees, in the entirety of the trust shares; an interest of that nature did not amount to ownership of the shares; and, therefore, neither of the sons was a "proprietor" within the meaning of s. 13 (2) (b) of the Finance (No. 2) Act, 1939 (as substituted by s. 31 (1) of the Finance Act, 1940).

B [FOR THE FINANCE (NO. 2) ACT, 1939, s. 13 (2), AS AMENDED BY THE FINANCE ACT, 1940, s. 31 (1), see HALSBURY'S STATUTES, Second Edn., Vol. 12, pp. 442, 443.]

Cases referred to:

(1) *Inland Revenue Comrs. v. Bibby & Sons*, [1945] 1 All E.R. 667; 114 L.J.K.B. 353; 173 L.T. 17; 29 Tax Cas. 167; 2nd Digest Supp.

(2) *Re Glory Paper Mills Co.*, [1894] 3 Ch. 473; 63 L.J.Ch. 885; 71 L.T. 528; 9 Digest 90, 370.

(3) *Grundy v. Briggs*, [1910] 1 Ch. 444; 79 L.J.Ch. 244; 101 L.T. 901; 9 Digest 370, 2357.

CASE STATED by the Special Commissioners of Income Tax.

D The Special Commissioners found that each of the three directors of the respondent company, who were the joint holders of 1,485 shares out of a total of fifteen hundred shares issued by the company, was entitled to claim to be a "proprietor," within the meaning of s. 13 (2) (b) of the Finance (No. 2) Act, 1939, as substituted by the Finance Act, 1940, s. 31 (1), by virtue of his or her name on the register of members notwithstanding that their respective holdings included shares registered in joint names. The Crown appealed against the finding of the commissioners, contending that none of the three directors was the owner of more than one-twentieth of the share capital of the company and accordingly none was a "proprietor." The relevant facts are set out in the judgment.

E *Sir Andrew Clark, K.C., J. H. Stamp and R. P. Hills* for the Crown.
J. Charlesworth (R. Rawden Smith with him) for the company.

Cur. adv. vult.

F May 26. ROMER, J., read the following judgment. This is an appeal by the Commissioners of Inland Revenue by way of Case Stated from a decision of the Special Commissioners who decided that each of the three directors of the respondent company ought properly to be regarded as a "working proprietor" for the purposes of s. 13 (2) (a) of the Finance (No. 2) Act, 1939, as substituted by s. 31 (1) of the Finance Act, 1940.

G The facts were not in dispute before the commissioners and may be shortly stated. A Mr. T. W. Law, who died on May 5, 1930, had for many years carried on the business of a baker and confectioner. By his will he appointed his widow and his two sons to be the executors and trustees thereof and gave to them his residuary estate (which included the said business) on trust for his wife for life and thereafter for the testator's children in equal shares, and he empowered his trustees to carry on the said business as if they were beneficially entitled thereto. H In 1936 the three trustees decided to form a company to carry on the said business, and, accordingly, on Oct. 26 of that year, formed the respondent company to acquire and carry on the business. The company's capital was and is £1,500, divided into fifteen hundred shares of £1 each. The sale of the business to the company was effected on Nov. 4, 1936, in consideration of the issue to the trustees of the whole of the said share capital, fully paid. Article 17 of the company's articles of association provided that the qualification of every director

should be the holding in his own right, and as sole holder, of at least five shares of any class or classes in the capital of the company.

The testator's widow and two sons were each allotted five shares in order to qualify them as directors of the company and the remaining 1,485 shares were registered in their joint names, the widow's name appearing first on the register. This arrangement was authorised by the beneficiaries under the testator's will by a deed of family arrangement dated Nov. 28, 1936, which also provided that the said trustees should hold the shares on the same trusts as were declared by the will in respect of the business and that they should have the same powers to carry on the company's business as they had possessed under the will in respect of the testator's business. A

Article 55 of Table A of sched. I to the Companies Act, 1929 [now art. 63 of Table A of sched. I to the Companies Act, 1948], applies to the respondent company and provides: B

"In the case of joint holders the vote of the senior who tenders a vote whether in person or by proxy, shall be accepted to the exclusion of the votes of the other joint holders; and for this purpose seniority shall be determined by the order in which the names stand in the register of members." C

At all material times the widow and the two sons worked full time in the conduct or management of the business.

For the purposes of computing standard profits the respondent company elected in favour of the minimum amount stated in s. 13 of the Finance (No. 2) Act, 1939. For each of the chargeable accounting periods ending May 5, 1944, 1945 and 1946 respectively and for the chargeable accounting period ending Dec. 31, 1946, it was proposed to assess the respondent company to excess profits tax on the basis that two of the three directors of the company—namely, the two sons—were not "proprietors" within the meaning of s. 31 (1) (b) of the Finance Act, 1940. It was not admitted by the Commissioners of Inland Revenue that the widow, the third director, was a "proprietor" but, as a concession, having regard to the special circumstances of the case, the commissioners did not oppose the allowance of a minimum standard computed on the basis of treating the widow as a "working proprietor." D

It was contended before the Special Commissioners on behalf of the company that the widow and the two sons, although trustees, were the owners of the whole of the issued capital of the company and that each of them was the "owner" of the shares (namely, all the shares) in respect of which he or she appeared on the register of members and that they were "working proprietors" within the meaning of s. 13 of the Act of 1939 as substituted. This contention was accepted by the Special Commissioners and hence this appeal by the Commissioners of Inland Revenue who, while still adhering to the concession before referred to in favour of the testator's widow, argue that neither of the sons is a "proprietor" for the purposes of the section. Indeed, the Revenue say that in strictness the widow is not a "proprietor" either, inasmuch as the reference in s. 13 (2) of the Act of 1939 to "owning" share capital of a company means owning beneficially and not merely as a trustee. Beyond noting that LORD RUSSELL OF KILLOWEN in *Inland Revenue Comrs. v. J. Bibby & Sons, Ltd.* (1) ([1945] 1 All E.R. 669) was *prima facie* disinclined to accept this view I do not propose to consider it further, for the concession to which I have referred and the fact that I am unable to accept the arguments advanced on behalf of the two sons which I have outlined make it unnecessary for me to do so. I, accordingly, approach the matter on the assumption that a person may "own" capital for the purposes of the section in a representative, as distinct from a beneficial, capacity. E F G H

On this assumption it was argued before me on behalf of the company that the sons and their mother were joint tenants of the trust holding of 1,485 shares;

that the interest of each joint tenant is an interest in an undivided whole; and that, accordingly, it may fairly be said that in law each of the trustees owns the entirety of the trust holding. I am quite unable to accept this argument. The fact that a joint tenant has a legal interest in the entirety of the subject-matter of the joint tenancy seems to me to be far removed from the conception that each such tenant "owns" the subject-matter, whatever the meaning that may be attributed to the word "own."

A It is difficult to think of any act of ownership in relation to the shares that either of the sons can perform on his own. He cannot sell them, transfer them, mortgage them, or give a discharge to the company for dividends declared on them, nor can he exercise any control in respect of them, for the voting rights attached to the shares are exercisable primarily by the mother (a fact which may justify logically the discriminatory concession in her favour to which I have referred). If, then, a man is unable to perform any acts of ownership over or in relation to shares, how can it be said that he "owns" them? In my opinion, what each of the sons owns is neither the trust holding nor any ascertainable portion of it. What he does own is an interest, commensurate with the interests of each of his co-trustees, in the entirety of the trust shares, and that interest, in my judgment, is not within the scope of ownership prescribed by s. 13 of the Act of 1939. The result, would, indeed, be strange if the company's argument were to be accepted, for had the whole trust holding only just exceeded one-twentieth of the share capital of the company, the company would nevertheless have been able to rely on that holding as a sufficient foundation, not only for one, but for three individual working proprietors, a result which I cannot think was within the contemplation of the framers of the section.

D Counsel for the company sought to support or fortify the company's argument by the reasoning and conclusions in certain cases which relate to directors' qualification shares. The first of these is *Re Glory Paper Mills Co.* (2). In that case a gentleman named Dunster was a signatory to the memorandum of association of a certain company, and he signed for one hundred £10 preference shares. He also signed the company's articles of association, which named him as one of the first directors and provided that the qualification of a director should be the holding of shares of the nominal amount of £1,000 at the least. Dunster was a member of a firm which had been acting as agents in the formation of the company and were desirous of being appointed agents of the company. The directors and the firm agreed that the latter should take one hundred fully paid up shares and should be appointed agents of the company at a commission. The firm signed an application for the shares and they were allotted to them and they paid for them and were put on the register. The company did not call on Dunster to take one hundred shares in his own name, but treated the shares allotted to his firm as satisfying his signature to the memorandum and as his qualification as a director. Some years later the company was wound-up and the liquidator put Dunster on the list of contributories for one hundred shares in addition to the shares held by the firm. It was held by the Court of Appeal that there was only one agreement for taking one hundred shares and that Dunster's signature to the memorandum of association and the firm's application for shares were in performance of the same agreement, and that, therefore, the allotment of shares to the firm was a satisfaction of Dunster's signature of the memorandum and also of his qualification as a director. On the latter point LINDLEY, L.J., said ([1894] 3 Ch. 480):

"The articles say that the qualification of a director shall be the holding of 100 shares, and a director may act before he gets them. Mr. Dunster did hold the 100 shares, and there is nothing which requires him to hold them in his own name alone. If the company chooses to take the extra responsibility of his partner that does not matter."

LOPES, L.J., agreed, as also did DAVEY, L.J., who said (*ibid.*, p. 482):

"I entirely agree with LINDLEY, L.J., that a man is none the less a holder of 100 shares because the company has the additional advantage of having another person joined with him, both of those joint holders being jointly and severally liable to the company."

In *Grundy v. Briggs* (3) part of a testator's estate consisted of 122 shares of £100 each in the capital of a company. After his death his executors (who were the testator's widow and three children) produced the probate at the company's offices and were registered as the joint holders of the shares, being described in the register as "the widow and co-executors of James Grundy deceased." Ten of these shares were subsequently transferred by the executors leaving 112 shares standing in their joint names. Later on, one of the executors (who personally owned five shares) was appointed a director of the company, whose articles provided (*inter alia*) that: "each of the directors shall be the registered holder of not less than twenty shares." For present purposes it is sufficient to state that a question arose whether the executor's joint holding of the 112 shares with his co-executors satisfied the requirement of the relevant article. EVE, J., held that it did. After pointing out, first, that the company's articles did not require its directors to hold their qualification shares in their own right and that its constitution contemplated that a man might be a director in a representative capacity, holding somebody else's shares, and, secondly, that a continuity of shareholders would, for the reasons indicated by the learned judge, be in the interests of the company, EVE, J., proceeded as follows ([1910] 1 Ch. 451):

"Was [the executor in question] the registered holder of not less than twenty shares at the moment when he, his mother, his brother, and his sister were jointly registered as holders of 112 shares? I think he was. I think if anybody had asked what [his] holding in the company was, or of what shares he was the registered holder, the reply must have been that he was the registered holder of five shares in his own name and of 112 shares in the joint names of his mother, his brother, his sister, and himself, and I think I should be really disregarding the explicit expression of opinion both by LINDLEY, L.J. and DAVEY, L.J., in *Re Glory Paper Mills Co.* (2) if I were to hold that this article has been so framed as to exclude the operation of that decision."

It seems to me that I can derive very little assistance in the present case from either of these decisions. They decide merely that in cases where a qualification clause does not require a director to hold his qualification shares in his sole name or in his own right then ordinarily a director who is on the register jointly with others in respect of the requisite number of shares sufficiently discharges his obligation to the company. In such a case he can be properly regarded as the holder or even the registered holder of the shares, but the reasons for this conclusion, as stated by the lords justices in *Re Glory Paper Mills Co.* (2) and adopted by EVE, J., in *Grundy v. Briggs* (3), afford little support, in my judgment, for the view that one joint holder of the shares is the owner of the shares and, for the reasons which I have already stated, I am clearly of opinion that he is not.

In my judgment, accordingly, this appeal should be allowed, and the matter remitted to the Special Commissioners with a direction that, in computing the assessments in question the minimum standard profits, as provided for by s. 13 of the Finance (No. 2) Act, 1939, as substituted by s 31 (1) of the Finance Act, 1940, should be computed on the basis that neither of the two sons was a "proprietor" within the meaning of s. 31 (1) (b) of the Finance Act, 1940.

Appeal allowed with costs.

Solicitors: *Solicitor of Inland Revenue* (for the Crown); *Hewitt, Woollacott & Choun*, agents for *Gibson* (*Chas. H.*), *Thompson & Gascoigne*, *Newcastle-on-Tyne* (for the company).

[Reported by C. N. BEATTIE, ESQ., Barrister-at-Law.]

CURTIS v. MALONEY. R. CHEKE & CO. AND ANOTHER
(Third Parties).

[KING'S BENCH DIVISION (Finnemore, J.), May 24, 1950.]

Execution—Sale by sheriff of goods seized—Title of purchaser—Rights of true owner of goods—Bankruptcy and Deeds of Arrangement Act, 1913 (c. 34), s. 15.

A A sheriff, in execution of a writ of *fieri facias*, seized a motor cabin cruiser in the possession of the execution debtor, and sold it by public auction. The sale had been advertised and no claim was made to the vessel before the sale. It subsequently appeared that the cabin cruiser had, in fact, belonged to C., who now claimed from the purchaser the return of the cabin cruiser or its value, and damages for its detention.

B HELD: on the true construction of the operative part of the Bankruptcy and Deeds of Arrangement Act, 1913, s. 15, the purchaser obtained a title good against the whole world; the terms of the proviso to the section must be construed as being subject to the enacting part of the section and thus preserving to C. whatever rights he had by action other than against the sheriff and the purchaser; and, therefore, the action failed.

C [AS TO TITLE OF PURCHASER FROM SHERIFF, see HALSBURY, Hailsham Edn., Vol. 14, p. 69, para. 116; and FOR CASES, see DIGEST, Vol. 21, pp. 515-518, Nos. 915-939.]

Case referred to:

(1) *Jones Bros. (Holloway), Ltd. v. Woodhouse*, [1923] 2 K.B. 117; 92 L.J.K.B. 638; 129 L.T. 317; 21 Digest 372, 1470.

D ACTION.

In 1948 the plaintiff left a motor cabin cruiser in the care of Messrs. V. Radley & Sons, boatwrights, who subsequently got into financial difficulties with the result that a judgment was obtained against them. In execution of a writ of *fieri facias* against Messrs. Radley & Sons the sheriff of Essex seized the boat, and on Jan. 25, 1949, by the sheriff's order it was sold by auction, no claim having been made to the sheriff by any third party in respect thereof. On Feb. 25, 1949, the plaintiff claimed the return of the boat from the purchaser, and on Mar. 30, 1949, he served the writ in the present action, claiming from the purchaser the return of the boat, or £450 its value, and damages for its detention. The purchaser relied on the Bankruptcy and Deeds of Arrangement Act, 1913, s. 15, and also brought in as third parties the sheriff and the auctioneers, against whom he claimed an indemnity under the Law Reform (Married Women and Tortfeasors) Act, 1935, s. 6, and, alternatively, damages for breach of the warranty implied by the Sale of Goods Act, 1893, s. 12 (1).

Glyn-Jones, K.C., and *Chedlow* for the plaintiff.

P. H. R. Bristow for the defendant (the purchaser).

G *Beresford, K.C.*, and *Pensotti* for the third parties.

FINNEMORE, J.: The first point which arises in this case is the construction of the Bankruptcy and Deeds of Arrangement Act, 1913, s. 15. It is by no means an easy matter, because the section is difficult to construe if one is to give full effect to everything which is in it, including what is commonly called the operative part of the section and the proviso thereto. The section provides:

H "Where any goods in the possession of an execution debtor at the time of seizure by a sheriff, high bailiff, or other officer charged with the enforcement of a writ, warrant, or other process of execution, are sold by such sheriff, high bailiff, or other officer, without any claim having been made to the same, the purchaser of the goods so sold shall acquire a good title to the goods so sold..."

It then goes on to say that no person shall be entitled to recover against the sheriff, high bailiff, or other officer, subject to certain provisions about notice. Then there is the proviso:

“ Provided that nothing in this section contained shall affect the right of any claimant who may prove that at the time of sale he had a title to any goods so seized and sold to any remedy to which he may be entitled against any person other than such sheriff, high bailiff, or other officer as aforesaid.”

The important parts for the purpose of this case are, first, the words “ the purchaser of the goods so sold shall acquire a good title to the goods so sold ” and, secondly, the proviso. It is argued for the plaintiff that the purpose of this section was to give protection to the sheriff, a protection which he had not enjoyed before, the courts of this country always having been jealous to guard the rights of owners of property and to preserve their rights against people who wrongfully disposed of their property. It is then argued that, that being the object and purpose of the section, the proviso leaves open every possible right to the true owner against everybody except the sheriff. It is argued that that includes a right against the innocent purchaser of the goods so sold to whom previously the section had purported to give a good title. On the other side, it is said that the proviso must be limited, because, if you construe it in the way for which the plaintiff contends, you destroy any meaning that could be given to the words relating to the acquisition of a good title by the purchaser of goods sold by the sheriff after seizure. The Act provides that the purchaser of the goods so sold shall acquire a good title. It is said that he cannot acquire a good title if the true owner can assert against him his better title and claim the goods which the purchaser bought from the sheriff.

There appears to be no authority on the point. A number of text books have been referred to, but the only one, I think it is fair to say, which gives a plain opinion on this matter is HALSBURY'S LAWS OF ENGLAND, Hailsham ed., vol. 14, p. 69, para. 116, where the writers say:

“ A sale by the sheriff is not a sale in market overt, but where any goods in the possession of an execution debtor at the time of seizure by the sheriff are sold by the sheriff without any claim having been made to them, the purchaser acquires a good title subject to the right of any person, who may prove that at the time of sale he had a good title to any of the goods, to any remedy to which he may be entitled against the purchaser.”

That is a plain expression of opinion by the writers of that title in favour of the argument contended for by the plaintiff. I do not think that GOODEVE ON PERSONAL PROPERTY, 8th ed., does any more than set out in the writer's own words the section, with the possible exception that on p. 496 he says:

“ This, however, does not affect the right of any claimant who proves that at the time of the sale he had a title to any goods so seized and sold to seek any remedy he may be entitled to against persons other than the sheriff or other officer concerned, for example, the judgment creditor.”

Of course, “ for example, the judgment creditor ” does not exclude the innocent purchaser, though it may be argued that, for what it is worth, it is an expression of opinion of the probable meaning of this proviso as not including the purchaser.

In *Jones Bros. (Holloway), Ltd. v. Woodhouse* (1) the true owners of some furniture proceeded against the execution creditor for the proceeds of the sale of their property as money had and received by him for their use, and it was held that the action was well founded. Doubt was expressed whether there was any estoppel and also how much of the money received by the judgment creditor could be recovered. Section 15 was not under review. While at first sight one might be surprised that, if the plaintiff's view of the section which is argued

before me is right, the plaintiffs in *Jones Bros. (Holloway), Ltd. v. Woodhouse* (1) should have proceeded against the judgment creditor for money had and received, there may be many explanations of that. One obvious one is that the proceedings were more than a year after the sale. The sale was of articles of furniture, and it may well be that they had gone past recall, or were not worth claiming by the time that the proceedings were taken, but the plaintiff's
A counsel in argument seems to have assumed that there was no right against the purchaser. McCARDIE, J., in that case plainly states his view of the effect of this section. He says ([1923] 2 K.B. 126):

“By the Bankruptcy and Deeds of Arrangement Act, 1913, s. 15, where goods in the possession of an execution debtor at the time of seizure by the
B sheriff are sold by the sheriff without any claim having been made to them, the purchaser of the goods so sold is protected, and the sheriff is protected also, unless in either case he had notice or might have found that the goods were not the property of the execution debtor. It is reasonably clear from the section that it is not intended to interfere with the right of the true owner of the goods to recover their value from the execution creditor at whose
C instance they have been seized.”

Again it has to be pointed out that the question which arises here was not argued in that case. I think, therefore, there is no authority which gives any real guidance, and I must do the best I can to give to this section a meaning which I think is the proper one.

It has been argued that, while the purchaser of the goods obtains a good title,
D that title cannot prevail against the true owner, because by the proviso the true owner is entitled to any remedy which he has against any person other than the sheriff or such officer. It is said that, had it been intended to protect the purchaser as against the true owner, nothing would have been more easy than to have put it in plain terms in the proviso. The conclusion to which I have come is that the section says in the plainest possible terms:

“... the purchaser of the goods so sold shall acquire a good title to the
E goods so sold.”

I think a “good title” must mean a good title against everybody, including the person who might at a later date show that he had got a better title as being the
F true owner. It then goes on to exempt from any liability the sheriff who has by his sale given that good title to the innocent purchaser. Then comes the proviso, and I think that

“any claimant who may prove that at the time of sale he had a title to
any goods”

G includes the true owner. The proviso reserves to him any remedy to which he may be entitled against anybody other than the sheriff. I think, however, that it must be read subject to the original enactment that the purchaser of the goods so sold shall acquire a good title. Otherwise the proviso contradicts that part of the section, and renders it meaningless, and I do not think it is necessary to read it in that sense.

H I think the purpose and object of this section is, first, to protect the innocent purchaser who buys from the sheriff; secondly, to protect the sheriff against any action against him; and, thirdly, to preserve to the true owner whatever other rights he has by action against anybody except the sheriff. It is probably right to say that the true owner did not need any provision in this section to be able to pursue his right for money had and received against the judgment creditor, but one can understand that in a section of the nature of s. 15 there might well be an express proviso to preserve all other rights than against the

purchaser or the sheriff. I have come to the conclusion, therefore, that the plaintiff is not entitled to sue the defendant in detinue as he has done, and his action against the defendant fails.

Judgment for the defendant against the plaintiff with costs. Judgment for the third parties against the defendant with costs.

Solicitors: *R. I. Lewis & Co.* (for the plaintiff); *White & Leonard*, agents for *H. M. Pinney*, Hornchurch (for the defendant); *Patersons, Snow, Coe's & Kearsley's*, agents for *Gepp & Sons*, Chelmsford (for the third parties).

[Reported by F. A. AMIES, Esq., Barrister-at-Law.]

BORTHWICK-NORTON AND OTHERS v. COLLIER.

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Somervell and Asquith, L.J.J.), May 22, 23, 24, 1950.]

Requisition—Land—Compensation—Right of owner to compensation—Formal claim made by lessee—"Owner"—Computation of rackrent—Regard to restrictive covenants in lease—Date at which rackrent to be computed—Compensation (Defence) Act, 1939 (c. 75), s. 2 (3), s. 11, s. 17 (1)—Public Health Act, 1936 (c. 49), s. 343 (1).

The plaintiffs were the ground lessors of premises let to the defendant's (the tenant's) predecessor in title under a long lease dated July 30, 1934, at a rent of £150 per annum. The lease contained a full repairing covenant and was subject to restrictions as to user. At the time of the lease the rent obtainable on a yearly tenancy was £180 per annum. On Mar. 30, 1944, the premises were requisitioned and the requisition ended on Feb. 28, 1948. The tenant, in his own name, made a claim within the six months period prescribed by s. 11 of the Compensation (Defence) Act, 1939, for compensation for damage caused during the requisition. The amount of the compensation was agreed, and authorisation was given for its payment by the requisitioning authority, but, as both the lessors and the tenant claimed to be entitled to the compensation, the authority interpleaded, and the issue was tried before HILBERY, J., who found for the lessors. On appeal, the tenant contended that the lessors were not entitled to the compensation because they had not made a claim within the period prescribed by s. 11; that they were not the "owners" within s. 2 (3) and s. 17 (1) of the Act as they were not receiving the rackrent of the premises calculated as at the time of the de-requisition; and that the restrictive covenants contained in the lease should be disregarded in assessing the rackrent.

HELD: (i) if a claim to compensation were properly put forward within the prescribed time by a tenant or some other person properly interested, an owner was not barred by s. 11 from claiming the compensation although the claim to it had not been made by him or on his behalf; the Landlord and Tenant (Requisitioned Land) Act, 1944, s. 1 and s. 2, gave a tenant who had paid for repairs rendered necessary by a requisition a remedy over against the actual recipient of the compensation money and so the tenant in the present case had a *locus standi* to put forward the claim; and the lessors were not precluded from claiming the compensation.

(ii) when the court had to consider whether a rent was a rackrent it must have regard to restrictive covenants in the lease.

(iii) "rackrent" in the definition of "owner" given in s. 17 (1) of the Act meant a rent which was a rackrent at the date when the lease was granted and not one which was necessarily still a rackrent at the date of

de-requisition; the rent receivable by the lessors was a rackrent at the date of the lease; and, therefore, the lessors were the "owners" within s. 2 (3) of the Act and entitled to receive the compensation.

[FOR THE COMPENSATION (DEFENCE) ACT, 1939, s. 2 (1) (b) (3), s. 7, s. 11 and s. 17, see HALSBURY'S STATUTES, Second Edn., Vol. 3, pp. 990, 1000, 1002, and 1005; and FOR THE LANDLORD AND TENANT (REQUISITIONED LAND) ACT, 1944, s. 1, s. 2, and s. 3, see HALSBURY'S STATUTES, Second Edn., Vol. 13, pp. 972, 973.]

A APPEAL from a decision of HILBERY, J., dated Mar. 14, 1950, whereby it was held that the plaintiffs as lessors were entitled to receive the compensation payable in respect of the requisitioning of premises situate at No. 6, Somers Crescent, Paddington, of which the defendant was lessee. After the premises B had been de-requisitioned the defendant made a claim under the Compensation (Defence) Act, 1939, s. 11. The claim was admitted and the damage quantified, but, as both the plaintiffs and the defendant claimed to be the owner of the premises within s. 17 of the Act, the requisitioning authority, the London County Council, declined to pay until the dispute was settled. In an action by the plaintiffs against the defendant the county council interpleaded, and it was C ordered that the issue between the parties should be tried and the compensation money paid into court to abide the result. HILBERY J., gave judgment for the plaintiffs, and the defendant appealed. The facts appear in the judgment of SOMERVELL, L.J.

Sir Shirley Worthington-Evans for the plaintiffs.

D *H. J. Astell Burt* for the defendant.

SIR RAYMOND EVERSLED, M.R.: I will ask SOMERVELL, L.J., to deliver the first judgment.

E SOMERVELL, L.J.: This is an appeal from a judgment of HILBERY, J., on an interpleader issue which arose in the following circumstances. The appeal is concerned with premises at No. 6, Somers Crescent, London. On F July 30, 1934, the plaintiffs, Paddington Estates Trustees, who were the owners of those premises, granted a lease of them to Brigadier-General Lloyd, the rent payable under that lease being £150 per annum. On Mar. 30, 1944, the house was requisitioned by the Ministry of Works. Later, the requisitioning powers were transferred to the London County Council and were exercised by them. On Feb. 28, 1948, No. 6, Somers Crescent, was de-requisitioned. G On Mar. 12, 1948, Brigadier-General Lloyd assigned his lease to Mr. Collier, the defendant, who is one of the parties to the present interpleader issue. As a result of the requisitioning certain rights to compensation arose. There was a rental payable during the period of requisition with which we are not particularly concerned, though it was referred to in connection with one of the issues raised. There is statutory provision, and it is on this that the case turns, with regard to compensation for making good damage done to the premises H during the requisitioning period. The defendant put in a claim in respect of the damage under the Compensation (Defence) Act, 1939, s. 11. That claim was agreed in amount, and the question was then raised whether under the Act it was payable to the defendant or to the plaintiffs? That is the issue in these proceedings. The London County Council interplead.

Before I go into the history I will refer to the Compensation (Defence) Act, 1939. The section we are concerned with is s. 2 (1) which provides:

"The compensation payable under this Act in respect of the taking possession of any land shall be the aggregate of the following sums, that is to say . . . (b) a sum equal to the cost of making good any damage to the land which may have occurred during the period for which possession thereof is so retained (except in so far as the damage has been made good during

that period by a person acting on behalf of His Majesty), no account being taken of fair wear and tear or of damage caused by war operations."

Sub-section (3) is:

"Any compensation under para. (b) of sub-s. (1) of this section shall accrue due at the end of the period for which possession of the land is retained in the exercise of emergency powers, and shall be paid to the person who is then the owner of the land."

Section 7 reads:

"Any dispute as to whether any compensation is payable under this Act, or as to the amount of any compensation so payable, shall, in default of agreement, be referred to, and determined by, the appropriate tribunal constituted under the following provisions of this Act, and the decision of that tribunal shall be final: Provided that . . ."

and then there is a provision for a Special Case to be stated on any question of law. Section 11 says:

"No claim for any compensation under this Act shall be entertained unless notice of the claim has, in such form and manner as may be prescribed, been given to the prescribed authority within the period of six months, or such longer period as the Treasury may, either generally or in relation to any particular claim or class of claims, allow, beginning in either case with the date on which the compensation accrues due or the date of the passing of this Act, whichever is the later."

By s. 17 (1):

"'Owner' means (a) in relation to land, the person who is receiving the rackrent of the land, whether on his own account or as agent or trustee for any other person, or who would so receive the rackrent of the land if it were let at a rackrent . . . and in this definition the expression 'rackrent' has the same meaning as in the Public Health Act, 1936."

I will come back to the definition in the Public Health Act, 1936, later when I deal with that issue, because I propose to deal with the points raised by counsel for the defendant in the order in which he made them.

I will also refer to the Landlord and Tenant (Requisitioned Land) Act, 1944. It would appear to have been thought in 1944 that, if the Act of 1939 were left as it was, tenants might not get the rights in respect of compensation for damage done to which, having regard to the terms of their leases, it might be thought they were entitled. If, for instance, the damage was done in respect of repairs which the tenant, under his lease paying a rackrent, was liable to do, could the landlord get the compensation and insist on the tenant carrying out his covenant? That obviously would have been unjust. A tenant might, when the requisition was over, have found the premises in a very bad state and he might himself have carried out some repairs to make it habitable—repairs for which, it was shown on investigation, the requisitioning authorities were liable. It would seem wrong if in those cases the tenant had no right to be reimbursed and that the landlord should get and keep the money. The matter engaged the attention of Parliament, and the first two sections of the Landlord and Tenant (Requisitioned Land) Act, 1944 dealt with it. Section 1 (1) modifies the obligations under repairing covenants in respect of damage which occurs during a requisition of leaseholds where the landlord has got the compensation money, so that he does not in effect get relief twice over. Section 2 gives a tenant who has made good damage in respect of which compensation is paid to the landlord the right to recover from the landlord the money he has spent up to the proportion of the compensation referable to the damage which he has repaired.

The requisition in the present case having ceased on Feb. 28, 1948, on Mar. 18, 1948, the defendant put in a claim in the prescribed form within six months. Therefore, on the face of it, the provisions of s. 11 were satisfied. The actual figure was agreed, there being a sum in respect of surveyor's fees and a sum in respect of damage. The district surveyor made a report and the payment was authorised. Then the solicitor to the London County Council took the point that under the provisions of the Act of 1939 the amount must be payable to the owner, who is the person entitled to receive the rackrent. He asked the defendant for his title and the matter was examined. The authorities took the view that the plaintiffs were the owners under the Act, and, therefore, their consent to payment to the defendant should be obtained. The plaintiffs were communicated with and there was a suggestion that the money might be deposited in joint names and drawn on in favour of the defendant if he satisfied the plaintiffs that he had done repairs in respect of which compensation had been paid. However, nothing came of that. The defendant made his claim against the county council, the council interpleaded, and the plaintiffs were made plaintiffs in the interpleader proceedings. The surveyor's fees, £55 7s. 9d., which the defendant had paid, were paid to him. The plaintiffs made no claim in respect of them, and they pass out of the picture. The interpleader order reads as follows:

"Whereas the above-named the trustees of the Paddington Estate affirm and the above-named Francis Howard Collier denies that the fund of £1,128 18s. 7d. now in court to the credit of this action . . . and for the recovery whereof the said Francis Howard Collier lately commenced an action against the London County Council is payable to the said the trustees of the Paddington Estate and not to the said Francis Collier and that the costs of the London County Council directed to be deducted as in the master's said order are payable by the said Francis Howard Collier and not by the said the trustees of the Paddington Estate And it has been ordered by the order of Master Horridge dated Mar. 9, 1949 that the said issue shall be tried at Middlesex by a judge alone and be entered in the long non-jury list."

The first point taken by counsel for the defendant was that the plaintiffs can make no claim here because they made no claim on the prescribed form within the six months provided for by s. 11. He said that they cannot rely on the defendant's claim in any way, that it was not made on their behalf, that they had no knowledge of it, that the defendant did not purport to act as their agent, and, indeed, the subsequent proceedings show that that was the last position in which he intended to put himself. Therefore, it was submitted, the plaintiffs cannot succeed. HILBERY, J., dealt with that in this way:

"The defendant's counsel's next contention was that the plaintiffs' claim in this issue was a claim to compensation, and was not made within the time or in the form prescribed by the Act. He relied on the words of s. 11 of the Act. The answer to this seems to me to be that s. 11 is intended to apply to the claim to compensation made under s. 2. That claim was already disposed of and the amount of it settled by agreement before this issue was directed to be tried by this court. The party made plaintiffs in this issue are not claiming compensation under s. 2, but are claiming to be the party to whom the amount of compensation, as quantified when the claim for compensation was made, has to be paid according to the express direction given in the Act. That is a claim which is quite distinct from the claim for compensation to be made in the form and on the form prescribed by the Act. That contention, therefore, likewise fails."

I agree with that and it seems to me in accordance, not only with the wording

of the Act, but with common-sense. The object of a short period of limitation is clearly that, if a claim for compensation for damage under s. 2 is going to be made, it is only right and proper that it should be made promptly in order that the requisitioning authorities shall have a chance of seeing what has been damaged. If there was a delay, it might be very difficult to prove what damage had been done during the requisitioning period and what damage had been done since. That was fulfilled in the present circumstances by the claim being put forward by the defendant, and it seems to me that s. 11 is satisfied if a claim is put forward by a tenant, or by someone properly interested if there is someone other than a tenant who might be in that position—I am thinking of someone at the moment apart from the owner—and the matter is properly investigated and the damage considered, and the amount, as in this case, quantified. The matter did not have to go to the tribunal. The fact that the Act provides that the compensation is to be paid to the owner does not seem to me to affect the matter. The claim has been made, the compensation has been assessed, and “X” comes forward and says: “I am the owner.” In my view, provided the claim is properly put forward, an owner is not barred by s. 11 because he did not himself, in his own name, put forward a claim within the six months. Therefore, I think, that point fails. It was pointed out towards the end of the argument by SIR RAYMOND EVERSLED, M.R., that, even if it might arise in certain cases, it would be very difficult to regard it as a good point here where the county council have paid the money into court. That being so, it must be for the court to decide, there being this sum of compensation due under s. 2 (1), which is the party to whom it should be paid. I also think that the sections of the Landlord and Tenant (Requisitioned Land) Act, 1944, to which I have referred, give a tenant a *locus standi* to put forward the claim. So far as that is concerned, therefore, I think that point fails.

The second point is this. I have read the definition in s. 17 (1) which provides that for the purposes (*inter alia*) of s. 2 (3) “owner” in relation to land, means the person receiving the rackrent. Section 18 (1) goes on to provide:

“ . . . and in this definition the expression ‘rackrent’ has the same meaning as in the Public Health Act, 1936.”

The Public Health Act, 1936, s. 343 (1) provides:

“ ‘rackrent’ in relation to any property means a rent which is not less than two-thirds of the rent at which the property might reasonably be expected to let from year to year, free from all usual tenant’s rates and taxes, and tithe rentcharge (if any), and deducting therefrom the probable average annual cost of the repairs, insurance and other expenses (if any) necessary to maintain the same in a state to command such rent.”

That definition seems to me to proceed on this basis. First, a figure is assumed on a lease from year to year under which the landlord would do the repairs necessary to maintain the property in a state to command the rent. Having arrived at that figure, there must be deducted from it the average annual cost of the repairs, insurance and other expenses necessary to maintain the property in a state to command the rent. A figure is then arrived at, and the rackrent is two-thirds or more of the figure so obtained. Counsel for the defendant submits that the plaintiffs did not establish that, as at the date of requisitioning, they were receiving the rackrent. On that there are two points, and HILBERY, J., dealt with both of them. The first point is: Is it sufficient that the sum payable under the lease granted in 1934 amounted to a sum within the definition of rackrent in s. 343 (1) of the Public Health Act, 1936, considering the circumstances existing at the time when the lease was granted, or is it necessary to consider whether the figure is within the definition in the circumstances as they existed when the requisition ended, which might lead to a different result one way or the other, as the value of the property might

have gone up or down? HILBERY, J., decided that it was sufficient if the rent was within the definition at the time when the lease was granted. There is a second point under this lease. The premises were to be let as a single dwelling. Clause 2 (1) of the lease provides that the tenant

“will not use or permit to be used the demised premises or any part thereof for any illegal or immoral purpose nor for or as a hospital or charitable institution or for the teaching of singing or music of any sort nor for any trade business manufacture or profession whatsoever but will keep and use the demised messuage as and for a single private dwelling-house in one occupation only with any area yard or ground therewith demised as and for private ground in connection with the demised messuage only.”

When considering whether the rent which is being received is a rackrent, is it necessary to consider the restrictive covenants in the lease? There was a suggestion that it was necessary to consider what rent would be paid by somebody who was prepared to spend hundreds or thousands of pounds in converting the premises into flats. That, I think, clearly must be ruled out, because the definition is based on a lease from year to year, but it is possible to imagine a lease in all respects similar to this except that the lessee could use the house for a trade, business, or profession, or for the teaching of singing or music. It may be that, if these restrictions were removed, the property would fetch a larger rent, either in 1934 or in 1948, than the sum which was, in fact, paid, but it seems to me that in applying this definition and considering whether a rent is a rackrent, the court must have regard to the restrictive covenants in the lease. They must have regard to the premises as they are.

It would be, I think, an absurd position if, for instance, in an obviously residential neighbourhood with a rent obviously a rackrent for the premises as a private residence, the court was compelled to say that it was not a rackrent because a much larger figure might have been got if the house had been let with power to use it as a shop. I do not think that such of the evidence as was called in regard to what might be got for this house, apart from the restrictive covenants in the lease, has any relevance to the issue we have to decide. If the 1934 rent is taken, counsel for the defendant agreed, the evidence called for the plaintiffs (which on this issue the learned judge preferred to that called for the defendant) was conclusive. That evidence was that the tenant at that time had had a previous lease from the same estate. He surrendered some years at the end of his lease, and he had done some improvements to the house. That sort of negotiation is common and the evidence was that on the office records, which were not in dispute, the rent obtainable on a yearly tenancy was recorded as £180. By reason of the surrender of the remaining years of the earlier lease and because of the improvements which had been done to the house, the tenant was charged £150. As it was a full repairing lease, the deduction contemplated by the definition had already been done. Therefore, £150 being more than two-thirds of £180, it is a rackrent within the definition. HILBERY, J., indicated that, if he had to consider the later date, he also found that the rent was a rackrent. He put it in this way:

“In support of these last contentions, evidence was called to establish, if possible, (a) that, if freshly let on Feb. 28, 1948, for single occupation, the rent obtainable would have been very much higher than the £150 per annum reserved by the existing lease. The evidence called by the defendant failed to satisfy me of this as a matter of fact. I prefer the evidence called by the plaintiffs, and, relying upon it, decide this point against the defendant.”

Counsel for the defendant complains first of all that the judge was dealing with the evidence of a single occupation, and I have given my reasons for thinking he was right in so restricting himself. Then he criticised the expression “very much higher,” which is, undoubtedly, a vague phrase. It would be

necessary that it should be a figure, two-thirds of which was more than £150, so that it would have to be a good deal higher. The general effect of the evidence was that the position was, if anything, worse in 1948 than it was in 1934. Having read the evidence, I think the respondents have established that at the date when the requisition ceased they were the persons receiving a rack-rent within the definition. In those circumstances, therefore, the plaintiffs make out their case, and there should be an order for payment out to them of the sum in court, and the appeal should be dismissed.

ASQUITH, L.J.: I agree. The appeal raises two questions—(i) Was notice of the claim given within the time limit and otherwise in accordance with the terms of s. 11 of the Compensation (Defence) Act, 1939? and (ii) if s. 11 was complied with, who was the “owner” to whom under s. 2 (3) the compensation fell to be paid? On the second of these issues I do not wish to add anything to what **SOMERVELL, L.J.**, has said. On the first I venture to add two or three sentences. The defendant’s argument under this head, as I understand it, is that, even if the plaintiffs were the “owners” at the material time, the notice of claim which s. 11 requires to be given within six months is a notice which has to be given by *them*—the owners—or on *their* behalf and no such notice was given by them or on their behalf within those time limits or at all. It is, indeed, abundantly plain that notice was given within six months by the defendant, that this was the only notice given, and that he gave it on his own behalf only. The defendant’s submission under this head would have been difficult to resist if s. 11 had provided that the notice must be given by the owner or the person who ultimately turns out to be the owner, but the Act nowhere does this. It nowhere identifies the claimant under s. 11 with the owner, and I cannot see that any such identification must be implied. There is nothing absurd in a provision that if due notice of a claim is given by “X,” so that its merits and quantum can be ascertained, then, when its merits have been ascertained and compensation has been assessed, the compensation should be paid to such person as turns out to be entitled to it, even though that person is not “X” but “Y.” Indeed, this is what I think the Act says. The result in some cases may be that “Y” reaps the benefit of an act done neither by him nor on his behalf, but that does not seem to me a fatal objection to the construction suggested, nor necessarily the final result of adopting such a construction. It is not a fatal objection to the construction in question, because the object of the Act is to discover (a) whether compensation is due, and, if so, how much, and (b) to whom it should be paid, and for this purpose it is not necessary that the person lodging the claim and the person receiving the compensation should be identical. Nor is it necessarily the result of so construing the Act that money claimed by “A” should go finally and irrevocably to “B,” for “B,” though the immediate recipient, may well not be the final depository of the funds or of all of them. Section 2 (1) of the Landlord and Tenant (Requisitioned Land) Act, 1944, clearly envisages and provides for a case where compensation for damage has been paid to “Y,” who is not the tenant, yet the tenant incurs expenditure in making good the damage, and in such a case the tenant is given a remedy over against the actual recipient of the compensation money. Those and similar provisions in the Act of 1944 seem greatly to mitigate the injustice which at first sight might seem to result from “Y” being entitled to reap where “X” has sown. For these and the other reasons given by **SOMERVELL, L.J.**, I agree that the appeal should be dismissed.

SIR RAYMOND EVERSLED, M.R.: I also am of the same opinion and do not wish to add anything to the observations which have fallen from my brethren, with which I entirely agree.

Appeal dismissed. Order for payment of compensation money to plaintiffs.

Solicitors: *Trower, Still & Keeling* (for the plaintiffs); *Blount, Petre & Co.* (for the defendant).

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

R. v. FULHAM, HAMMERSMITH AND KENSINGTON RENT
TRIBUNAL. *Ex parte* PHILIPPE.

[KING'S BENCH DIVISION (Lord Goddard, C.J., Humphreys and Parker, JJ.),
May 15, 16, 26, 1950.]

*Rent Control—Rent tribunal—Certiorari—Rental equivalent—Determination—
Premium—Payment to lessor for work done to premises—Payment to lessor
of half profit on assignment of lease—Landlord and Tenant (Rent Control)
Act, 1949 (c. 40), s. 1 (5), s. 18 (2), sched. I, Part I, para. 1.*

Under the terms of a five years' lease, dated May 14, 1947, a tenant covenanted to pay to the landlord a sum of £180 in respect of specified works of reconstruction and decoration of the premises which had been commenced by the landlord. This work was later done, and the tenant paid to the landlord the sum of £180. The tenant subsequently surrendered the original lease and was granted, at his request, a fourteen years' lease. In consideration of the landlord's agreement to grant that lease, the tenant undertook to pay to the landlord one half of any profit which he might make by assigning the lease. On Oct. 15, 1947, the tenant sold the lease for £650, and the landlord agreed to the assignment on payment by the tenant of £221, being half the profit made by the tenant on the sale. In 1949, on an application by the assignee, the rent tribunal determined the standard rent of the premises, certified that the Landlord and Tenant (Rent Control) Act, 1949, sched. I, Part I, para. 1, which relates to the payment of premiums, applied to the two sums of £180 and £221, and determined the rental equivalent of those two sums at £7 3s. 2d. a quarter. On an application by the landlord to bring up and quash the certificate and determination of the rent tribunal, the preliminary point was taken on behalf of the tribunal that where a tribunal had jurisdiction under s. 1 of the Act of 1949 to determine the rent, the fact that they wrongly came to the conclusion that a premium had been paid, and, as a result, reduced the rent, did not enable the court to grant an order of *certiorari*.

HELD: (i) although the power of a tribunal to fix the rental equivalent of a premium only arose on an application under s. 1, *certiorari* would lie in respect of a decision of a tribunal wrongly determining the rental equivalent of a payment which was not a premium since (a) the jurisdiction of the tribunal to determine the standard rent and their jurisdiction to determine the rental equivalent of a premium were separate jurisdictions, to the erroneous exercise of either of which *certiorari* was applicable, and (b) notwithstanding the words "where . . . it appears to the tribunal that . . . a premium has been paid" in para. 1, Part I, of sched. I, it must not merely appear to the tribunal that a premium has been paid, but a premium must actually have been paid in order to found the jurisdiction of the tribunal to determine the rental equivalent of a premium.

Observations of LORD ESHER, M.R., in R. v. Income Tax Special Purposes Comrs. (1888) (21 Q.B.D. 319), applied.

(ii) the sum of £180 being a payment in respect of work done by the landlord was not a "pecuniary consideration in addition to rent" within the definition of "premium" in s. 18 (2) of the Act of 1949, but the sum of £221, having been paid in consideration of the grant of the second lease to the first tenant, was a premium for the purposes of para. 1, Part I of sched. I, although it was not paid at the time of the grant of the lease and would never have become payable if the tenant had assigned the lease at a profit. Since, by reason of that payment, the tribunal had jurisdiction to grant a certificate that Part I of sched. I applied, that certificate was valid, but the determination of the rental equivalent of the two sums of £180 and £221 must be quashed.

[FOR THE LANDLORD AND TENANT (RENT CONTROL) ACT, 1949, s. 1 (5), 2 (1), 6 (1), 18 (2), Sched. I, paras. 1, 2 (1), 8, 10 (1), see HALSBURY'S STATUTES, Second Edn., Vol. 13, pp. 1095, 1097, 1110, 1111, 1114.]

Cases referred to:

- (1) *R. v. Minister of Health, Ex p. Glamorgan County Mental Hospital (Committee of Visitors)*, [1938] 4 All E.R. 32; 102 J.P. 497; *sub nom.*, *R. v. Minister of Health*, [1939] 1 K.B. 232; 108 L.J.K.B. 27; 159 L.T. 508; Digest Supp.
- (2) *R. v. Income Tax Special Purposes Comrs.*, (1888), 21 Q.B.D. 313; 53 J.P. 84; *sub nom.*, *R. v. Income Tax Special Comrs., Ex p. Cape Copper Mining Co., Ltd.*, 57 L.J.Q.B. 513; 59 L.T. 455; 2 Tax Cas. 332; 28 Digest 97, 580.
- (3) *R. v. Hampstead and St. Pancras Furnished Houses Rent Tribunal, Ex p. Ascot Lodge, Ltd.*, [1947] 2 All E.R. 12; [1947] K.B. 973; [1947] L.J.R. 1003; 176 L.T. 560; 111 J.P. 349; 2nd Digest Supp.

MOTION by the landlord, Felicie May Philippe, for an order of *certiorari* to bring up and quash a certificate and determination of the Fulham, Hammersmith and Kensington Rent Tribunal, dated Dec. 9, 1949.

The landlord was the freeholder of premises the standard rent of which had been determined by the tribunal under the Landlord and Tenant (Rent Control) Act, 1949, on an application by the assignee of the lease of the premises. The tribunal had also certified that Part I of sched. I to the Act of 1949 applied and had determined that two payments made to the landlord by the original tenant, who had assigned the lease for a sum in excess of the payments, were premiums. The landlord contended that neither sum was a premium, and that, consequently, the tribunal had no jurisdiction to determine the matter. The facts appear in the judgment of the court, delivered by PARKER, J.

Dare for the landlord.

J. P. Ashworth for the tribunal.

Cur. adv. vult.

May 26. PARKER, J., read the following judgment of the court. By the Landlord and Tenant (Rent Control) Act, 1949, s. 1, a tribunal, which, for the purpose of the section is defined by s. 6 as one constituted under the Furnished Houses (Rent Control) Act, 1946, for any district in which that Act is in force, or, in the case of any other district, a tribunal constituted in accordance with the schedule to the Act of 1946, is given power to fix the standard rent of any dwelling-house for which the rent would otherwise be the rent at which it was first let after Sept. 1, 1939. By s. 2 (1) of the Act of 1949, no person shall in future, as a condition of the grant, renewal or continuance of a tenancy, require the payment of any premium in addition to the rent, and any such payment, if made, is recoverable by action.

As regards a premium which has at the commencement of the Act already been paid in respect of the grant, renewal or continuance of a tenancy, the tribunal is given power by sched. I, para. 10, to fix what is called the "rental equivalent" of the premium, which, by para. 8, is defined as the amount of the premium divided by the number of rent periods between the commencement of the term, or of the continuance or renewal of a term, and the relevant date, which, in the case of a tenancy for a term of years certain exceeding seven years is the date of expiration of that term. Once the tribunal has fixed the rental equivalent, the rent payable by any tenant of the dwelling-house shall not exceed the standard rent determined by the tribunal less the rental equivalent of the premium.

In the present case *certiorari* was moved on behalf of the landlord, Felicie May Philippe, the freeholder of a flat known as 9A, Adam and Eve Mews, Kensington, to bring up and quash a certificate and decision dated Dec. 9, 1949, of the rent tribunal for Fulham, Hammersmith and Kensington, whereby

the tribunal determined a rental equivalent of £7 3s. 2d. a quarter to June 24, 1961. The ground of the application is, in effect, that no premium had been paid, and that, accordingly, the tribunal had no jurisdiction to determine a rental equivalent.

A Before going into the facts, we will deal with the preliminary point, taken on behalf of the tribunal, that, even if in law no premium had been paid, the remedy of *certiorari* does not lie. Paragraph 1 of Part I of sched. I to the Act provides:

B “Where on an application under s. 1 of this Act made within twelve months from the date of the commencement of this Act it appears to the tribunal that before the commencement of this Act any premium has been paid (whether lawfully required or not) in respect of the grant, continuance or renewal of a tenancy of the dwelling-house to which the application relates, whether by the tenant or by a previous tenant of the dwelling-house, and has not been fully repaid or recovered, the tribunal shall, if the tenant so requires, certify that this Part of this schedule applies, and thereupon (a) except in a case falling within the next following subparagraph, the rent payable shall be limited in accordance with para. 2 of this schedule . . .”

C Paragraph 2 (1) provides:

D “Subject to the provisions of this paragraph, where sub-para. (a) of the last foregoing paragraph has effect, the rent payable by the tenant, or by any subsequent tenant, for any rent-period beginning after the tribunal have issued their certificate and before the relevant date shall not, save as hereinafter provided, exceed the reasonable rent less the rental equivalent of the premium.”

Paragraph 10 (1) provides:

E “It shall be the duty of the tribunal, on any application to them on which they issue a certificate under para. 1 of this schedule, to determine such of the following matters as are required to be determined for the purposes of the application, that is to say—(a) the rental equivalent of a premium; (b) the relevant date; . . . and the determination by the tribunal of any of the said matters shall be conclusive for all purposes.”

F It was contended that where, as in the present case, the tribunal had jurisdiction under s. 1 of the Act to determine the rent, the fact that they wrongly came to the conclusion that a premium had been paid, and, as a result, reduced the rent, did not enable this court to grant an order of *certiorari*. Reliance was placed on the well-known passage from the judgment of GREER, L.J., in *R. v. Minister of Health, Ex parte Glamorgan County Mental Hospital (Committee of Visitors)* where, quoting HALSBURY'S LAWS OF ENGLAND, vol. 9, p. 888, para. 1493, he said ([1938] 4 All E.R. 36):

G “Where the proceedings are regular upon their face and the magistrates had jurisdiction, the superior court will not grant the writ of *certiorari* on the ground that the court below had misconceived a point of law. When the court below has jurisdiction to decide a matter, it cannot be deemed to exceed or abuse its jurisdiction, merely because it incidentally misconstrues a statute, or admits illegal evidence, or rejects legal evidence, or misdirects itself as to the weight of the evidence, or convicts without evidence . . .”

H While, however, it is true that the tribunal's power to fix the rental equivalent of a premium only arises on an application under s. 1 (1) of the Act, it seems to us that this is really a matter of procedure and that their jurisdiction to determine the standard rent and their jurisdiction to determine a rental equivalent are two separate jurisdictions. Section 1 (1) of the Act enables a tribunal to fix a reasonable rent, which is to be the standard rent for the future, whereas Part I of sched. I enables the tribunal to determine a deduction which a tenant may make

from the standard rent up to the relevant date. Section 1 (5) further provides:

"In determining under this section what rent is reasonable for a dwelling-house, no regard shall be had to the fact that any premium has been paid in respect of the grant, continuance or renewal of a tenancy; but the provisions of Part I of sched. I to this Act shall have effect in relation to such premiums paid before the commencement of this Act."

Thus, in exercising their jurisdiction to fix the standard rent, the tribunal are not permitted to take the payment of any premium into consideration. Further, their powers to fix a rental equivalent only arise if the tenant requires them to certify under para. 1 of Part I of sched. I.

It was further contended on behalf of the tribunal in support of the contention that *certiorari* would not lie that Parliament had invested these tribunals with the jurisdiction of determining whether a premium had been paid and not merely with the jurisdiction to fix a rental equivalent if, in fact, a premium had been paid. Reference was made to the passage of LORD ESHER, M.R., in *R. v. Income Tax Special Purposes Comrs.* (2) (21 Q.B.D. 319):

"When an inferior court or tribunal or body, which has to exercise the power of deciding facts, is first established by Act of Parliament, the legislature has to consider what powers it will give that tribunal or body. It may in effect say that, if a certain state of facts exists and is shewn to such tribunal or body before it proceeds to do certain things, it shall have jurisdiction to do such things, but not otherwise. There it is not for them conclusively to decide whether that state of facts exists, and, if they exercise the jurisdiction without its existence, what they do may be questioned, and it will be held that they have acted without jurisdiction. But there is another state of things which may exist. The legislature may intrust the tribunal or body with a jurisdiction, which includes the jurisdiction to determine whether the preliminary state of facts exists as well as the jurisdiction, on finding that it does exist, to proceed further or do something more. When the legislature are establishing such a tribunal or body with limited jurisdiction, they also have to consider, whatever jurisdiction they give them, whether there shall be any appeal from their decision, for otherwise there will be none. In the second of the two cases I have mentioned it is an erroneous application of the formula to say that the tribunal cannot give themselves jurisdiction by wrongly deciding certain facts to exist, because the legislature gave them jurisdiction to determine all the facts, including the existence of the preliminary facts on which the further exercise of their jurisdiction depends; and if they were given jurisdiction so to decide, without any appeal being given, there is no appeal from such exercise of their jurisdiction."

Looking at para. 1 of Part I of sched. I alone, some support can be obtained for the contention that these tribunals are tribunals of the second type referred to by LORD ESHER. In particular, the words:

"Where . . . it appears to the tribunal that before the commencement of this Act any premium has been paid . . . in respect of the grant, continuance or renewal of a tenancy . . . and has not been fully repaid or recovered, the tribunal shall . . ."

suggest that the tribunal has jurisdiction to determine whether any payment made is a premium. It is, however, necessary to look not merely at this paragraph of the first schedule, but at the Act as a whole, and, in particular, at the provision which gives the tribunal its jurisdiction under that paragraph. Thus, s. 18 (2) of the Act defines a premium as including

"any fine or other like sum and any other pecuniary consideration in addition to rent."

It is a premium as so defined paid in respect of the grant, continuance or renewal of a tenancy which by s. 1 (5) is not to be taken into consideration by a tribunal in determining the standard rent and to which the provisions of Part I of sched. I are to apply. It seems to us, therefore, that the fact that such a premium has been paid is a condition precedent to the exercise by the tribunal of its jurisdiction under the first schedule. In other words, before the tribunal can be said to have jurisdiction, it must not merely appear to them that such a premium has been paid, but such a premium must have been paid.

It is to be observed, moreover, that this court has already held that these tribunals in regard to their functions under the Furnished Houses (Rent Control) Act, 1946, are tribunals of the type first referred to by LORD ESHER, M.R. : see *R. v. Hampstead and St. Pancras Furnished Houses Rent Tribunal, Ex parte Ascot Lodge, Ltd.* (3), a case of prohibition. Further, in regard to their functions under s. 1 (1) of the Act now under consideration, the tribunals clearly have no jurisdiction if, for instance, the dwelling-house had been let prior to Sept. 1, 1939. It would be, to say the least, an odd result if in regard to their functions under sched. I to this Act, Parliament had intended them to act as a different form of tribunal. In our view, therefore, *certiorari* will lie if it should turn out that no such premium has been paid.

Turning to the facts of the present case, the landlord is the owner of two premises 9 and 9A, Adam and Eve Mews, Kensington, which were used before the war as a café and shop premises and which suffered war damage on two occasions. In 1945 plans were passed for the reconstruction of the premises into two flats with garages underneath. By 1947 most of the work had been completed, and on May 14, 1947, the landlord let No. 9A to one Perkins for a term of five years at £185 per annum. The lease contained a full repairing covenant on the part of the tenant. The engrossment provided that the tenant would at his own expense complete certain works of reconstruction and decoration which still remained to be done and were set out in a schedule. Before execution, however, the engrossment was altered at the request of the tenant, and, in order to limit his liability, was made to provide that he would pay to the landlord the costs incurred by her in completing the work up to the sum of £180. This work was later in the main done, and the £180 was then paid.

Almost at once Mr. Perkins asked to have a five years' lease of No. 9 and a fourteen years' lease of No. 9A so that he could dispose of the latter. The landlord was agreeable provided that Mr. Perkins agreed, as he did, to pay over to the landlord half of any profit made by him in assigning the lease. This arrangement was implemented by a surrender of the lease of No. 9A, the grant of a lease of No. 9A for fourteen years dated June 14, 1947, and an agreement dated June 14, 1947, for payment by Mr. Perkins of half of any such profit. On Oct. 15, 1947, Mr. Perkins sold the lease to one Gibbs for £650 and the landlord agreed to the assignment against the payment by Mr. Perkins to her of £220 19s. 7d. being half the profit made by him on the sale. The letting of No. 9A in 1947 was the first letting of the premises, and in 1949 Mr. Gibbs applied to the tribunal for the determination of the standard rent, which they fixed at £125. We are not concerned with that decision in any way. At the same time, however, Mr. Gibbs asked the tribunal to certify under para. 1 of Part I of sched. I in respect of the said sum of £180 and in respect of the half share in the profit made on the assignment and paid by Mr. Perkins to the landlord. On Dec. 29, 1949, the tribunal certified that Part I of sched. I applied, and determined the rental equivalent as £7 3s. 2d. per quarter, and the relevant date as June 24, 1961. A simple calculation shows, and, indeed, it is admitted, that, in arriving at a rental equivalent of £7 3s. 2d. per quarter, the tribunal has treated the payments of the £180 and £220 19s. 7d. as premiums.

With regard to the sum of £220 19s. 7d. we think that the tribunal were clearly right in regarding this as a premium paid in respect of the grant of a tenancy.

The agreement of June 14, 1947, under which it was paid, specifically stated that the half profit on any assignment was to be paid

"in consideration of your agreeing to grant me a lease of the above flat for a term of fourteen years from June 24, 1947."

It is true that it was not paid at the time the lease was granted, and that no sum would ever become payable unless the tenant assigned at a profit, but we think that, nevertheless, when paid, as it was in this case, it amounted to a premium. The £180, however, was in no ordinary sense of the word a premium. It was a contribution by the tenant towards work done by the landlord, and provision for its payment was inserted at the express wish of the tenant, who had hitherto agreed to complete the work himself and desired to limit his liability in that respect. It is true that the definition of premium in s. 18 is in very wide terms, including as it does "any other pecuniary consideration in addition to rent," and that the tribunal can certify if such a premium has been paid "in respect of the grant of a tenancy," but, in our view, the £180 was paid, not "in respect of" such a grant, but in respect of work done by the landlord.

In the result, it appears to us that the tribunal had no jurisdiction to include the said sum of £180 as a premium in arriving at their determination of the rental equivalent. Inasmuch as this court has no power to apportion the rental equivalent determined by the tribunal, the order of this court must be that the determination of the rental equivalent as £7 3s. 2d. per quarter be quashed. Since, however, by reason of the payment of £220 19s. 7d., the tribunal had jurisdiction to give a certificate that Part I of sched. I applied, that certificate is valid and will not be quashed.

Order of certiorari granted. Determination of the rental equivalent quashed. Certificate that Part I of sched. I to the Act of 1949 applied not quashed. No order as to costs.

Solicitors: Tatton, Gaskell & Tatton (for the landlord); Solicitor, Ministry of Health (for the tribunal).

[Reported by F. A. AMIES, ESQ., Barrister-at-Law.]

R. v. BARNET, ETC., RENT TRIBUNAL. *Ex parte* MILLMAN. [KING'S BENCH DIVISION (Lord Goddard, C.J., Humphreys and Parker, JJ.), May 16, 26, 1950.]

Rent Control—Premium—Purchase price of goodwill of business—Landlord and Tenant (Rent Control) Act, 1949 (c. 40), s. 2 (2), s. 18 (2), sched. I, Part I, para. 1.

On July 9, 1947, the landlord of a dwelling-house and shop, who had for many years carried on there the business of a retail confectioner and tobacconist, demised the premises for a term of fourteen years at a rent of £260 per annum, and, by a deed of assignment of the same date, assigned his goodwill in the business to the tenant for £1,500, covenanting not at any time thereafter to carry on, manage, or be concerned in, the business of a confectioner or tobacconist within a radius of two miles from the said premises. On Mar. 1, 1950, on an application by the tenant under s. 1 (1) of the Landlord and Tenant (Rent Control) Act, 1949, to determine a reasonable rent for the premises, a rent tribunal certified that sched. I, Part I, to the Act, applied to the premises, and determined that the rental equivalent of the sum of £1,500 was £7 14s. 9d. per month.

HELD: (i) assuming that the £1,500 was a premium, a payment made for the genuine purchase of the goodwill and against the seller entering into a

restrictive covenant not to carry on a similar business was not made "in respect of the grant" of the tenancy within the meaning of para. 1 of Part I, sched. I, to the Act of 1949, and, therefore, Part I of sched. I did not apply, and the certificate and determination of the rent tribunal must be quashed.

A (ii) the tribunal was not entitled, when determining the reasonable rent of the premises, to take into account the value of a trade connection associated with the premises and fix a higher rent than they would have fixed otherwise, on the ground that the particular tenant was benefiting to that extent from the letting.

[FOR THE LANDLORD AND TENANT (RENT CONTROL) ACT, 1949, s. 1 (5), s. 2 (2), s. 12 (2), s. 18 (2), and sched. I, Part I, para. 1, see HALSBURY'S STATUTES, Second Edn., Vol. 13, pp. 1095, 1097, 1108, 1110.]

B Case referred to:

(1) *R. v. Fulham, Hammersmith and Kensington Rent Tribunal, Ex parte Philippe*, ante, p. 211.

MOTION by the landlord, Reuben Millman, for an order of *certiorari* to bring up and quash a certificate and determination of a rent tribunal, dated Mar. 1, 1950, whereby they certified, on an application by the tenant of the premises, C which comprised a shop and living accommodation, that the Landlord and Tenant (Rent Control) Act, 1949, sched. I, Part I, applied to the tenancy, and determined the rental equivalent of a sum paid by the tenant on an assignment to him by the landlord of the goodwill of the business conducted on the premises. The facts appear in the judgment of the court, delivered by PARKER, J.

D *Bernard Lewis* for the landlord.
J. P. Ashworth for the tribunal.

Cur. adv. vult.

May 26. PARKER, J., read the following judgment of the court. This is an application for an order of *certiorari* moved on behalf of Reuben Millman, the landlord of a dwelling-house known as 289, Lordship Lane, Tottenham, to bring E up and quash the certificate and determination of the rent tribunal for Barnet, dated Mar. 1, 1950, whereby the tribunal certified that Part I of sched. I to the Landlord and Tenant (Rent Control) Act, 1949, applied to the tenancy of the said dwelling-house, and determined the rental equivalent of a premium as £7 14s. 9d. per month and the relevant date in respect thereof as July 9, 1961. F The ground on which this relief is sought is that the sum in respect of which the tribunal determined such a rental equivalent was not a premium paid in respect of the grant, continuance or renewal of a tenancy within the meaning of para. 1 of Part I of sched. I to the Act, and that, therefore, the tribunal exceeded its jurisdiction.

Prior to 1947 the landlord, assisted by his wife, had for many years carried on the business of a retail confectioner and tobacconist at the said premises, of G which he was the freeholder. He and his wife lived above the shop, and in the course of time he had built up a substantial goodwill. In 1947, being then about sixty-four years of age, he decided to retire and sell the business. By a lease dated July 9, 1947, he demised the premises to one Leonard Montrose for a term of fourteen years (determinable at the option of the lessee at the expiration of the first seven years) at a rent of £260 per annum. By a deed of assignment of H the same date, the landlord, in consideration of the sum of £1,500, of which £1,200 was then paid, assigned to Mr. Montrose all his goodwill, interest and connection of and in his said business, and covenanted that he would not at any time thereafter carry on, manage, or be concerned or engaged or interested in, the business of a confectioner or tobacconist within a radius of two miles from the said premises. The landlord further agreed to sell to Mr. Montrose all the stock of his said business to be paid for on delivery. Mr. Montrose and his wife were then living at 355, Lordship Lane, and the landlord, desiring to remain

in the neighbourhood, obtained a fourteen years' lease of those premises from Mrs. Montrose.

On Nov. 7, 1949, Mr. Montrose applied to the tribunal to fix the standard rent of 289, Lordship Lane, the letting to him having been the first letting. When the tribunal viewed the premises Mr. Montrose referred to the payment of £1,500 for goodwill, and the tribunal then informed him that, if he so desired, he should make an application for the determination of the rental equivalent. On Feb. 1, 1950, Mr. Montrose sent in an application to the tribunal referring to the said £1,500 as a premium and asking the tribunal to certify that the provisions of Part I of sched. I applied. On Mar. 1, 1950, the tribunal heard the application, certified that Part I of the said schedule applied, and determined the rental equivalent as £7 14s. 9d. per month and the relevant date as July 9, 1961.

This court has already held in *R. v. Fulham, Hammersmith and Kensington Rent Tribunal, Ex parte Philippe* (1) that the remedy of *certiorari* will lie if no premium was, in fact, paid in respect of the grant, continuance or renewal of a tenancy. It was admitted before us, and it is, we think, clear from the affidavit of the chairman of the tribunal, that the tribunal accepted that the assignment of July 9, 1947, was a genuine assignment of the goodwill and that it was worth £1,500. That being so, the only question is whether this £1,500 was a premium paid in respect of the grant, continuance or renewal of a tenancy. It was argued on behalf of the tribunal that it was, on the ground that the definition of premium in s. 18 (2) of the Act was very wide and that the words in s. 1 (5)

"...paid in respect of the grant, continuance or renewal of a tenancy ..."

were wide enough to cover any payment made *on* such a grant, continuance or renewal which would not have been made but for the grant. Reference was further made to s. 2 (2) and (4) and to s. 12 (2) of the Act of 1949. Section 2 (2) provides that:

"Subject to the provisions of Part II of sched. I to this Act, a person shall not, as a condition of the assignment of a tenancy to which this section applies, require the payment of any premium."

Section 2 (4) provides that:

"Notwithstanding anything in sub-s. (2) of this section, an assignor may, if apart from this section he would be entitled so to do, require the payment by the assignee . . . (d) where part of the dwelling-house is used as a shop or office, or for business, trade or professional purposes, of a reasonable amount in respect of any goodwill of the business, trade or profession, being goodwill transferred to the assignee in connection with the assignment or accruing to him in consequence thereof."

Section 12 (2) provides that:

"Save as hereinafter provided, a person shall not, as a condition of the grant, renewal, continuance or assignment of rights under a contract to which the Act of 1946 applies, require the payment of any premium: Provided that this sub-section shall not prevent . . . (b) a requirement that there shall be paid a reasonable amount in respect of goodwill of a business, trade or profession, being goodwill transferred to a grantee or assignee in connection with the grant or assignment or accruing to him in consequence thereof."

It is contended that these provisions show that, except where a payment for goodwill is expressly permitted, it constitutes a premium within the meaning of the Act. Why no similar exception is provided in the case of the grant, renewal or continuance of an unfurnished tenancy it is hard to understand and idle to speculate on. Be that as it may, we think that before the tribunal can certify and determine a rental equivalent there must have been a premium, as defined by the Act, paid in respect of the grant, continuance or renewal of a tenancy.

A

Even assuming, without deciding, that the £1,500 was a premium within the definition in s. 18 (2), we cannot think that it was paid "in respect of" such a grant. Read in their widest sense the words "in respect of" would cover the payment of money for whatever purpose so long as it could be said that no tenancy would have been granted but for the payment. Thus, the words would cover the purchase price of the stock taken over or the reimbursement to the landlord of the proportion of any outgoings such as rates, insurance and the like, paid in respect of the period covered by the tenancy. No doubt, it may not be easy in some cases to say whether a payment comes within these words, but where, as here, a payment is made for the genuine purchase of the goodwill of a business and against the seller entering into a restrictive covenant not to carry on a similar business, we do not think that it can be said to have been paid "in respect of" the grant. In these circumstances, the order of this court is that the said certificate and determination be quashed.

B

We should add that, though we are not concerned with the tribunal's determination of the standard rent, it is to be observed from the affidavit of the chairman of the tribunal that the tribunal took into account the value of the trade connection associated with the premises and fixed the rent at a figure higher by £100 per annum than they would otherwise have done as they considered that the tenant was benefiting to this extent from the letting of the premises. The tribunal were clearly not entitled to do this. They were fixing what was to be the standard rent of the premises, and not the value to a particular tenant. Moreover, having done this they then proceeded to fix a rental equivalent which would enable the tenant to deduct almost £100 from the rent so fixed.

C

Certiorari granted. No order as to costs.

D

Solicitors: *Offenbach & Co.* (for the landlord); *The Solicitor, Minister of Health* (for the tribunal).

[*Reported by F. A. AMIES, ESQ., Barrister-at-Law.*]

E

THE UNITAS.

[PRIVY COUNCIL (Lord Porter, Lord Simonds, Lord Normand and Lord MacDermott), March 1, 2, 7, 8, 9, May 8, 1950.]

F

Prize Law—Condemnation—Ship—Enemy flag—Duress—Ship built in Germany by German subsidiary of Dutch company under agreement with and subsidised by German government.

G

N.V., a Dutch corporation, was, through its Dutch and German subsidiaries, the sole shareholder in a German company, Verkaufs, which had its own board of directors, but was controlled by N.V. from Rotterdam. In 1931, as a result of decrees by the German government affecting remittances from Germany, debts (amounting to about £7,500,000) due from N.V.'s subsidiary companies in Germany to N.V. and its subsidiaries in Holland were "frozen" and became "blocked marks," and trading profits of the German subsidiaries ceased to be transferable to N.V. or its Dutch subsidiaries and were classified as "inland marks." In order to extract some of the blocked marks from Germany, N.V., with the consent of the German authorities, arranged to place contracts in German shipyards for the building of ships for sale to foreign purchasers. In 1935 N.V. was asked by the German government to build a whaling fleet in Germany for operation under the German flag. At first it refused to do so, but in 1936, under the threat of economic pressure and that its assets in Germany would be confiscated or rendered valueless, it agreed. The conditions were that the

H

fleet, when built, should be chartered to a new company, in which N.V. would not have more than a fifty per cent. interest, and that the fleet should not be transferred from the German flag without the consent of the German government. A subsidy towards its construction was granted by the German government. In September, 1937, the *Unitas*, a whaling factory ship, and the chief unit of the fleet, was completed and delivered to *Verkaufs* and registered at Bremen as a German ship, and in 1938 she performed a whaling voyage. After the outbreak of the second world war, but while Holland was still neutral, N.V. did nothing to dissociate itself from the activities of its subsidiaries in Germany. The *Unitas* was captured by the Allied invading forces in the port of Wilhelmshaven in June, 1945, and was seized in prize. At the date of capture she was flying the German flag and no change had been made at any time in her registration. N.V. and its Dutch subsidiaries claimed the release of the vessel on the ground *inter alia* that she was placed under the German flag involuntarily and under duress because she was built only as a result of pressure by the German government.

HELD: although the threat by the German government to the economic interests of N.V. and its subsidiaries was of a serious character, the building of the whaling fleet and its German registration and chartering to a German company were not involuntary in the sense of being unintentional, but were the result of a deliberate choice on the part of N.V. between two distasteful alternatives, and a choice which was probably followed by considerable profit for them; the fact that the *Unitas* was built as a result of German pressure, because a worse fate might have befallen N.V. if they did not give way, was a totally inadequate reason for avoiding the natural consequence of flying the German flag; and, as N.V. had failed to show that they were not within the general rule that the flying of an enemy flag in war time was conclusive of the nationality of a ship, the *Unitas* was rightly seized and condemned.

Decision of LORD MERRIMAN, P. ([1948] 1 All E.R. 421), affirmed.

[AS TO ENEMY CHARACTER OF SHIP, see HALSBURY, Hailsham Edn., Vol. 26, p. 216, para. 489; and FOR CASES, see DIGEST, Vol. 37, pp. 577-580, Nos. 87-128.]

Cases referred to:

- (1) *Daimler Co., Ltd. v. Continental Tyre & Rubber Co. (Gt. Britain), Ltd.*, [1916] A.C. 307; 85 L.J.K.B. 1333; 114 L.T. 1049; Digest 145, 195.
- (2) *The St. Tudno*, [1916] P. 291; 86 L.J.P. 1; 115 L.T. 634; 37 Digest 579, 111.
- (3) *The Vrow Elizabeth*, (1803), 5 Ch. Rob. 2; 165 E.R. 676; 37 Digest 577, 88.
- (4) *The Fortuna*, (1811), 1 Dods. 81; 1 Eng. Pr. Cas. 193, n.; 165 E.R. 1240; 37 Digest 649, 1019.
- (5) *The Vigilantia*, (1798), 1 Ch. Rob. 1; 1 Eng. Pr. Cas. 31; 165 E.R. 74; 37 Digest 577, 87.
- (6) *The Primus*, (1854), 1 Ecc. & Ad. 353; 2 Eng. Pr. Cas. 290; Spinks, 48; 24 L.T.O.S. 15; 164 E.R. 203; 37 Digest 579, 107.
- (7) *The Onderneeming*, (1803), 5 Ch. Rob. 7, n.; 165 E.R. 678; 37 Digest 578, 96.
- (8) *The Tommi, The Rothersand*, [1914] P. 251; 84 L.J.P. 35; 112 L.T. 257; 37 Digest 580, 119.
- (9) *The Palme*, (1872), Dalloz, Jurisprudence Generale, Pt. III, 94.
- (10) *The Taxiarchis*, (1913), R.G.D.I.P. xx, 518.
- (11) *The Pontoporos*, (1915), 1 Br. & Col. Pr. Cas. 371; subsequent proceedings, [1916] 1 P. 100; 85 L.J.P. 143; 114 L.T. 418; 37 Digest 676, 1436.
- (12) *The Carolina*, (1802), 4 Ch. Rob. 256; 1 Eng. Pr. Cas. 385; 165 E.R. 604; 37 Digest 604, 440.

(13) *The Ocean Bride*, (1854), Spinks, 66; 2 Ecc. & Ad. 8; 24 L.T.O.S. 99; 164 E.R. 277; 37 Digest 656, 1128.

APPEAL by the claimants from a decree of LORD MERRIMAN, P., dated Feb. 20, 1948, and reported [1948] 1 All E.R. 421.

A The Unitas, a whaling factory ship which was registered as a German vessel, the property of a German company, was captured by the Allied invading forces in the port of Wilhelmshaven in June, 1945, and seized as prize. The claimants were Lever Brothers and Unilever, N.V. (a Dutch corporation) and two subsidiary Dutch companies. The ship had been built, as the result of an agreement between the claimants and the German government, by a subsidiary company of the claimants incorporated in Germany. On completion in September, 1937, she was chartered to a newly-formed German company more than half the capital of which was subscribed by German interests and the remainder by the German subsidiary of the claimants. On a motion for the condemnation of the ship and her cargo, the claimants contended *inter alia* that the ship was placed under the German flag involuntarily and under duress. LORD MERRIMAN, P., dismissed the claim on the ground that duress was not proved and the flag of the ship was decisive of her enemy character, and he decreed the ship to be good and lawful prize. The claimants appealed. The facts appear in the judgment of the Board delivered by LORD PORTER.

C *Sir Walter Monckton, K.C., Sir William McNair, K.C., and E. W. Roskill* for the appellants.

Le Quesne, K.C., and Quintin Hogg for the respondent, the Procurator-General.

D The Board took time for consideration.

May 8. The following judgment of the Board was delivered by LORD PORTER. This is an appeal against a decree by LORD MERRIMAN, P., sitting in prize, who, on Feb. 20, 1948, pronounced that the steamship Unitas belonged at the time of capture and seizure to enemies of the Crown and was liable to confiscation as good and lawful prize. The learned President gave leave to appeal, subject to the provision of security for costs of the appeal, and directed that the decree should be suspended pending the appeal.

E The Unitas is a whale factory ship of about twenty-one thousand gross registered tonnage. The evidence on behalf of the Crown was confined to the formal affidavits of seizure and ship's papers, from which it appeared that throughout her life, from the date when she was built in 1937 until she was seized, she was registered in the port of Bremen, Germany, and was of German nationality. At all material times her immediate ownership was vested in a German limited liability company, known prior to June, 1939, as Jurgens-Van den Bergh Margarine Verkaufs Union G.m.b.H. and thereafter as Margarine Verkaufs Union G.m.b.H., referred to hereafter as "Verkaufs." She was registered in the name of Verkaufs, and at the date of capture and seizure was flying the German flag. At the time of the unconditional surrender of Germany she was lying in the port of Wilhelmshaven in Germany and was there captured by H.M.S. Alexandra. After capture she was transferred to Methil in the county of Fife and there formally seized in prize on July 1, 1945. The writ herein was issued on July 17, 1945, and on Aug. 10, 1945, an appearance was duly entered on behalf of the first appellants, Lever Brothers and Unilever N.V. of Rotterdam, referred to hereafter as "N.V.," as parties interested in the ship. On June 18, 1946, further appearances were entered for the second appellants, Marga Maatschappij tot beheer van Aandeelen in Industrieele Ondernemingen N.V., referred to hereafter as "Marga," and the third appellants, Saponia Maatschappij tot beheer van Aandeelen in Industrieele Ondernemingen N.V., referred to hereafter as "Saponia," as parties interested in and as beneficial owners of the ship. On Jan. 7, 1947, a claim was filed on behalf of all these appellants, as parties interested in or as beneficial owners of the ship, tackle, apparel and furniture.

An additional claim was filed at the same time for all losses, costs, demurrage and expenses by reason of her seizure and detention as prize, but was abandoned before their Lordships, it being admitted that the seizure, but not the condemnation, was justified.

N.V. is a Dutch corporation. Its shares are publicly held, mainly by British and Dutch nationals, and it owns the entire share capital of the second and third appellants, both of whom are also Dutch corporations. They, in their turn, jointly own the entire shares of a company incorporated under the laws of Germany, named *Margarine Union Vereinigte Oel-und Fettwerke A.G.*, hereafter called "*Margarine Union*," and *Margarine Union* owned the entire share capital of *Verkaufs*. It was not disputed by the respondent that the general control of the German companies in the organisation through which N.V., *Marga* and *Saponia* carried on business in Germany was at all times exercised by N.V. in and from Rotterdam. Though the companies in Germany had their own boards of directors, these boards had no authority to deal independently with policy or management. N.V. appointed a body in Berlin known as the "*praesidium*," the principal members of which were of Dutch nationality, and this body controlled N.V.'s German businesses and ensured that the decisions taken in Rotterdam were effectively carried out.

The respondent maintained that condemnation of the *Unitas* was justified on two main grounds, (i) that she flew the German flag, and (ii) that the legal title to her was vested in *Verkaufs*. In answer to the first of these contentions the appellants submitted that the flying of an enemy flag is only a *prima facie* ground for condemnation, and is subject to exceptions which cover the present case. As to the second, they maintain that it is the duty of the Prize Court to look behind the legal facade and determine where the true ownership of the *Unitas* lay, and that, on the principles laid down in the House of Lords in *Daimler Co., Ltd. v. Continental Tyre & Rubber Co. (Gt. Britain), Ltd.* (1), as applied to prize in *The St. Tudno* (2), the whole and sole ownership in the ship was—in this case, as it was in that—in every real and business sense in the beneficial owners. The respondent, on his part, maintained that the principles laid down in the *Daimler* case (1) might be effective in a case where the legal ownership was in a friend or neutral, to disclose an enemy beneficial ownership and so lead to condemnation, but would not dispose of enemy taint where the legal ownership was that of an enemy. In any case, however, it was maintained on his behalf that, if it were permissible to treat *Verkaufs* as a mere branch of N.V., then *Verkaufs* was a "house of trade" of N.V. in Germany, and that, in that event, since the *Unitas* was the concern of that house of trade, it was the duty of N.V. on the outbreak of war between the United Kingdom and Germany on Sept. 3, 1939, to dissociate itself from *Verkaufs*. This duty they did nothing to fulfil between the outbreak of war and the invasion of Holland in May, 1940, and for this further reason the *Unitas*, as a concern of the German house of trade, was condemnable in prize.

The learned President decided in favour of the respondent on the ground that the vessel's flag was decisive of her enemy character. He held that, even if there were exceptions to the rule as to the enemy flag, the present case did not fall within them. He agreed with the respondent's second submission that the principle of the *Daimler* case (1) did not apply, even if it were established that the beneficial ownership was that of a friend or neutral, and further held that N.V. had failed between September, 1939, and May, 1940, to dissociate itself from *Verkaufs*. Having regard to the importance of the interests involved and in view of the likelihood of an appeal to their lordships' Board, the learned President dealt fully with each of the contentions put forward in order that full assistance might be afforded on appeal to their lordships in considering each aspect of this case. As, however, the Board think that the flying of the enemy flag alone is in this and in most cases sufficient to dispose of the matter

at issue, they refrain from expressing any opinion in regard to the other two difficult and controversial matters.

Prima facie, of course, the flying of an enemy flag in war time is conclusive of the nationality of a ship and subjects her to seizure and condemnation in a court of prize. If it is done voluntarily, it is conclusive, but (say the appellants), if it is done under duress or, indeed, under pressure and against the will of the owner of the ship, it is but an element to be taken into consideration and may well be inconclusive. For this argument, reliance is placed on the expressions, over and over again appearing in the cases, which begin with SIR WILLIAM SCOTT's words (5 Ch. Rob. 6) in *The Vrow Elizabeth* (3):

"In that case [*viz.*, an earlier unreported case], however, it was held that the fact of sailing under the Dutch flag and pass was decisive against the admission of any claim; and it was observed that as the vessel had been enjoying the privileges of a Dutch character, the parties could not expect to reap the advantages of such an employment, without being subject at the same time to the inconveniences attaching on it. When I lay down this rule, I do not say that there may not be cases of such particular circumstances, as to raise a reasonable distinction. The treaty of Amiens had stipulated for the liberty of withdrawing British property from the ceded and restored islands. But the governments of France and Holland afterwards refused to suffer such property to be exported from these colonies, otherwise than in ships of France and Holland, and on a destination to those countries. The difficulty which has arisen in the removal of British property, for want of shipping, may have induced our own government to permit British ships to put themselves under Dutch flags for this particular purpose; and in such cases the particular situation of affairs arising out of this refusal to execute the treaty, may have entitled such parties to a relaxation of the general rule."

This consideration was repeated in *The Fortuna* (4) in the words of the same judge (1 Dods. 87):

"... all that the court has thrown out respecting the effect of the flag and pass is this, that the party who takes the benefit of them is himself bound by them ..."

He adds what is germane to another aspect of this case, "but they do not bind other parties as against him."

It will, at a later stage, be desirable to analyse the width of the exception to which SIR WILLIAM SCOTT refers, but at the moment the quotations set out are examples of those relied on by the appellants in support of the proposition that to be bound by the rule of the flag the shipowner must voluntarily adopt it and not be coerced into its use. For the allegation that their act was involuntary, the appellants lay stress on the statements endorsed in Mr. Rykens' affidavit. They may be summarised as follows. On Aug. 1, 1931, the German subsidiaries of N.V. were indebted to N.V. or its subsidiaries in Holland to the extent of about £7,500,000 sterling, and at this time the German government introduced financial legislation under which these credit balances were converted into what were known as blocked marks, with the result that N.V. and its Dutch subsidiaries were no longer able freely to obtain repayment from Germany of loans which they had advanced to their German subsidiaries for the provision of working capital or of moneys due from them for the supply of raw material. About the same time the amount of reichsmarks representing the trading profits of the subsidiary companies of N.V. in Germany ceased to be transferable to N.V. or its subsidiary companies in Holland. These reichsmarks, which did not represent foreign claims on Germany, were classified as "inland marks" and could be used within limits for making investments in Germany. As a result of these and further financial restrictions later imposed, the accumulated cash and cash

investments held by N.V.'s subsidiary companies in Germany had risen by 1936 to a figure of about RM.61,000,000. The possession of these large amounts of blocked and inland marks led the appellants to endeavour to find means of extracting the blocked marks from Germany, even at a considerable financial sacrifice. Accordingly, they obtained the consent of the German authorities to order the construction inside Germany, on behalf of N.V. or one of its associated companies, of ships for exportation and sale to foreign purchasers. As a term of their consent, the German authorities required (*inter alia*) that part of the building price should be paid out of the proceeds of the sale of certain commodities which N.V. was to import into Germany. This obligation involved the expenditure of considerable sums in currency other than German, which amounted at first to twenty per cent. and later to forty-five per cent. of the building price. Nevertheless, by these means N.V. and its associated companies were able to extract from Germany a proportion of the blocked mark balances and to convert them into foreign currency.

By the end of 1935 twenty contracts for the construction of forty-seven ships of approximately a quarter million tons had been placed, and between January and October of the succeeding year thirteen further contracts had been placed for twenty-one ships totalling over £200,000. Meanwhile, in April or May, 1935, Dr. Schacht approached Mr. Hendriks [the principal Dutch member of the *praesidium*] and Mr. Rykens with a view to persuading the appellants to build a whaling fleet in Germany for operation under the German flag, but the appellants were able to avoid complying with the proposal at that time because Norwegian seamen experienced in whaling operations were needed for the successful prosecution of the whaling enterprise and the Norwegian government were unwilling to allow them to sail under the German flag. At the beginning of 1936, however, this obstacle had been overcome and Mr. Rykens and Mr. Hendriks knew that similar proposals for the building of whaling fleets had been made by Dr. Schacht to two of the trade rivals of N.V. in Germany and that those trade rivals had agreed to undertake the task. At this juncture Dr. Schacht again approached Mr. Hendriks. The terms then proposed contained the stipulation that the fleet could not be transferred from the German flag without the consent of the German government and that the vessels should be chartered to and operated by a German concern in which the appellants would enjoy no more than a half share. If accepted, the plan would attract a subsidy of thirty per cent. with a maximum of RM.3,500,000 from the Reich towards the construction of the fleet. The appellants ultimately decided to accept the proposals and instructions were given so that the necessary arrangements for a contract with the German government might be made. Ultimately, an agreement was reached by May 20, 1936, under which certain further provisions were confirmed. The appellants were to build a whaling fleet consisting of the *Unitas* and eight catchers at a total price of approximately RM.13,000,000, and in return were to receive from the Reich government a subsidy of thirty per cent. of the building cost with a maximum of RM.3,500,000. The appellants were to advance the foreign currency required for the purchase of items supplied from abroad, estimated at £7,000 sterling, and to be allowed to recoup themselves these advances *plus* a fair rate of interest by deliveries of whale oil from the first whaling season at fair market prices. They also agreed to finance such of the costs of the whaling expeditions as would have to be paid in foreign currencies on similar terms, and to operate the fleet, when built, through a working company at a charter price of a quantity of whale oil (estimated at 7,000 tons per annum), which they would afterwards sell to the German government at the ruling world price converted into reichmarks. The balance of the whale oil was also to be sold to the German government by the working company on similar terms. The agreement was subject to the condition that the appellants should have treatment not less favourable than that accorded to their German competitors, and the

Reich Air Ministry or Naval Observatory was to be permitted to set up meteorological stations on board the vessels and to arrange for experienced radio operators and short wave equipment to be carried on board.

This history of the negotiations which led up to the building of the Unitas does not of itself show duress or, indeed, any undue pressure by the German government, but Mr. Rykens says categorically that the hidden threat was there.

A In the first place, he says that on a previous occasion in 1935, when N.V. was asked to supply guilders to the German government on credit terms and refused to do so, open threats were uttered by high officials in the Ministry of Finance that N.V.'s previous quotas would be cut, and that, although Dr. Schacht and Herr von Ribbentrop alleged that they were unaware of the proposed cuts, he had no doubt that they knew of the threats. The attitude of the German government and the covert threats lying behind the pressure that was brought to bear are, perhaps, best set out in Mr. Rykens' own words at the end of his affidavit :

C "Though my conversations with Dr. Schacht and also Herr von Ribbentrop were conducted in a courteous manner, I was never left in any doubt as to the reality of the threats lying behind their proposals, and I have no doubt at all that, if N.V. had not agreed to the building of the whaling fleet in Germany for operation under the German flag, effective steps would have been taken to confiscate or render virtually valueless the N.V. assets in Germany and to restrict to the minimum any further carrying on of business by N.V. in Germany. As an illustration of the high-handed and lawless action of the German authorities, I would mention that before the outbreak of war one of N.V.'s German subsidiaries carrying on business in East Prussia had the quota of one of its factories arbitrarily taken by the German authorities so that it was forced to cease carrying on business."

D In the succeeding paragraph he shows the method adopted by the German government in compelling compliance with their wishes:

E "But for the pressure brought to bear by Dr. Schacht and the sanctions which the German government was in a position to impose had N.V. not ultimately complied with their demands, the said whaling fleet would never have been built and thereafter owned and operated under the German flag. The construction of the said whaling fleet was not voluntarily undertaken by N.V., nor was it a freely chosen investment which N.V. decided to make of their own volition. N.V. was, in my respectful submission, forced by the German government into a position in which they had no alternative but to comply with the German government's demands."

F For the purpose of their decision their Lordships are prepared to accept Mr. Rykens' statements, but they are, nevertheless, of opinion that they are insufficient to constitute a ground for rejecting the conclusiveness of the fact of flying the German flag. In the course of his judgment, the learned President said ([1948] 1 All E.R. 427):

G "... I do not doubt at all that the German government were in a position to bring economic pressure to bear on foreign concerns trading in the country through German subsidiaries, nor that they would hesitate to bring to bear any such pressure as they thought would serve their purpose."

H Indeed, he envisages the possible confiscation of N.V.'s German business as one of the steps which might be taken, and, in their Lordships' view, the threat is none the less serious though one of the adverse actions which the German government contemplated was the cancellation of the orders for ships to be built in Germany and sold abroad. In any case, it was a threat of the most serious character and their Lordships are in no sense minded to minimise its importance.

The question, however, remains whether a threat to the economic interests or even existence of N.V.'s German subsidiaries is enough to render a ship flying

the German flag immune from the sanction of seizure and condemnation. It does not, in their Lordships' view, assist the appellants' case to speak of the building of the whaling fleet and its German registration and chartering to a German company as involuntary. In truth, it was not involuntary in the sense of being unintentional. It was a deliberate choice taken between two distasteful alternatives. It is only involuntary in the sense that the appellants would have preferred not to make a choice at all. Faced with the obligation of doing so, they made their election. And it is not irrelevant to remember that that election was made three years before war broke out, and, though no accounts have been furnished, and possibly none could be furnished, yet the ship was built in time to perform a whaling voyage in 1938 and may well have earned considerable emoluments for her owners. The fact that she was built as a result of German pressure and German threats, because a worse fate might have befallen the appellants if they did not give way, seems to their Lordships a totally inadequate reason for avoiding the natural consequence of flying the German flag.

The strictness with which the rule is followed is accentuated again and again in the prize law of many countries and in the text books dealing with the topic. WHEATON'S INTERNATIONAL LAW, HALL'S INTERNATIONAL LAW and OPPENHEIM'S INTERNATIONAL LAW all state the principle in unqualified terms. It is enough to quote HALL'S INTERNATIONAL LAW, 8th ed., p. 588, n.:

"According to these rules [*viz.*, the rules observed in the British prize courts] the flag of the enemy is conclusive against the ship flying it, but the courts can go behind a neutral flag and ascertain who is the real owner, and enemy shares in a ship flying a neutral flag can be condemned."

The cases to the like effect are well known and numerous. The two earliest reported, *The Vigilantia* (5) and *The Vrow Elizabeth* (3), contain unequivocal statements to the like effect, and, indeed, it is not disputed that this is the general rule. It is said, however, that the principle does not apply except in cases where the owners voluntarily chose to accept the benefit of the enemy flag for their own advantage. To support this argument reliance is placed on the type of expression to be found in *The Fortuna* (4), or, perhaps more clearly, in *The Primus* (6). In *The Fortuna* (4) the words of SIR WILLIAM SCOTT are (1 Dods. 87):

"... all that the court has thrown out respecting the effect of the flag and pass is this, that the party who takes the benefit of them is himself bound by them ... but they do not bind other parties as against him ..."

In *The Primus* (6) DR. LUSHINGTON used the words (1 Ecc. & Ad. 354): "If he reap the benefit accruing during peace, he must also take the consequence of war." Similar expressions are to be found in many of the cases, but, in their Lordships' opinion, a conclusion that a shipowner, who built his ship—unwillingly it may be, but still with the object of avoiding a position less favourable to himself—and sailed her under an enemy flag, would avoid seizure and condemnation in prize in the event of war is altogether unjustified. The statement that the shipowner has taken the benefit and must endure the consequences is not in essence a limitation of the doctrine, but an explanation of its origin.

It is true that, as pointed out above, SIR WILLIAM SCOTT said (5 Ch. Rob. 7) in *The Vrow Elizabeth* (3):

"... I do not say that there may not be cases of such particular circumstances, as to raise a reasonable distinction."

He instanced a case [*The Onderneeming* (7)] where, after the peace of Amiens, the French failed to fulfil an undertaking to provide shipping to repatriate British subjects, and ships flying an enemy flag were thereupon used for that purpose, and after outbreak of war held free of condemnation. So, too, in *The Tommi* (8) SIR SAMUEL EVANS, P., said ([1914] P. 256):

"The law with regard to the effect of carrying the flag is perfectly clear, namely, that if a ship does sail under a particular flag, *unless there are very*

special exceptions, she has elected to enjoy the protection of the State whose flag she flies, and she is regarded as a ship belonging to that State."

Their Lordships accept the view that there may be circumstances which make the flying of the enemy flag inconclusive as a reason for condemning a ship in prize, but such circumstances must be very exceptional. The few in which a ship flying the enemy flag has escaped condemnation are all of that character.

- A In addition to the cases mentioned in *The Vrow Elizabeth* (3), their Lordships' attention has only been called to three, and they are not aware of any others. Those three are *The Palme* (9) and *The Taxiarchis* (10), mentioned in WHEATON'S INTERNATIONAL LAW, 7th ed., pp. 152, 153, and *The Pontoporos* (11). The *Palme* was a German vessel purchased by the Swiss Red Cross from German owners. The Swiss government would not allow their flag to be flown, and, in
- B default of any other, the German flag was retained and a German agent appointed. The circumstances were peculiar and exceptional, and a French prize court decreed her release. *The Taxiarchis* (10) was a case exhibiting some features of the same kind. The vessel was British, owned and registered in Cyprus, which at that time was nominally under Turkish rule, but actually administered by Britain. There was no national flag of Cyprus and, therefore, she flew the
- C Turkish flag. In each of these cases, the absence of a national flag, coupled with the neutral or friendly nationality of the owners, was the deciding factor. The *Pontoporos* was a Greek ship, captured by the *Emden* and used as a coaling auxiliary, but her master never consented to her use as such and was kept a prisoner. The case is a true example of involuntary submission to enemy duress. Indeed, the prize court which tried her case contrasted it with *The Carolina* (12),
- D where the master had, though unwillingly, accepted service under an enemy belligerent. In *The Pontoporos* (11) the basis of the decision in *The Carolina* (12) is explained by WOODWARD, Acting-C.J., Supreme Court of the Straits Settlements, thus (1 Br. & Col. Pr. Cas. 379):

E "The act of force referred to by the learned judge would seem to be the laying of an embargo on the ship, and fitting her up as a transport against the will of the master, and during his absence; but the facts show that when he returned he acquiesced . . ."

In *The Carolina* (12) itself, SIR WILLIAM SCOTT said (4 Ch. Rob. 260):

F "... a man cannot be permitted to aver, that he was an involuntary agent in such a transaction. If an act of force, exercised by one belligerent on a neutral ship or person, is to be deemed a sufficient justification for an act done by him, contrary to the known duties of the neutral character, there would be an end of any prohibition under the law of nations to carry contraband, or to engage in any other hostile act."

- G The circumstances in *The Carolina* (12) in substance resemble those now under consideration, whereas those in the three cases relied on by the appellants are in a different category. It is, as a general rule, where captors are concerned, the use of the enemy flag which entitles them to seize. Neutral ownership, of itself, does not protect the ship. In *The Ocean Bride* (13) the vessel was British owned and flew the British flag, but was nominally transferred to Russian ownership to protect her from seizure in case of war between this country and Russia.
- H On these facts being established, she was released. As showing the importance of the flag, DR. LUSHINGTON said (2 Ecc. & Ad. 16):

"If this vessel had been sailing under the colours of an enemy, I should say this was a claim which could not be sustainable, but here she remains navigated under British colours; and that prevents a difficulty which would have been insuperable—for if the vessel had been under Russian colours that would have been conclusive against all the world, for reasons I need not refer to, as it is a well-known principle."

Their Lordships have thought it desirable to deal at some length with the grounds on which the appellants support their case, as the claim is a large one and the principle at stake important. From the authorities which have been referred to, it is clear that the flag under which a ship sails constitutes one of the most important elements, if not the most important element, which a court of prize has to consider in determining whether she is rightly seized and condemned as prize. It is, however, not necessary for their Lordships to set exact bounds to the limitations to be placed on the *dicta* that the flying of an enemy flag is conclusive, or to pronounce on the correctness or otherwise of every decision relied on or the accuracy of every individual expression of opinion contained therein. Whatever view may be taken on the matter, the present case is, in their Lordships' opinion, far removed from those exceptional cases in which that rule may be discarded. In the view of the Board, the *Unitas* was rightly seized and condemned, and their Lordships will, therefore, humbly advise His Majesty that the appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors: *Simpson, North, Harley & Co.* (for the appellants); *The Treasury Solicitor* (for the Procurator-General).

[Reported by H. McL. MORRISON, ESQ., Barrister-at-Law.]

SHORE v. MINISTRY OF WORKS AND OTHERS.

[COURT OF APPEAL (Tucker, Singleton and Jenkins, L.JJ.), May 24, 1950.]

Club—Members' club—Member injured through faulty construction of club premises—Liability of management committee for breach of warranty.

During an entertainment on club premises the plaintiff, a member of the club, was struck by a brick which had become dislodged from the roof and sustained personal injuries. The club was a members' club, and the plaintiff brought an action against the second and other defendants, the management committee of the club, for breach of warranty. She alleged that the contract of membership between the defendants and herself contained an implied warranty that the club premises were and would be as safe for the purpose for which she was admitted as reasonable care and skill could make them, that the building, in fact, was not in the state of safety and repair required by the contract, and, accordingly, that she was entitled to damages.

HELD: the contract entered by the parties when the plaintiff paid her subscription to the secretary of the club and he accepted it on behalf of the members was merely a contract that she should be admitted to membership of the club on the terms of its rules, and the warranty alleged could not be read into it.

MacLennan v. Segar ([1917] 2 K.B. 325) and *Hall v. Brooklands Auto-Racing Club* ([1933] 1 K.B. 205), distinguished.

Per JENKINS, L.J.: If this had been a proprietary club and the proprietors had admitted the plaintiff to membership for reward it may well be that the principle stated in *MacLennan v. Segar* (*supra*) would have applied and the plaintiff would have been entitled to succeed.

[AS TO RIGHTS AND LIABILITIES OF CLUBS AND MEMBERS, see HALSBURY, Hailsham Edn., Vol. 4, pp. 498-505, paras. 921-934; and FOR CASES, see DIGEST, Vol. 8, pp. 515-520, Nos. 63-103.]

Cases referred to:

- (1) *MacLennan v. Segar*, [1917] 2 K.B. 325; 86 L.J.K.B. 1113; 117 L.T. 376; 29 Digest 9, 120.
- (2) *Francis v. Cockrell*, (1870), L.R. 5 Q.B. 501; 39 L.J.Q.B. 291; 23 L.T. 466; 42 Digest 908, 49.

(3) *Hall v. Brooklands Auto-Racing Club*, [1933] 1 K.B. 205; 101 L.J.K.B. 679; 147 L.T. 404; Digest Supp.

(4) *Prole v. Allen*, [1950] 1 All E.R. 476.

APPEAL by the plaintiff from a decision of LYNSEY, J., at Bristol Assizes on Feb. 14, 1950, in which he held that the defendants, the management committee of a members' club to which the plaintiff belonged, were not liable in damages for the personal injuries she sustained when a brick was dislodged from the roof of a building which formed part of the club premises and fell on her while she was attending a free entertainment organised by the defendants for the benefit of members of the club.

For the plaintiff it was argued that, by reason of her membership of the club, there existed between herself and the defendants a contract which contained an implied warranty that the premises were safe for the purposes for which she was admitted as a member. By their defence the defendants denied that they had entered into a contract containing such a warranty. The facts are fully set out in the judgment of TUCKER, L.J.

J. C. Perks for the plaintiff.

Casswell, K.C., and *Eric Mills (Humphrey Edmunds with them)* for the defendants.

TUCKER, L.J.: This is an appeal from a decision of LYNSEY, J., given at Bristol Assizes in an action brought by the plaintiff, Mrs. Shore, originally against the Ministry of Works and the members of the committee of management of the Corsham Community Centre. At the trial the case against the Ministry of Works was abandoned and the case proceeded only against the members of the committee, and LYNSEY, J., decided in favour of the defendants.

The Ministry of Aircraft Production had, during the war, occupied a large area in or about Corsham in Wiltshire, and there grew up there a number of prefabricated buildings and a village for the workers known as the Married Quarters Estates, Corsham. In 1943 some of the residents were minded to form what is called a community centre, and for that purpose to form a club. In due course a club was formed and its constitution and rules appear in a document called the "Constitution" and dated October, 1944, as follows:

"(1) The name of the centre shall be the 'Corsham Community Centre.'

(2) Its aims and objects shall be: (a) to promote the well-being of the community resident in the Married Quarters Estates, Corsham ... (3)

Membership: Membership of the centre shall be open to adult members of Corsham Married Quarters Estates and to Corsham and District residents and to such other persons as the management committee shall approve.

(4) Fees of membership shall be as follows: 5s. 0d. per person per annum ... (5) Application for membership shall be made on official application forms obtainable from the secretary and the members of the management committee."

Rule (6) deals with the election of the management committee, and there are provisions for the retirement of members of the committee annually. Rule (7) provides for the appointment of officers, namely, a chairman, vice-chairman, honorary treasurer, and three trustees in whom the property of the centre shall be vested. Rule (8) provides the procedure for nominations to the management committee. Rule (9) provides for meetings and for the summoning of general meetings. Rule (10) makes provision for banking and for auditing of accounts and for the signing of cheques, and so forth. By r. (11): "The use of the centre shall be at the discretion of the management committee," and r. (12) provides the procedure for altering the constitution, which can only be done by a two-thirds majority at the annual general meeting. Throughout this document and throughout the case the word "centre" is used in two senses. The club itself is called the Corsham Community Centre and it carried on its activities in a hall, referred to as a community centre. At the material time the hall was the property

of the Ministry of Aircraft Production, although at the time of this action it was owned by the Ministry of Works, and the Ministry of Aircraft Production had, in a letter of Dec. 30, 1943, granted a licence to the club to use the premises in accordance with that letter. I think it is clear that the club were licensees and nothing more, and, furthermore, that it was the club as a whole who were the licensees as distinct from the committee. The committee merely had authority, under the rules, from the members to manage the affairs of the club and to provide, at their discretion, to what use the centre should be put.

In March, 1947, the plaintiff was a member of this club, having paid her subscription in October, 1946. In March, 1947, she attended some entertainment in this hall as one of her privileges of membership. The entertainment was given for club members only and they attended without payment beyond that which they had already made for membership of the club. On the night in question there was an exceptional gale which caused damage owing to the insecure construction of the roof, some bricks became dislodged, and the plaintiff was struck by a brick and suffered injuries as a result. The judge has not found it necessary to assess the damages which he would have awarded her if he had found the defendants to be responsible, but he has found that the premises were not as safe as reasonable care and skill on the part of anyone could make them.

The present case, however, was not framed in negligence. The plaintiff put her whole case on contract and pleaded that the contract between herself and the committee of management contained an implied warranty that the premises were as safe for the purposes for which she was admitted as a member as reasonable care and skill could make them. Counsel for the plaintiff founds his argument on the decision of McCARDIE, J., in *MacLenan v. Segar* (1). That case dealt with the relationship of an innkeeper and his guest, and in his judgment McCARDIE, J., said ([1917] 2 K.B. 332):

"So too as to premises generally the rule, I think, is the same, and upon the decisions as they stand may be stated as follows, namely: Where the occupier of premises agrees for reward that a person shall have the right to enter and use them for a mutually contemplated purpose, the contract between the parties (unless it provides to the contrary) contains an implied warranty that the premises are as safe for that purpose as reasonable care and skill on the part of any one can make them. The rule is subject to the limitation that the defendant is not to be held responsible for defects which could not have been discovered by reasonable care or skill on the part of any person concerned with the construction, alteration, repair, or maintenance of the premises; and the headnote to *Francis v. Cockrell* (2) must to this extent be corrected. But subject to this limitation it matters not whether the lack of care or skill be that of the defendant or his servants, or that of an independent contractor or his servants, or whether the negligence takes place before or after the occupation by the defendant of the premises."

That statement of law was approved by this court in 1933 in *Hall v. Brooklands Auto-Racing Club* (3), a case dealing with a visitor who was admitted for reward to witness motor racing at Brooklands.

Counsel for the plaintiff submits that, on its facts, the present case comes within the principles laid down in *MacLenan v. Segar* (1). He says that when the plaintiff joined this club she made a contract with the committee and that there is to be implied into that contract a warranty in the terms stated by McCARDIE, J. In my opinion, however, the present case is altogether different from *MacLenan v. Segar* (1) and *Hall v. Brooklands Auto-Racing Club* (3). The only contract that the plaintiff made was when she paid her subscription to the secretary of the club as representing its members, and that, in my view, was only a contract with the other members of the club that she should be admitted to membership. She was admitted to membership on the terms of the rules governing the club, contained in the document called the "Constitution" which I have read. In that document are to be found all the matters which govern her relationship

A with the other members of the club, and the duties of the management committee and any authority which they derive from the body of members. There is nothing in the constitution which could impose on the committee the liability which the plaintiff seeks to put on them. After she had become a member of the club, whenever she attended this hall in the circumstances in which she was there on this occasion, she was merely one member of the club making use of premises of which the club as a whole were licensees, and I do not think that she has any remedy against the committee based on this contract. What the position might be had negligence been alleged does not arise.

B We have been referred to *Prole v. Allen* (4), a case recently decided by PRITCHARD, J., at the Somerset Winter Assizes in which he had to deal with an action brought by a member of an unincorporated members' club against some members of the committee and a steward of the club. In that case the action was founded solely in tort, the learned judge held that the members of the committee owed no duty to the plaintiff, and, accordingly, as against them, the action failed. That case does not assist in the present appeal, the case on behalf of the plaintiff here not having been founded on tort.

C In dealing with the present matter, LYNSEY, J., having referred to *MacLennan v. Segar* (1) and *Hall v. Brooklands Auto-Club* (3), said:

D "But it seems to me here that the real contract made by Mrs. Shore in joining this club and in paying her subscription was not made with the committee. It was a contract made with all the other members of the club, and entitled her, together with all the other members of the club, to enjoy the amenities of the club and become a part-owner of the property of the club, and also to have a rightful share in this licence which the club had from the minister. In my view, the management committee of the club were doing no more than acting as agents for all the members. They were elected by the members and they were exercising the powers of all the members as agents for those members. They were not a body which was contracting as a separate body with individual members, nor had they any separate entity for the purpose of contracting with outsiders who came with members of the club ... It was shown in the course of the club's defence that the members of the club might be vicariously liable for particular negligence of the members of the committee, but I cannot read into this contract, entered into when the plaintiff joined the club, a warranty by the committee that, in fact, the club premises, which they only had a licence to use, would be as safe as reasonable care and skill could make them. If they had made any such contract on behalf of the club and for the club, they would have been undertaking to do something which they had no legal right to do, and they could not implement their contract. I cannot for one moment read into this contract such a warranty."

G That last paragraph has been criticised by counsel for the plaintiff who has said that, for instance, *vis-a-vis* a member of the public who might be attending an entertainment at this club, it would be a curious result if the club or its committee could escape liability, based on the doctrine of *MacLennan v. Segar* (1), by reason of the fact that, unknown to the visiting guests, they were only the licensees of the premises with the limited rights and powers attached to licensees. It is not necessary to express a concluded view with regard to this because it was not the basis of the judgment of LYNSEY, J., but, as at present advised, I am inclined to feel that there is some substance in counsel's submission on that part of the case. For the reasons I have stated, I do not think the plaintiff has any remedy based on contract which entitles her to recover judgment against the committee of the club, whom she is now suing. The appeal must fail.

H SINGLETON, L.J.: I am of the same opinion. The plaintiff's action against the committee of management was based entirely on contract. It was alleged in the statement of claim that the contract relied on, which was a contract

of membership, included an implied warranty that the club premises would be as safe as reasonable care and skill could make them. I am not prepared to hold that any such term was to be implied into this contract. I agree with the submission made by counsel for the defendants that one must look at the circumstances and see who the parties are in considering whether or not a term such as this can be implied into a contract between the plaintiff and the person with whom she contracted, or those on whose behalf he contracted with her.

In the judgment of McCARDIE, J., in *MacLenan v. Segar* (1), to which my Lord referred, and which was approved in this court in *Hall v. Brooklands Auto-Racing Club* (3), the learned judge said ([1917] 2 K.B. 332):

"Where the occupier of premises agrees for reward that a person shall have the right to enter and use them for a mutually contemplated purpose, the contract between the parties (unless it provides to the contrary) contains an implied warranty that the premises are as safe for that purpose as reasonable care and skill on the part of any one can make them."

I draw attention to the words "agrees for reward." I do not think this is such a case. When the plaintiff became a member of the community centre soon after its formation, she became a member on the same terms as the other members and entitled to the same rights as they had. At some time thereafter, it may be, she took part in electing a committee of management, but she was not one with whom the occupier (even if the club could be regarded as the occupier) agreed for reward that she should have the right "to enter and use" the premises—to use the words of McCARDIE, J. I find it unnecessary to read a term of this kind into the contract, and I think it would be wrong to do so. For that reason I agree that the appeal must be dismissed.

JENKINS, L.J.: I agree. I confess to feeling considerable sympathy with the plaintiff who met with this accident, the liability for which, it seems, she can bring home to nobody. On the other hand, it would, to my mind, be very serious if the elected members of the committee of management of a club of this kind found themselves saddled, by virtue of their office, with a warranty as to the safety of the club premises. That result would be surprising indeed.

If this had been a proprietary club and the proprietors had admitted the plaintiff to membership for reward, it may well be that the principle stated in *MacLenan v. Segar* (1) would have applied and that the plaintiff would have been entitled to succeed. Once it appears, however, that this was a members' club and not a proprietary club, then it seems to me there is an end of the case, for the contract which the plaintiff made in October, 1946, was an ordinary contract of membership of a members' club, and the rights she acquired under it were simply those which she was entitled to enjoy in common with the other members, including the right from time to time to use the club premises in accordance with the rules, with all their defects or imperfections. There was nothing in the nature of a special contract between the plaintiff and the committee of management. Her relationship to the committee of management was that of any other member. The persons from time to time elected to the committee of management were members elected by their fellows to manage the affairs of the club on behalf of the general body of members, and clearly they could not, by virtue of that relationship, be held to have given a warranty to the other members of the club as to the state or condition of the building. The considerations thus briefly summarised and more fully dealt with in what my Lords have already said lead me also to the conclusion to which they have come, that notwithstanding any temptation one may feel to decide the contrary, the plaintiff has failed to bring home any legal liability against any of the defendants, and the appeal should, therefore, be dismissed.

Appeal dismissed with costs.

Solicitors: *Arthur Taylor & Co.*, agents for *Titley, Long & Co.*, Bath (for the plaintiff); *Berrymans* (for the defendants).

[Reported by J. D. PENNINGTON, Esq., Barrister-at-Law.]

LISSACK v. LISSACK.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Pearce, J.), May 24, 25, 26, 1950.]

Divorce—Cruelty—Defence—Insanity.

While suffering from disease of the mind the husband killed the child of the marriage and attempted suicide. At his trial he was found Guilty of murder, but insane, and was ordered to be detained during His Majesty's pleasure. The wife petitioned for divorce on the ground of his cruelty in committing those acts, and by his guardian *ad litem* he set up the defence that at the material time he knew neither the nature nor the quality of his acts, that he did not know they were wrong, and that he was not responsible for them.

HELD: in petitions based on cruelty the duty of the court to interfere was intended, not to punish the husband for the past, but to protect the wife for the future, and to withdraw from consideration intolerable conduct which was due to insanity would render the court powerless in cases where help was most needed; the defence of insanity was not open to the husband; and the wife was entitled to a decree.

Reasoning of DENNING, L.J., in White v. White ([1949] 2 All E.R. 350), *applied.*

[AS TO INSANITY AS A BAR TO DIVORCE, see HALSBURY, Hailsham Edn., Vol. 10, pp. 669, 670, para. 989; and FOR CASES, see DIGEST, Vol. 27, pp. 323, 324, Nos. 3020-3025, and Digest Supp.]

Cases referred to:

- (1) *Kirkman v. Kirkman*, (1807), 1 Hag. Con. 409; 161 E.R. 598; 27 Digest 286, 2579.
- (2) *Holden v. Holden*, (1810), 1 Hag. Con. 453; 161 E.R. 614; 27 Digest 285, 2563.
- (3) *Yarrow v. Yarrow*, [1892] P. 92; 61 L.J.P. 69; 66 L.T. 383; 27 Digest 324, 3025.
- (4) *Hyman v. Hyman and Goldman*, [1904] P. 403; 73 L.J.P. 106; 91 L.T. 361; 27 Digest 342, 3227.
- (5) *Hanbury v. Hanbury*, [1892] P. 222; 61 L.J.P. 115; *subsequent proceedings*, 8 T.L.R. 559; 27 Digest 324, 3024.
- (6) *M'Lachlan v. M'Lachlan*, [1945] S.C. 382; 2nd Digest Supp.
- (7) *White v. White*, [1949] 2 All E.R. 339; [1950] P. 39; 113 J.P. 474.
- (8) *Hall v. Hall*, (1864), 3 Sw. & Tr. 347; 33 L.J.P.M. & A. 65; 9 L.T. 810; 164 E.R. 1309; 27 Digest 323, 3022.
- (9) *Astle v. Astle*, [1939] 3 All E.R. 967; [1939] P. 415; 109 L.J.P. 6; Digest Supp.
- (10) *M'Naghten's Case*, (1843), 10 Cl. & Fin. 200; 8 E.R. 718; 14 Digest 56, 229.
- (11) *Squire v. Squire*, [1948] 2 All E.R. 51; [1949] P. 51; [1948] L.J.R. 1345; 112 J.P. 319; 2nd Digest Supp.
- (12) *Kellock v. Kellock*, [1939] 3 All E.R. 972; Digest Supp.

PETITION for dissolution of marriage by the wife on the ground of her husband's cruelty.

The cruelty alleged was that the husband had killed the only child of the marriage and had then attempted to commit suicide. When he was tried for murder, the husband was found to be Guilty but insane and he was ordered to be detained during His Majesty's pleasure. By his guardian *ad litem* he put in an answer pleading that he was not responsible for his actions at the material times owing to disease of the mind.

Tyndale, K.C., and Thomas Dewar for the wife.

Stuart Horner for the husband.

PEARCE, J.: This is a wife's petition for divorce on the ground of her husband's cruelty in killing their only child and attempting to kill himself. The husband, by his guardian *ad litem*, pleads that at the time of the alleged cruelty he knew neither the nature nor the quality of his acts, that he did not know that they were wrong, and that he was not responsible for them.

The parties were married in 1941. They had a daughter in 1942. On Oct. 25, 1948, the wife went out for the evening, leaving the husband in charge of the child. When she returned, the room was barricaded, the child had been strangled by the husband, and he had been unsuccessfully trying to commit suicide by putting his head in the gas oven. The statement he made later to the police starts with the words: "I want to tell you how I came to do this terrible thing." In it he says that he made up his mind to do the deed weeks before Oct. 25, that he had creeping paralysis brought about by a bad habit continued from childhood, that this disease was hereditary, and that he had passed it on to his child. These were insane delusions. Neither he nor his daughter had suffered from that disease. He decided, he said in his statement, not to leave her with such a complaint and made up his mind to kill her and himself. He wrote a note in anticipation, but he could not get the courage to do it until Oct. 25. His statement describes in distressing detail how he killed the child. In a rational letter written on Nov. 5 from prison to his wife's brother, he uses these words: "After what I have done to Rosie I can hardly face her . . . I know what torment, misery, agony, she is going through." He refers to the suffering of his parents, and says: "There does not seem much more I can say except that I've messed up a lot of decent people's lives." On Nov. 17 he was tried for murder and was found Guilty but insane, and he is now detained at Broadmoor. From there he wrote two letters to the wife, regretting the pain he had caused her and the "terrible things" he had done. He is not incurably insane. His condition has improved, and it is possible that in the future he may be released. The medical evidence shows clearly that the shock has had, as one would suppose, a very serious effect on the wife's health and nerves, that some part of that damage will be permanent, and that some mental relief would be afforded to her by a release from her marriage tie to this husband.

Apart from the question of insanity, the wife has a clear right to the relief she claims. There can be no greater cruelty to a woman than the killing of her child. Does his insanity prevent her getting relief?

Counsel for the wife argues that insanity of the husband is no defence to a wife's petition based on cruelty. He relies on the following cases and on the fact that such a defence has in no reported case been successful. In *Kirkman v. Kirkman* (1), SIR WILLIAM SCOTT, referring to the necessity to provide for the safety and comfort of the individual, said (1 Hag. Con. 410):

"If that safety is endangered by violent and disorderly affections of the mind, it is the same, in its effects, as if it proceeded from mere malignity alone; it cannot be necessary that, in order to obtain the protection of the court, it should be made to appear to proceed from malignity."

In *Holden v. Holden* (2) the same judge made observations tending in the same direction (1 Hag. Con. 458). In *Yarrow v. Yarrow* (3) ([1892] P. 94) and in *Hyman v. Hyman and Goldman* (4) ([1904] P. 407), SIR FRANCIS JEUNE, P., expressed doubt whether insanity could be a complete answer to a charge of adultery.

In *Hanbury v. Hanbury* (5) SIR CHARLES BUTT, P., in charging the jury said ([1892] P. 224):

"I am not entirely satisfied that a mere plea of insanity is a sufficient answer to a suit. It may be that a person is so insane as to necessitate his or her confinement in an asylum or some other place of permanent

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detention, and the disease may be such that there is no hope of recovery or amelioration such as will allow of his or her discharge. When a disease of that sort seizes upon a person, and he or she has to be incarcerated or permanently to be placed in confinement, I should hesitate to say that in regard to an act committed in such a state of insanity a plea of insanity might not be an answer. But I think it is very different with regard to intermittent and recurrent insanity. If a man is afflicted with madness or insanity of such a nature as to necessitate keeping him in duress for the rest of his life, there is no danger of violence to his wife. I conceive that the object of the Divorce Act is not so much, or nearly so much, the punishment or retribution for a marital offence as the protection of the party who is in peril. I believe that protection, and not punishment or retribution, is the main object; and if it can be shewn that the insanity is of such a nature that it will produce violence on the part of the husband, and endanger the safety of the wife, though it need not entail the permanent incarceration of the man, but only his restraint from time to time—if the mania is recurrent and comes on suddenly from time to time she may be placed in great jeopardy. In such a case I can well conceive that, although in some instances insanity may be one of those misfortunes which must be taken by a wife with her husband for better or for worse, and though it may assume the form of a disease, yet if it is such as to imperil the wife's safety she is entitled to the protection of this court. Assuming for a moment that these attacks were not brought on the respondent by his own self-indulgence, assuming that they were the result of hereditary disease, I should still be disposed to hold that the acts of cruelty committed in one of these fits of mania would entitle the wife to the remedy which she asks—separation from her husband. If the mania is intermittent and recurrent, the husband is entitled to go home when he recovers from time to time—the wife cannot refuse him admission to the conjugal home; and if the mania is likely to recur accompanied with violence which would place the wife in peril, the ordinary protection which she is supposed to obtain by proceedings in lunacy is a delusion, because it does not protect her against the return home of her husband, who is liable at any moment to become a lunatic.”

When that case came before the Court of Appeal, LORD ESHER, M.R., with whom LINDLEY and KAY, L.JJ., concurred, said (8 T.L.R. 560) that:

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“He was prepared to lay down as the law of England that whenever a person did an act which was either a criminal or culpable act, which act, if done by a person with a perfect mind, would make him civilly or criminally responsible to the law, if the disease in the mind of the person doing the act was not so great as to make him unable to understand the nature and consequences of the act which he was doing, that was an act for which he would be civilly or criminally responsible to the law. Consequently, even though the respondent's mind was diseased, he was as responsible to the law as if his mind was not diseased. The judgment of the learned PRESIDENT was therefore right. There was a larger question which the PRESIDENT touched upon, but did not decide—namely, whether, even if the respondent's mind had been such that he did not know the nature of what he was doing or that he was doing wrong, the petitioner would or would not be entitled to a divorce. It was unnecessary to decide that question, and he desired to leave it open.”

In a Scottish case, *M'Lachlan v. M'Lachlan* (6), LORD MONCRIEFF, LORD CARMONT and LORD RUSSELL held that an act committed by an epileptic during a seizure when he was temporarily irresponsible constituted cruelty. They came to that conclusion after a careful consideration of the law of Scotland and England. Finally, counsel for the wife relies on a judgment

delivered in *White v. White* (7), where DENNING, L.J., has cogently and in detail considered the matter and expressed the opinion that insanity is no defence to a charge of cruelty, with a possible qualification when the insanity is known to the injured party.

Counsel for the husband argues that in the passages cited in *Kirkman v. Kirkman* (1) and *Holden v. Holden* (2), SIR WILLIAM SCOTT was directing his mind, not to insanity, but to intention, and was dealing with lack of balance rather than madness. Counsel for the husband also argues that in *Hanbury v. Hanbury* (5), SIR CHARLES BUTT, P., was really saying that insanity can be an answer, but it must be of a certain degree, though it is to be noted that he appears to consider that cruelty committed in recurrent fits of mania would entitle a wife to a judicial separation. It is argued, rightly, that *Yarrow v. Yarrow* (3) and *Hyman v. Hyman and Goldman* (4) are neutral and leave the matter completely in doubt. Reliance is placed on *Hall v. Hall* (8) where SIR CRESSWELL CRESSWELL said (3 Sw. & Tr. 349):

"With danger to the wife in view, the court does not hold its hand to inquire into motives and causes. The sources of the husband's conduct are, for the most part, immaterial. Thus, I have no doubt that cruelty does not cease to be a cause of suit if it proceeded from 'violent and disorderly affections,' as said in one case, or from 'violence of disposition, want of moral control, or eccentricity,' as said in another, or 'from a liability to become excited in controversy,' in the language of a third; but madness, dementia, positive disease of the mind, this is quite another matter. An insane man is likely enough to be dangerous to his wife's personal safety, but the remedy lies in the restraint of the husband, not the release of the wife. Though the object of this court's interference is safety for the future, its sentence carries with it some retribution for the past. In either aspect it would be equally unjust to act on the excesses of a disordered brain: in the latter, for the insane are not responsible; in the former, for insanity may be cured and the danger at an end."

Counsel for the husband points out that in *M'Lachlan v. M'Lachlan* (6) one of the learned judges appears to regard certifiable insanity as an answer to cruelty. In *Astle v. Astle* (9) HENN COLLINS, J., held that insanity satisfying the test in *M'Naghten's* case (10) was an answer. That opinion was not necessary to the decision, as he found cruelty proved and gave the wife a decree, and part of the reasoning in that case has been disapproved by the Court of Appeal in *Squire v. Squire* (11). It is, therefore, not a safe guide. So, too, with *Kellock v. Kellock* (12) decided at the same time by HENN COLLINS, J.

Counsel for the husband also relies on the judgment of ASQUITH, L.J., in *White v. White* (7). In that case BUCKNILL, L.J., held that the judge of first instance was wrong in refusing a decree on the ground of insanity and that the wife was responsible for her acts, and he decided that a decree to the husband should be granted. Although, in arriving at that decision, he applied the test laid down in *M'Naghten's* case (10) he expressly left open, without giving an opinion either way, the question whether insanity can be a defence to a charge of cruelty. ASQUITH, L.J., in agreeing with BUCKNILL, L.J., held that, to afford a defence ([1949] 2 All E.R. 348):

"... the insanity must, at all events, not fall short of such insanity as would afford a defence to a criminal charge within the *M'Naghten* rules."

He added (*ibid.*, 348):

"It is unnecessary in the present case, having regard to the view I take of the facts, to decide whether the converse holds, namely, that, if the respondent does not know what he is doing, or does not know it

is wrong, this is in any or every case a defence, though for myself I incline to that view."

He then gave reasons for that view. DENNING, L.J., agreed with the other learned lords justices in allowing the appeal and in granting a decree, but he did so for different reasons. He held that insanity was no defence—with the possible exception of cases where the injured party knew that the other was of unsound mind—and he held that the *M'Naghten* rules were not applicable. That view was necessary to his decision since, in his opinion, the respondent was insane within the *M'Naghten* rules, and, had such insanity been a possible defence, there could have been no decree.

In this difficult state of the law the matter comes before me. It is for the husband to establish that a legal defence of insanity does exist in matrimonial cases. Although such a defence has never been successfully and affirmatively held to exist in any reported case it has been assumed to exist in some of the cases cited, but that assumption was not necessary to the decisions. In criminal matters, where the object is punishment, such a defence is obviously necessary in a just society. So, too, in a more limited form at common law and in chancery, but I do not think it is a safe analogy to assume that, therefore, justice requires it in matrimonial matters.

Since in petitions based on cruelty the duty of the court to interfere is intended, not to punish the husband for the past, but to protect the wife for the future, the question for the court is whether the wife can with safety to life and health live with the husband now. To withdraw from the ambit of legal cruelty conduct that is intolerable, but is due to insanity, is to make the court powerless to help in cases where help may be most needed. It is said that the other course may also cause hardship. Theoretically it may. If a husband is cruel to his wife owing to insanity and then recovers, it is hard for him that he should be divorced by her, but since, *ex hypothesi*, her affection and fortitude were not great enough to enable her in the circumstances to tolerate a continuance of married life and she wished for divorce, it is unlikely that he would attain happiness by maintaining the marriage tie. Moreover, since such a defence has in no reported instance ever been made out on the facts, its existence would seem to give little practical benefit to respondents.

These considerations and the reasons set out in the judgment of DENNING, L.J., seem to me convincing. Among many conflicting opinions on the subject, I cannot find that it has been clearly established that insanity is a defence to a petition based on cruelty. For that reason, and because, in my view, such a defence is not in accord with the true view of the law relating to cruelty, I hold that the defence of insanity is not open to the husband and that the wife is entitled to a decree.

In case I am held to be wrong in this view, it is desirable that I should express my opinion whether the necessary degree of insanity has been proved in this case. If insanity can be a defence, the onus of proving it must be on the husband. The test suggested is that laid down in *M'Naghten's* case (10) as the proper test in criminal cases, namely (10 Cl. & Fin. 210):

" . . . to establish a defence on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong."

The test whether the husband knew that he was doing wrong is a very unsatisfactory one in measuring misdeeds so dependent on the circumstances and personalities of the parties as acts of cruelty. Things may be cruel in particular circumstances and between particular persons that are not at the time of their commission known to be wrong. To alter the test by substituting for the word "wrong" the word "cruel" would not be possible in view of the decision

of the Court of Appeal in *Squire v. Squire* (11). This in itself shows how unsatisfactory is such a test. To limit the test so that it accords with that applied in common law and chancery courts would make it more practical. HALSBURY'S LAWS OF ENGLAND, 2nd ed., vol. 21, p. 293, para. 504 (quoted by BUCKNILL, L.J., in *White v. White* (7)), reads as follows:

"In an action at common law or in chancery, where the responsibility of a person alleged to be of unsound mind is in question, the issue generally directed is: 'Was the person alleged to be of unsound mind at the date in question capable of understanding the nature of the act he was performing?'"

Such a limitation of the test would be reasonable, since the test of the knowledge of wrong, though suitable to criminal matters where the primary object is punishment, is not suitable in matrimonial matters, where it would be out of accord with the authorities which I have already cited. In this case it is agreed that the husband knew the nature and quality of his acts. If, therefore, that limited test were applied in this case, the wife would succeed.

Even if the test in *M'Naghten's* case (10) is the true test, the husband can only defeat the wife's prayer if he did not know his acts to be wrong. On this issue there is a divergence of medical opinion. I have to decide it on the evidence before me. The opinion formed by a jury—who, incidentally, did not have before them all the evidence that I have had—does not compel me to the same conclusion. The doctor who saw the husband thirty-six hours after the crime and thereafter from time to time for some three weeks says that, though he cannot speak with certainty, there is a high degree of probability, that owing to schizophrenia the husband had no knowledge that his acts were legally or morally wrong. He suggested also that the disease might have created an irresistible impulse to the deed, but, in view of the man's own statement, this seems most unlikely. This doctor relies on the complete flatness and absence of emotion displayed by the husband when he examined him, a condition typical of schizophrenia. It must be remembered that the husband had been through a horrible ordeal, to which, if his statement is to be believed, he had difficulty in screwing up his courage, an ordeal which must have taken heavy toll of his nervous resources. The doctor at Broadmoor says that the husband was certifiable when he entered that institution. The opinion of the doctor called by the wife is that the husband knew that what he was doing was contrary to law and was wrong. That opinion is derived from the husband's signed statement and the other documents, on which this doctor relies as showing knowledge of wrong, and which, at all events, as the other doctor admits, give some indication of that knowledge. All the documents show the husband's appreciation of the pain which his acts would inflict, or had inflicted, on the wife. The reference in the original note to "this terrible thing" and "what a terrible thing to do to a wonderful girl like Rosie" are more consistent with an appreciation of wrong than with a failure to appreciate it. There is here no glorification of his act, no indifference to its consequences. So, too, with the signed statement made the day after the occurrence, where he explains how he "came to do this terrible thing." So, too, with his difficulty in getting up his courage to do it and in his waiting to do it till his wife went out. So, too, with the contrition expressed in the letters after the event.

I am asked to believe that at the moment of the killing the knowledge of wrong passed from his mind. If, as I believe, when he first planned the deed and wrote the note, he knew it was wrong, yet determined to do it if he could muster the courage, and if, as I believe, when he made his signed statement shortly after the event (and later when he wrote the letters) he knew it to be wrong, I find it impossible to assume an intervening interval when he did not know it to be wrong. The evidence of the doctor called by the wife seems to me the more likely to be correct, but, at the highest, the matter is one of opinion

and probability. I have to consider whether the husband has proved clearly that he did not know that it was wrong. I am satisfied that on the evidence he has not proved that clearly or at all. This case seems to me very similar to that considered in the fourth question in *M'Naghten's* case (10), and since the husband's conduct, even if the delusions had been true, would have been unlawful, he cannot escape liability for that conduct. There will be a decree *nisi* in favour of the wife.

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Decree *nisi*.

Solicitors: *T. C. Boyes*, Law Society Services Divorce Department (for the wife); *Official Solicitor* (for the husband).

[Reported by R. HENDRY WHITE, ESQ., Barrister-at-Law.]

B

Re JONES (deceased). MIDLAND BANK EXECUTOR AND TRUSTEE CO., LTD. v. LEAGUE OF WELLDOERS AND OTHERS.

[CHANCERY DIVISION (Danckwerts, J.), June 8, 1950.]

C

Annuity—Perpetual—Gift to unincorporated body—Validity.

By his will, made on Mar. 1, 1926, the testator, who died on Oct. 4, 1936, gave certain annual sums to a number of societies, some of which were charitable while others were not, and some of which were incorporated while others were not. He gave the residue of his estate to trustees on certain trusts, with power to postpone sale or conversion for two years, or, if necessity arose owing to difficulty in disposing of his foreign estate, for three years, and he then directed that on the realisation of his foreign estate certain capital sums should be paid to the societies in substitution for the annuities which he had previously given. The will contained a provision for the abatement of all legacies and bequests, should the estate be insufficient to pay them in full, which was found to be the case. It was not possible to realise the foreign estate within three years from the time of the testator's death, and it was not known how long the realisation might take.

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HELD: (i) the gift of the capital sums was made on an uncertain event which was not necessarily bound to happen within the period allowed by the rule against perpetuities, and, therefore, the substituted gift failed completely.

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(ii) the annual sums given to the societies were perpetual annuities, not only in the case of the gifts to the corporations, but also in the case of those to unincorporated bodies; there was no rule of law which prevented a perpetual annuity being given to an ascertained unincorporated body; and, therefore, as the beneficiaries were entitled to demand payment of a capital sum instead of a sum paid over a period of years, the gifts were valid, whether or not the beneficiaries were charitable societies.

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[AS TO PERPETUAL ANNUITY, see HALSBURY, Hailsham Edn., Vol. 28, pp. 195-197, para. 360; and FOR CASES, see DIGEST, Vol. 39, pp. 135-139, Nos. 292-336.]

H Cases referred to:

- (1) *Hicks v. Ross*, [1891] 3 Ch. 499; 60 L.J.Ch. 853; 65 L.T. 200; 39 Digest 193, 828.
- (2) *Re Hollins*, [1918] 1 Ch. 503; 87 L.J.Ch. 326; 118 L.T. 672; 39 Digest 126, 188.

ADJOURNED SUMMONS, from the Liverpool District Registry, to determine *inter alia* the validity of gifts, under the testator's will, of annual sums to various charitable and non-charitable societies, some of which were unincorporated

bodies. The testator's estate was found to be insufficient to meet the bequests which had priority over residue, and, therefore, there would have to be a large abatement. The facts appear in the judgment.

E. W. Griffith for the trustees.

G. Maddocks, W. Geddes, A. O. Hughes, Hesketh, Wilfrid Hunt, Benas, G. D. Johnston, J. Turner, Harold Brown, for beneficiaries.

Denys Buckley for the Attorney-General.

DANCKWERTS, J. [after dealing with other questions arising under the testator's will, which was made on Mar. 1, 1926, continued]: I have now to deal with the gifts which are the principal subject-matter of the will. I do not propose to read them all in detail, but, after the gifts which I have previously considered in the course of this case, the testator proceeds to give to a number of societies, some of which are plainly charitable, some of which are plainly not charitable, some of which are incorporated, and some of which are not incorporated, annual sums of £25 per annum and other amounts, such as £12 10s. per annum, which are, apparently, in the nature of perpetual annuities. He then gives, devises, and bequeaths the whole of the residue of his property, real or personal, whether in the United Kingdom or abroad, to his trustees on trust to divide the same among five societies, which, I think, are charitable societies, in such proportions as the trustees in their discretion think fit, and he directs any surplus income to be paid to those societies. Although he has not in terms given any express trust for sale, he directs that his trustees:

"... shall have power to postpone the sale or conversion of the whole or any part of my estate before payment of any bequests after consultation with the local valuers in Uruguay as to my Uruguayan property or others with a knowledge of local values there, including the Uruguayan consul in Liverpool, for two years or, if the necessity arises owing to difficulty in disposing of my foreign estate, for three years, and I further direct that in case my estate shall be insufficient to pay in full the specific legacies and bequests hereinbefore mentioned each such legacy shall abate proportionately."

He did not give any legacies which are accurately described as specific legacies according to the legal meaning of that term, and, presumably, he means the particular legacies which he had given previously in his will. He then goes on:

"And I further direct that on the realisation of my foreign estate the following capital amounts shall be paid to the beneficiaries hereinafter mentioned and such shall be in substitution for and not in addition to any annuities hereinbefore provided for the said hereinafter mentioned beneficiaries and in this latter event the provision as to proportionate abatement in case of deficiency shall apply generally."

He proceeds to name all the previous beneficiaries to whom he had given annuities, with the exception of Rationalist Press Association, Ltd., to whom he had given an annuity of £25. In all cases where capital sums are given, with one exception, he has calculated them on the basis of a twenty years' purchase of the annual sum. The one exception is ten years instead of twenty years.

The question is, first, whether that substituted gift is effective, or whether it fails under the rule against perpetuities or for any other reason. It is to be observed that the testator, who died on Oct. 4, 1936, clearly anticipated that his estate in Uruguay would be realised at the latest within a period of three years from his death, but it was not possible to realise it within that period. The gift is not, as the testator might have expressed it, in the terms that these capital sums should be paid on the realisation of the foreign estate or at the expiration of three years from his death, whichever shall first happen, but is simply on the realisation of his foreign estate. The realisation of his foreign

estate might, or might not, take a very long time. It seems to me, therefore, that the gift of the capital sums is made on an uncertain event of which it cannot be said that it is necessarily bound to happen within the period allowed by the rule against perpetuities, and, consequently, it is invalid, with the result that the substituted gift fails completely.

A We are left, therefore, with the original gift of the annual sums. These, clearly, seem to be perpetual annual sums. They obviously must be so in the case of corporations, which may go on for ever, and the same might apply to unincorporated bodies. There seems no rule of law which prevents a perpetual annuity, any more than other species of property, being given to an ascertained unincorporated body, the members of which can dispose of it as they dispose of other property. Therefore, I think that any argument as to the invalidity of the gift of the annuities fails. As Mr. Wilfrid Hunt has pointed out, the method by which the value of such perpetual annuities is to be ascertained has been clearly laid down in *Hicks v. Ross* (1), and *Re Hollins* (2). *Re Hollins* (2) was a case of abatement and EVE, J., pointed out ([1918] 1 Ch. 516) that the principle had been decided by KEKEWICH, J., in *Hicks v. Ross* (1) that:

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C “ . . . the price to be paid for such an annuity is such a sum as at the price of the day will purchase $2\frac{1}{2}$ per cent. government stock sufficient to produce the annuity, excluding any charge for brokerage.”

It appears that any of the beneficiaries to whom such an annuity was given could, if they wished, demand payment of a capital sum in cash instead of a sum paid over a period of years. Therefore, it seems to me, these gifts of perpetual annuities are valid, whether the bodies concerned be corporate or incorporate, and whether or not they be of a charitable nature.

D *Declaration that all the gifts of capital sums, which were to be paid on the realisation of the testator's foreign estate, were void for perpetuity, and that the bequests of a defined sum per annum to any charitable or non-charitable person, company or body were valid bequests.*

E Solicitors: *Rutherfords*, Liverpool, *Sharman & Son*, Liverpool, *H. W. Stacey & Co.*, Liverpool, *Edwin Berry & Co.*, Liverpool, *S. Thornhill Tracey*, Chalfont St. Giles, *Laces & Co.*, Liverpool, agents for *Rider, Heaton, Meredith & Mills*, London, *Miller, Taylor & Holmes*, Liverpool, agents for *Jaques & Co.*, London, *Hill, Dickinson & Co.*, Liverpool, agents for *Lee & Pembertons*, London, *Lynch & Furlong*, Liverpool, *Herbert J. Davis*, *Berthen & Munro*, Liverpool, *Forwood, Williams & Co.*, Liverpool, *Moore & Price*, Birkenhead, F *Whitley & Co.*, Liverpool, agents for *Clare & Clare*, London, *Dodds, Ashcroft & Cook*, Liverpool, agents for *John H. Mote & Son*, London, *Nigel Ryland*, Manchester, *P. S. Harvey*, Liverpool, *Ayrton & Alderson Smith*, Liverpool, *Yates, Sheridan & Co.*, Liverpool (for beneficiaries); *Batesons & Co.*, Liverpool, agents for *Treasury Solicitor* (for the Attorney-General).

[Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.]

Re MOUNT EDGCUMBE SETTLED ESTATES.

[CHANCERY DIVISION (Harman, J.), May 19, 1950.]

Settlement—Settled land—Capital moneys—Application to purpose not authorised by trust instrument—Compensation for chattels destroyed by enemy action—Purchase thereof of chattels to devolve as heirlooms—Settled Land Act, 1925 (c. 18), s. 64.

By cl. 4 of his will dated June 28, 1940, a testator, who died on Apr. 18, 1944, bequeathed to the person who should under the limitations therein-after contained become beneficially entitled to the rents and profits of his settled estates such of his chattels and effects given by the next following clause thereof as his trustees should in their absolute discretion consider unsuitable to be retained in settlement. By cl. 5 he bequeathed to his trustees all his chattels and effects not otherwise specifically disposed of on trust to allow the same (except such of them as the trustees should consider unsuitable to be retained in settlement) to devolve as heirlooms along with his said settled estates. By cl. 16 the testator devised and bequeathed his freehold and leasehold property (his "settled estates") in strict settlement, and by cl. 23 and cl. 24 he bequeathed all his personal property not otherwise disposed of to his trustees on the usual trusts for sale and conversion and the payment of funeral and testamentary expenses, debts, legacies, annuities and duties, and on trust to invest the residue of the proceeds and stand possessed of the investments so made or any part of his residuary personal estate for the time being unconverted on "the trusts and subject to the powers and provisions upon and subject to which capital money arising under the Settled Land Act, 1925, from my settled estates or investments representing the same would be held." At the date of the testator's will the property which would have been subject to cl. 16 included a mansion, but in 1941 the mansion and its contents were destroyed by enemy action. As regards part of the mansion the War Damage Commission determined that compensation should be on the basis of the cost of works, and as regards the contents, which were insured under the private chattels scheme pursuant to the War Damage Act, 1941, the commission agreed (after the date of the testator's death) that the maximum payment of £10,000 should be made as compensation. In due course the £10,000 was received by the trustees for the purposes of the Settled Land Act, 1925, and they held it as capital money as being part of the testator's residuary personal estate. It was proposed to re-build the mansion, but, although the tenant for life desired to live in it when it was habitable, he was unable without financial assistance to furnish it, and the question arose whether the £10,000 might be devoted to the provision of furniture and other chattels. All existing remaindermen of full age consented to the transaction, and the guardian *ad litem* of the existing infant remaindermen was of the opinion that it was for the infants' benefit.

HELD: the court had jurisdiction under the Settled Land Act, 1925, s. 64, to authorise the application of the money to the purpose proposed because it would benefit the persons interested, and it was proper in the exercise of that jurisdiction in the present case to sanction the application of not more than £10,000, as and when the mansion or any part thereof should be fit for habitation, in the purchase of such furniture and chattels for the mansion as the Settled Land Act trustees for the time being should consider suitable to be retained in settlement as heirlooms.

Re White-Popham Settled Estates ([1936] 2 All E.R. 1486), *applied*.

[AS TO GENERAL POWER OF TENANT FOR LIFE TO EFFECT TRANSACTIONS UNDER ORDER OF COURT, see HALSBURY, Hailsham Edn., Vol. 29, pp. 745, 746, para. 1037; and FOR CASES, see DIGEST, Vol. 40, p. 745, Nos. 2762, 2763.]

Case referred to:

- (1) *Re White-Popham Settled Estates*, [1936] 2 All E.R. 1486; [1936] Ch. 725; 105 L.J.Ch. 368; 155 L.T. 553; Digest Supp.

ADJOURNED SUMMONS for relief under the Settled Land Act, 1925, s. 64, namely, that the tenant for life in possession for the time being under a settlement made by the will of the Right Honourable Piers Alexander Hamilton, Earl of Mount Edgecumbe, deceased, might be authorised to direct that £10,000 received from the War Damage Commission pursuant to the War Damage Act, 1941, in respect of chattels formerly belonging to the testator but destroyed in his lifetime by enemy action, be applied in the purchase of furniture or other chattels suitable for the equipment of the mansion of Mount Edgecumbe on the footing that any chattels so purchased should be held on the trusts expressed in cl. 5 of the will of the testator as to chattels thereby directed to devolve as heirlooms.

Under the terms of the will and in the events which had happened the settled estate stood limited at the date of the summons :—(a) on trust for the applicant for life with remainder; (b) on trust for the first and other sons of the applicant successively according to seniority in tail male with remainder; (c) on trust for the respondent, Edward Piers Edgecumbe (who was forty-six years of age and had no issue male), for life with remainder; (d) on trust for his first and other sons successively according to seniority in tail male with remainder; (e) on trust for the respondent, George Aubrey Valletort Edgecumbe (who was forty-two years of age), for life with remainder; (f) on trust for the respondent, Robert Charles Edgecumbe (the eldest son of the said George Aubrey Valletort Edgecumbe who was ten years of age), for life with remainder; (g) on trust for the first and other sons of the said Robert Charles Edgecumbe successively according to seniority in tail male with remainder; (h) on trust for the respondent, Piers Valletort Edgecumbe (the second son of the said George Aubrey Valletort Edgecumbe who was three years of age and born after the death of the testator), in tail male with remainders over. The applicant was seventy-six years of age and had no male issue living.

Rawlence for the applicant, the tenant for life in possession, and one of the trustees for the purposes of the Settled Land Act, 1925.

P. H. B. W. Foster for the adult remaindermen.

Burnett-Hall for the infant remaindermen.

Lord Mancroft for the remaining trustees for the purposes of the Settled Land Act, 1925.

HARMAN, J. : This is an application of an unusual kind by the present tenant for life of the Mount Edgecumbe settlement. That was a settlement made by the will of the absolute owner of the mansion house, an historic house on the banks of the River Tamar opposite Plymouth which belonged to the family for many years, upon strict trusts under which the present applicant, the sixth earl, and the remaindermen take successive interests. In 1941 the mansion house and its contents, which were extremely valuable, were destroyed by enemy action. The contents were insured, so far as might be, under the private chattels scheme pursuant to the War Damage Act, 1941. The maximum payment by the commission under that Act was £10,000. No sum was paid in the testator's lifetime, and he, having been the absolute owner of the chattels, was merely entitled at his death to a chose in action—his unsettled right to a payment by the War Damage Commission. A claim to the maximum amount was admitted by the commission, and in due course payment was received by the trustees for the purposes of the Settled Land Act, 1925, who hold the money as part of the testator's residuary personal estate.

By his will the testator directed that his residuary personal estate should be sold and that the net proceeds should be held on trusts to correspond with

those concerning his realty. Clause 24 of his will provided that the net balance of the proceeds of sale (after payment of certain outgoings) should be held :

“upon the trusts and subject to the powers and provisions upon and subject to which capital money arising under the Settled Land Act, 1925, from my settled estates or investments representing the same would be held.”

Therefore, this £10,000 is now capital money under the Settled Land Act, to be devoted to such purposes as capital money may be under that statute. The purchase of chattels in circumstances like these is not one of those purposes. A

There is now a plan, but no more than a plan, for re-building the Elizabethan part of this mansion. A design has been prepared. The War Damage Commission have, apparently, agreed that it is to a certain extent a case for a cost of works payment and that the commission will meet the cost of re-building the mansion house to that extent. It is, therefore, proposed to re-build the older part of the former mansion, so that the original very large house will be replaced by a mansion of a reasonable size, preserving the features of the historic mansion of which the walls are still standing. The applicant, however, says that, though it would be his desire to live there, it would be impossible for him to do so unless he is given some help towards furnishing the mansion. He suggests that the £10,000, which in a sense does represent the chattels which were settled by the testator's will, might be devoted to that purpose. B

I am satisfied that I have power under the Settled Land Act, 1925, s. 64, to authorise this transaction because it is for the benefit of the persons interested. That view of the section was taken by the Court of Appeal in *Re White-Popham Settled Estates* (1). At first instance, EVE, J., held that he could not sanction a certain transaction because it did not affect the settled land. The Court of Appeal, taking a wider view of the section, said that the transaction was proper if it was for the benefit of the persons interested under the settlement. That is enough for my purpose in this case. I have before me all the existing remaindermen under this settlement, and all those of full age are willing. The infants, of course, cannot consent, but they appear by their guardian who thinks it would be for the benefit of the infants that this expenditure should be made. Accordingly, I am willing to authorise the application of the £10,000 in the purchase of chattels, but only on terms. In the first place, £10,000 is a small sum in these days when you consider devoting it to the furnishing of a mansion. On the other hand, the chattels which the testator settled by his will were confined to such chattels as his trustees considered suitable to be retained in settlement, *i.e.*, they were not to be things which would be consumed in use or things of purely temporary utility, but substantial articles suitable to be kept as heirlooms. Secondly, I do not feel that it is right to allow the money to be spent now when there is no mansion house to put the chattels in. I propose to sanction the spending by or at the direction of the tenant for life, as and when the mansion house, or any part thereof, is re-built so as to be ready for occupation, of not more than £10,000 in the purchase of such furniture and chattels for the mansion house as the Settled Land Act trustees for the time being, other than the tenant for life should he be a trustee, consider to be suitable to be retained as heirlooms under the settlement created by the testator's will. C

Order accordingly. Costs of all parties as between solicitor and client to be paid out of the capital moneys subject to the trusts of the settlement. D

Solicitors: *Farrer & Co.* (for all parties). E

[Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.] F

G

H

THORNELOE & CLARKSON, LTD. AND OTHERS v.
BOARD OF TRADE.

[KING'S BENCH DIVISION (Sellers, J.), May 16, 17, 18, 1950.]

Control of Industry—Development council—Power to set up—“Desired by a substantial number of persons engaged in the industry”—Need to ascertain wishes of employers and employed—Industrial Organisation and Development Act, 1947 (c. 40), s. 1 (4).

By the Industrial Organisation and Development Act, 1947, s. 1, the Board of Trade were empowered by Order to establish for any industry a development council where expedient for certain purposes in connection with the industry. By s. 1 (4): “A development council order shall not be made unless the board or minister concerned is satisfied that the establishment of a development council for the industry is desired by a substantial number of the persons engaged in the industry.”

After consulting various organisations as required by s. 1 (3) of the Act, the Board of Trade made the Clothing Industry Development Council Order, 1949, setting up a development council for the clothing industry. At the relevant time, the total number of firms engaged in the industry was about twenty-four thousand of which six thousand belonged to trade organisations. Sixteen such trade organisations, comprising four thousand five hundred firms, expressed opposition to the proposed establishment of a development council. Of the employees engaged in the industry, who numbered four hundred and seventy-four thousand, one hundred and fifty thousand in two unions expressed a desire for a development council to be established. Certain firms engaged in the industry sought a declaration that the Order was *ultra vires* or void.

HELD: (i) for the purposes of s. 1 (4) the unit to be considered was the total of the persons engaged in the industry, and the board must be satisfied that the establishment of a development council was desired by a substantial number of those persons as a whole and not by (a) a substantial number of the employers, and (b) a substantial number of employees.

(ii) even if it were open to the court to consider the grounds for the board's being satisfied within s. 1 (4), there was evidence on which it was reasonable to conclude that a substantial number of persons engaged in the industry desired the council to be established, and, therefore, the Order could not be said to be *ultra vires* or void.

[FOR THE INDUSTRIAL ORGANISATION AND DEVELOPMENT ACT, 1947, s. 1 (4), see HALSBURY'S STATUTES, Vol. 40, p. 1275.]

Cases referred to:

- (1) *Liversidge v. Anderson*, [1941] 3 All E.R. 338; [1942] A.C. 206; 110 L.J.K.B. 724; 116 L.T. 1; 2nd Digest Supp.
- (2) *Point of Ayr Collieries, Ltd. v. Lloyd-George*, [1943] 2 All E.R. 546; 2nd Digest Supp.
- (3) *Robinson v. Minister of Town and Country Planning*, [1947] 1 All E.R. 851; [1947] K.B. 702; [1947] L.J.R. 1285; 177 L.T. 375; 111 J.P. 378; 2nd Digest Supp.

ACTION for a declaration that the Clothing Industry Development Council Order, 1949 (S.I. 1949, No. 2124), made by the Board of Trade on Nov. 16, 1949, was *ultra vires* the powers of the Board under the Industrial Organisation and Development Act, 1947, and void.

The plaintiffs were six limited companies engaged in the clothing industry. They alleged that the Order had been made by the Board of Trade (the defendants) in contravention of and without complying with the requirements of s. 1 (3) and (4) of the Act. The relevant facts are set out in the headnote.

Beufus, K.C., Lloyd-Jones, K.C., and Vester for the plaintiffs.
The Attorney-General (Sir Hartley Shawcross, K.C.) and J. P. Ashworth for the defendants.

SELLERS, J.: I have come to the conclusion that the Attorney-General's contention sufficiently prevails for the action to fail. The plaintiffs are six limited companies who are employed in the clothing industry, and by this action they claim a declaration that the Clothing Industry Development Council Order, 1949 (S.I. 1949, No. 2124), made by the Board of Trade on Nov. 16, 1949, is *ultra vires* the Industrial Organisation and Development Act, 1947. By their statement of claim they allege that the said Order was made by the Board of Trade in contravention and without complying with the requirements of s. 1 (3) and (4) of that Act. The Industrial Organisation and Development Act, 1947, s. 1, so far as material to this action, provides:

"(1) There may be established for any industry, by an Order in that behalf made by an authority specified in sub-s. (2) of this section, a body, in this Act referred to as a development council, to whom there may be assigned by the Order any functions of a kind specified in sched. I to this Act for whose exercise by the council it appears to that authority to be expedient to provide in order to increase efficiency or productivity in the industry, to improve or develop the service that it renders or could render to the community, or to enable it to render such service more economically . . . (3) Before making a development council Order the board or Minister concerned shall consult any organisation appearing to them or him to be representative of substantial numbers of persons carrying on business in the industry and such organisations representative of persons employed in the industry as appear to the board or Minister concerned to be appropriate."

The allegation with regard to that was that the industry was

"so organised that no organisation representative of persons carrying on business in the said industry is or could reasonably appear to be representative of a substantial number of persons so carrying on business."

When, however, the case was opened before this court, that allegation was abandoned or not persisted in, it being indicated, I think, that s. 14 of the Act made that contention untenable. The sole ground on which the order was sought to be impeached before the court was under s. 1 (4) which provides:

"A development council Order shall not be made unless the board or Minister concerned is satisfied that the establishment of a development council for the industry is desired by a substantial number of the persons engaged in the industry."

Before the Act of 1947, what is known as a working party had been set up in relation to the heavy clothing branch of the clothing industry, and the working party produced a report. After the passing of the Act, two other working parties—the Light Clothing Working Party and the Rubber-Proofed Clothing Working Party—were set up, and made investigations and issued their reports. As a result of the reports so made, the Board of Trade contemplated establishing a development council for the industry, and, in accordance with s. 1 (3) of the Act, called the representatives of the industry into consultation. On Jan. 13, 1948, on Nov. 9, 1948, and on Apr. 26, 1949, there were consultations between the Minister and the representatives of the industry. On the first two occasions the President of the Board of Trade himself attended, and, on the last occasion, Mr. John Edwards, the Parliamentary Secretary to the Board of Trade. Following the first of those consultations, a circular was sent to representative bodies inviting their comments or suggestions with regard to this proposal to set up a development council. In due course a draft Order was prepared, which was submitted for consideration by the industry, and on Nov. 16, 1949, the Order,

now the subject of this challenge, was passed by a resolution of each House of Parliament and came into operation on Jan. 1, 1950.

To support the submission that the Minister had acted beyond his powers, counsel for the plaintiffs submitted that, having regard to the terms of s. 1 (3) of the Act of 1947 where reference was made to what might be described as the two sides of the industry—persons carrying on business in the industry, on the one hand, and persons employed in the industry, on the other—that distinction should be maintained in construing sub-s. (4). Counsel invited the court to say that sub-s. (4) should be read as requiring the Minister to be satisfied that the establishment of a development council for the industry was desired by a substantial number of persons engaged in carrying on the business of the industry and also a substantial number of persons employed in the industry. But the sub-s. (4) refers to “persons engaged in the industry,” and that admittedly includes both employers and employed. It would appear to me that the phrase was advisedly used to include every interest in the industry, a wide and embracing term, and that the unit to be considered is the total of the persons engaged in the industry.

Counsel further submitted that “substantial” should be defined by the court in a way which would indicate more precisely what the basis of support for the project should be. Parliament could have stated, instead of a “substantial number of persons”, a fixed proportion or percentage, and it has not done so. Likewise Parliament could have required a substantial number of persons in each category to be in favour of the scheme, but the Act says “a substantial number of persons engaged in the industry.” I do not feel at liberty to substitute any more precise standard than “substantial” which is the requirement specified in the Act or to interpret “persons engaged in the industry” as if they were the same words as those used in s. 1 (3) describing those who have to be consulted. To do so would, I think, be to act as a legislator and not as a judge. The only interpretation I can give to this sub-section is that, as it states, the board or the Minister must be satisfied that the establishment of a development council of the industry is desired by a substantial number of persons engaged in the industry. I think the sub-section leaves it to the board or the Minister to assess, on grounds which they think fit, whether that requirement has been fulfilled. In one industry the weight might be placed on the desire of the employers; in another the weight might be placed on the desire of the employed, and Parliament, as I see it, has left it in the discretion of the stipulated persons to decide how that shall be applied.

The Attorney-General contended that it is not open to this court to consider the facts, and that it is for the Minister to investigate the matter and it is his satisfaction which that sub-section requires, but on the facts of this case I do not feel that this issue arises for the court’s consideration. If there had been a misdirection by the Minister as to the law, or if it had been established that there was no support whatsoever from the industry for this development council Order, other considerations might have arisen, and I should have required time to consider my judgment, but it seems to me, on what has been revealed in this case, that no such position does arise. I have dealt with the legal interpretation of the section. Even assuming I had acceded to the plaintiffs’ submission as to how that sub-section ought to be interpreted, there is no reason to think that the Minister did not apply his mind to the views of what may conveniently be termed both sides of the industry. I have nothing in front of me which satisfies me that he did not do that.

The expression of the satisfaction of the Minister that the requirement of s. 1 (4) had been complied with did not appear in the order and was nowhere stated. There may be good reason for this but, on the face of it, a brief statement by the competent authority of the necessary satisfaction and the basis of it would be helpful to all sections of an industry and might well have avoided litigation in the present case. It was, however, established that it need not be

expressly stated: *Liversidge v. Anderson* (1) *per* VISCOUNT MAUGHAM ([1941] 3 All E.R. 348).

[HIS LORDSHIP considered the facts with regard to the numbers of employers and employees who expressed approval or disapproval of the proposed Order, and continued:] On the facts, the very foundation of this action has gone, for it is impossible to say that such an order is *ultra vires* merely because a number of people strongly oppose it. It must be established that the Minister has done something which is outside his powers to the extent that the Order cannot stand. I am satisfied on the facts of this case that there was evidence on which it was reasonable to conclude that a substantial number of persons engaged in the industry desired the council to be established. That, in itself, is a sufficient answer to the plaintiffs' claim in this action. As soon as it was established that there was sufficient evidence on which the Board of Trade or the Minister could reach a conclusion that there was a substantial number who desired the council, the decision was, I think, unchallengeable.

The Attorney-General contended that there was a line of authorities which established that where duties—such as in the present case—were entrusted to the Minister or authority it was not for this court to interfere with their exercise. I will refer only to the one most relied on. In *Point of Ayr Collieries, Ltd. v. Lloyd-George* (2) the control of the appellants' undertaking was taken over by the Ministry of Fuel and Power under the Defence Regulations, 1939. In the course of the judgment in that case, LORD GREENE, M.R., said ([1943] 2 All E.R. 547):

“If one thing is settled beyond the possibility of dispute, it is that, in construing regulations of this character expressed in this particular form of language, it is for the competent authority, whatever Ministry that may be, to decide as to whether or not a case for the exercise of the powers has arisen. It is for the competent authority to judge of the adequacy of the evidence before it. It is for the competent authority to judge of the credibility of that evidence. It is for the competent authority to judge whether or not it is desirable or necessary to make further investigations before taking action. It is for the competent authority to decide whether the situation requires an immediate step, or whether some delay may be allowed for further investigation and perhaps negotiation. All those matters are placed by Parliament in the hands of the Minister in the belief that the Minister will exercise his powers properly, and in the knowledge that, if he does not do so, he is liable to the criticism of Parliament. One thing is certain, and that is that those matters are not within the competence of this court. It is the competent authority that is selected by Parliament to come to the decision, and, if that decision is come to in good faith, this court has no power to interfere, provided, of course, that the action is one which is within the four corners of the authority delegated to the Minister.”

The answer which was sought to be made by counsel on behalf of the plaintiffs to distinguish that line of authority was based on some observations in *Robinson v. Minister of Town and Country Planning* (3), *per* LORD GREENE, M.R., ([1947] 1 All E.R. 857):

“First, it must be shown to his satisfaction that a particular state of facts exists, *viz.*, that a part (or parts) of the area of the local planning authority consists of land which has sustained war damage or of such land together with other land contiguous or adjacent thereto. As I have said, no question is raised as to the propriety of the Minister's conclusion on this point, and I need say nothing more about it. The other class of matter is, in my view, one of opinion and policy as to which the Minister, assuming always that he acts *bona fide*, is the sole judge, *viz.*, he must be satisfied that it is requisite for the purpose of dealing satisfactorily with extensive war damage that all or some part of the land in question should be laid out afresh and re-developed as a whole. The words ‘requisite’ and

'satisfactorily' clearly indicate that the question is one of opinion and policy, matters which are peculiarly for the Minister himself to decide. No objective test is possible."

It was submitted that the Master of the Rolls was there distinguishing between questions depending on the view of the Minister where an objective test was impossible and questions, such as that in the present case, to which an objective test could be applied. It was said that, s. 1 (4) of the Act of 1947 permitted of an objective test and the court was free to investigate the matter to see whether the Minister had come to a conclusion which the court was prepared to uphold. Further support for that argument was sought from the judgment of SOMERVELL, L.J., where he said (*ibid.*, 863):

"It would be undesirable and impossible to formulate precisely what evidence and in what circumstances the courts might examine the Minister's decision under this Act or Acts with similar provisions. It has often been said in this class of case that the court will interfere if there is evidence of bad faith in the steps which lead up to the making of an order. LORD DUNEDIN, in dealing with an Act under which the Minister had power to confirm a scheme submitted by a local authority, said that, if one can find that the scheme is inconsistent with the provisions of the Act which authorises the scheme, the scheme will be bad. To take, no doubt, an impossible example under the present Act [the Town and Country Planning Act, 1944], if an authority submitted an application under s. 1 which showed on the face of it that the area covered had suffered no or very little war damage and the Minister purported to make an order, it might be said that the application was not in accordance with the provisions of the Act, and, therefore, could not found the Minister's jurisdiction. I have added these observations in case anything I have said might be construed as laying down that in no case can a party succeed in proceedings under s. 16 except where some definite provision of the Act, such as the giving of notices, has not been complied with, or where he takes upon himself the burden of establishing bad faith."

I do not find it necessary to consider that matter further because, in this case, I do not find any misdirection in law by the board or Minister and it has not been shown that there was no evidence for their consideration. As I have said, had it been otherwise I might have reserved my judgment to consider whether the line of authority relied on by the Attorney-General could be distinguished in the way which is indicated.

It was suggested during the argument that there was bad faith on the part of the Minister, but there was no such allegation in the pleadings, no evidence of it before the court and nothing in the case which gave any indication of it.

Judgment for the defendants with costs.

Solicitors: *Cooper, Bake, Fettes, Roche & Wade* (for the plaintiffs); *The Solicitor, Board of Trade* (for the defendants).

[Reported by F. A. ANNES, ESQ., Barrister-at-Law.]

Re BANBURY (*deceased*). WESTMINSTER BANK, LTD.
v. BANBURY.

[CHANCERY DIVISION (Danckwerts, J.), June 9, 1950.]

Annuity—Annuity free of income tax —“Payment” of stated amount—Direction by will to set aside annually £1,500 free of tax and accumulate—Finance Act, 1941 (c. 30), s. 25 (1).

By his will, dated June 12, 1934, B., who died on Aug. 13, 1936, devised all his freehold land to his trustee in strict settlement. By cl. 14, B. directed the sale and conversion of his personal estate, describing the resultant fund as his “residuary trust fund,” and by cl. 15 he provided: “Subject as aforesaid my trustee shall for a period of twenty-one years from my death set aside annually the sum of £1,500 (free of tax) from the income of the residuary trust fund and accumulate the same in the way of compound interest by investing the same and the resulting income thereof from time to time in any investments in which the residuary trust fund is authorised to be invested and shall add the accumulations to the capital of that fund so as to form one fund therewith.” By cl. 16, B. directed that his residuary trust fund should (in substance) devolve in the same way as his freehold land. On the construction of cl. 15,

HELD: although the “payment” directed to be made was no more than a transfer by the trustee from one account to another and the accumulation was not to be dealt with until the end of the twenty-one years, on a liberal interpretation of the Finance Act, 1941, s. 25 (1), the payment so to be made was a “payment” within the meaning of that term in that sub-section, and, therefore, the amount payable was to be reduced in accordance with s. 25 as amended by the Finance (No. 2) Act, 1945, s. 20.

[FOR THE FINANCE ACT, 1941, s. 25, see HALSBURY’S STATUTES, Second Edn., Vol. 12, pp. 525-527.]

ADJOURNED SUMMONS to determine, *inter alia*, whether, having regard to the Finance Act, 1941, s. 25 (1), as amended by the Finance (No. 2) Act, 1945, s. 20, on the true construction of the will and in the events which had happened, there ought to be set aside in accordance with the said will the annual sum of £1,500 free of income tax (a) at the current rate applicable in each year, or (b) the appropriate fraction within s. 25 (as amended).

Dunbar for the plaintiff, the trustee under the will.

Wilfrid Hunt for the first defendant, the tenant for life.

T. Burgess for the second defendant, the tenant in tail in remainder.

DANCKWERTS, J.: This is a short point, but at the same time one which is rather puzzling. By his will, which was dated June 12, 1934, Lord Banbury, who died on Aug. 13, 1936, devised all his freehold land and hereditaments to his trustee on trusts under which the first defendant, his grandson, Charles William Banbury, who is now Lord Banbury, if he attained the age of twenty-five years, became entitled to the income during his life on protective trusts without impeachment of waste. From and after the death of the first defendant there were trusts of certain other funds for the first or other sons of the first defendant successively according to seniority in tail male with remainder, followed, owing to the revocation of two clauses in the will, by a trust for the first and other sons of his brother, Edmund Banbury, successively according to seniority in tail male with remainder on trust for the first and other sons of his cousin, Edward Banbury, and, finally, on trust for his own right heirs in fee simple. The second defendant is a son of the brother, Edmund Banbury. The first defendant has attained twenty-five years, and he has married and has two daughters but no son. Consequently, the second defendant is the present

tenant in tail male in remainder, subject to the possibility of a son being born to the first defendant.

By cl. 14 of his will the testator bequeathed his personal estate on the usual trusts for conversion and described the resulting fund as "the residuary trust fund."

A By cl. 16 the residuary trust fund was directed to be held on trusts which in substance caused it to devolve in the same way as the land. The material clause of the will for the purposes of the question which I have to decide is cl. 15, which is in these terms:

B "Subject as aforesaid my trustee shall for a period of twenty-one years from my death set aside annually the sum of £1,500 (free of tax) from the income of the residuary trust fund and accumulate the same in the way of compound interest by investing the same and the resulting income thereof from time to time in any investments in which the residuary trust fund is authorised to be invested and shall add the accumulations to the capital of that fund so as to form one fund therewith."

C It is with regard to that provision setting aside £1,500 a year free of tax that the question arises having regard to the Finance Act, 1941, s. 25, which was designed to place on persons entitled to annual sums the burden of the increase in tax which occurred as the result of the war.

The Finance Act, 1941, s. 25, provides:

D " (1) Subject to the provisions of this section, any provision, however worded, for the payment, whether periodically or otherwise, of a stated amount free of income tax, or free of income tax other than surtax, being a provision which—(a) is contained in any deed or other instrument, in any will or codicil, in any order of any court, in any local or personal Act, or in any contract, whether oral or in writing; and (b) was made before Sept. 3, 1939; and (c) has not been varied on or after that date shall, as respects
E payments falling to be made during any year of assessment, the standard rate of income tax for which is 10s. in the pound, have effect as if for the stated amount there were substituted an amount equal to twenty twenty-ninths thereof."

F In the present case, both the date of the will and the date of the testator's death were before Sept. 3, 1939, and, therefore, there is no doubt that the provisions of this section are relevant if they are applicable to the terms of this clause. The section has been amended by the Finance (No. 2) Act, 1945, s. 20, which was passed to deal with an alteration of the standard rate of income tax below 10s. in the pound and has reference to the present time when the tax is 9s. in the pound. Nothing turns on that. Section 25 of the Act of 1941 further provides:

G " (3) A person who is entitled under any such provision as is mentioned in sub-s. (1) of this section to a payment free of income tax, or free of income tax other than surtax, shall be entitled to [an] adjustment of his surtax for the year 1940-41 . . . (4) If, in the case of a payment to which sub-s. (1) of this section applies, the relations of the payee and payor are such that the payee is accountable to the payor for so much of any relief from income
H tax which he receives as is ascribable to the payment (a) the liability of the payee to account to the payor shall be limited to twenty twenty-ninths of the sum for which he would have been accountable if the 1938-39 rates of income tax, other than surtax, had applied to the year of assessment in which the payment falls to be made, and the foregoing provisions of this section had not passed . . . "

That is only material so far as it throws some light on the meaning of sub-s. (1) for the purposes of the present case.

The question is whether s. 25 (1) applies to the circumstances of this case. There is no doubt that £1,500 annually is a "stated amount" and is a periodical payment, and that the words "free of tax," which are equivalent to "free of income tax," appear in the will. Is there, however, a "payment" within s. 25 (1), because, during the period of accumulation, the trustee, who is responsible for the payment of income tax on the income of the trust fund, will set aside primarily the sum of £1,500 and will then make the investments to carry out the trust, and it is not until the period of twenty-one years has come to an end that the trustee will deal with the income of the fund so accumulated along with the rest of the residuary trust fund by making payment of the income to the persons who are then entitled to receive the income of the residuary trust fund. Not until the residuary trust fund becomes divisible or payable finally will any payment out of that fund, which would include the accumulations made out of income in this way, be made to any particular person. In the meantime, the trustee is merely transferring from one hand to another a certain proportion of the income in its hands.

Counsel for the second defendant claims that this transaction is not within the provisions of this Act because it is not a payment. He submits that a payment involves a payor and a payee, and, no doubt, that is normally the case, as is, indeed, recognised by the provisions of s. 25 (4) of the Act of 1941. On the other hand, counsel for the first defendant, the present Lord Banbury, who receives the benefit only of such proportion of the income of the trustee as is left after this provision is attended to, and, therefore, suffers by the deduction from the income of which he would otherwise be the beneficiary, claims that there is a payment because sooner or later the fund is paid over to somebody who succeeds to the residuary trust fund.

The matter seems to be one of considerable difficulty. I think that counsel for the first defendant is plainly right when he suggests that the mischief of the Act includes a case of this kind, because, if the provision does not apply, it would, I think, have been thought by the legislature that an undue burden was being placed on a person in the position of the first defendant and that the sum which is to be accumulated ought to be reduced in fairness so that that person's income was not unduly restricted. I have come to the conclusion that a liberal interpretation ought to be given to the words of s. 25 (1). That, I think, is indicated by the words "any provision, however worded." To me that indicates that I am to have regard to the substance of the transaction rather than the narrow words of the section. I think, therefore, that there is a payment in the present case within the meaning of s. 25 (1), even though the trustee is merely paying to itself in another account which is also in the trustee's name, and, therefore, the provisions with regard to the reduction of such payment or amount are applicable in this case.

Order accordingly. Costs as between solicitor and client out of the capital of the fund.
Solicitors: *Gregory, Rowcliffe & Co.* (for all parties).

[Reported by R. D. H. OSBORNE, Esq., Barrister-at-Law.]

BIRCH v. NATIONAL UNION OF RAILWAYMEN AND OTHERS.

[CHANCERY DIVISION (Danckwerts, J.), May 22, 23, 25, 1950.]

Trade Union—Political fund—Member “contracting out”—Rules approved by Registrar of Friendly Societies—Effect of approval—Rule resulting in exclusion of exempted member from office—Validity—Trade Union Act, 1913 (c. 30), s. 3 (1) (b).

The Rules of the National Union of Railwaymen, a registered trade union, provide by r. XXI, cl. 8: “A member who is exempt from the obligation to contribute to the political fund of the union shall not be excluded from any benefits of the union, or placed in any respect, either directly or indirectly, under any disability or disadvantage as compared with other members of the union by reason of his being so exempt, except that such member shall take no part in the control or management of the political fund of the union, and shall be ineligible to occupy any office or representative position involving any such control or management.”

B., who had obtained exemption from the obligation to contribute to the union's political fund, was the elected chairman of a branch of the union, an office involving control or management of the political fund of the union. On Feb. 16, 1948, he was declared by the general secretary of the union ineligible by virtue of r. XXI, cl. 8, to hold that office, and he thereafter ceased to act as chairman. He sought a declaration that the rules of the union did not comply with the Trade Union Act, 1913, s. 3 (1) (b), in that they did not prevent him, as an exempted member, being placed at a disadvantage as compared with other members with regard to eligibility to hold the office of chairman, and that it was unlawful for the funds of the union to be applied in furtherance of any political object to which s. 3 applied so long as rules necessary for complying with s. 3 (1) (b) were not in force. The rules had been approved by the registrar as required by s. 3 (1).

HELD: (i) the approval of the registrar did not preclude consideration by the court whether the conditions required by s. 3 (1) (b) were satisfied.

(ii) as the effect of r. XXI, cl. 8, read with the other rules of the union, was to exclude B. from an office in the union, he was placed at a “disadvantage as compared with other members of the union . . . by reasons of his being . . . exempt” from the obligation to contribute to the political fund within s. 3 (1) (b), and, therefore, he was entitled to the declaration sought.

[AS TO STATUTORY REQUIREMENTS AS TO RULES OF TRADE UNION, see HALSBURY, Hailsham Edn., Vol. 32, pp. 492, 493, para. 786; and FOR CASES, see DIGEST, Vol. 43, pp. 103-105, Nos. 1088-1094.]

Cases referred to:

- (1) *Amalgamated Society of Railway Servants v. Osborne*, [1910] A.C. 87; 79 L.J.Ch. 87; 101 L.T. 787; 43 Digest 93, 963.
- (2) *Forster v. National Amalgamated Union of Shop Assistants, Warehousemen and Clerks*, [1927] 1 Ch. 539; 96 L.J.Ch. 141; 137 L.T. 86; 43 Digest 105, 1093.
- (3) *Dewhurst v. Clarkson*, (1854), 3 E. & B. 194; 2 C.L.R. 1143; 23 L.J.Q.B. 247; 23 L.T.O.S. 109; 18 J.P. 535; 118 E.R. 1114; 25 Digest 300, 87.
- (4) *Rosenberg v. Northumberland Building Society*, (1889), 22 Q.B.D. 373; 60 L.T. 558; 7 Digest 457, 17.
- (5) *Laing v. Reed*, (1869), 5 Ch. App. 4; 39 L.J.Ch. 1; 21 L.T. 773; 34 J.P. 134; 7 Digest 458, 25.
- (6) *Re Guardian Permanent Benefit Building Society*, (1882), 23 Ch.D. 440; 52 L.J.Ch. 857; 48 L.T. 134; 7 Digest 455, 4.

- (7) *Murray v. Scott, Agnew v. Murray, Brimelow v. Murray*, (1884), 9 App. Cas. 519; 53 L.J.Ch. 745; 51 L.T. 462; 7 Digest 455, 5.
- (8) *Cullerne v. London and Suburban General Permanent Building Society*, (1890), 25 Q.B.D. 485; 59 L.J.Q.B. 525; 63 L.T. 511; 55 J.P. 148; 7 Digest 458, 24.
- (9) *Davie v. Colinton Friendly Society*, (1870), 9 Macph. (Ct. of Sess.) 96; 25 Digest 323, 244 n.

ACTION.

The plaintiff, who was a member of the National Union of Railwaymen, claimed a declaration that the rules of the union in force did not comply with the Trade Union Act, 1913, s. 3 (1) (b), and that it was unlawful for the funds of the union to be applied in furtherance of any political object to which s. 3 of the Act applied so long as any rules necessary for complying with s. 3 (1) (b) were not in force. The plaintiff also asked for an injunction restraining the union from so applying its funds so long as any rules necessary for complying with the section were not in force, and a declaration that any words in r. XXI, cl. 8, of the rules of the union making the plaintiff ineligible, as a non-subscriber to the political fund, to occupy any office or position in the union involving any control or management were void.

Lloyd-Jones, K.C., J. H. Barrington and Vester for the plaintiff.

Sir Walter Monckton, K.C., and J. V. Nesbitt for the defendants, the National Union of Railwaymen, the general trustees of the union, and the trustees of the Woodford Halse branch of the union.

Cur. adv. vult.

May 25. **DANCKWERTS, J.**, read the following judgment. The plaintiff, Arthur Birch, who is employed as a railway goods guard, has been a member of the first defendant, the National Union of Railwaymen, a registered trade union, since 1936. In December, 1946, the plaintiff was elected chairman of the Woodford Halse branch of the union, and was re-elected as such chairman in December, 1947. In January, 1948, one of the defendants, William Bannard, a member of the branch and one of the trustees of the branch, was nominated by resolution of the branch to be one of the candidates for adoption by the union as a Parliamentary candidate, pursuant to r. XXI, cl. 10 (a), of the Rules of the Union, and the plaintiff as chairman of the branch signed the appropriate nomination form in accordance with that rule. The plaintiff, however, refused to sign a circular in the form of a personal recommendation of Mr. Bannard's nomination, because, as the plaintiff said, the plaintiff did not consider Mr. Bannard a sufficiently responsible person in view of the part which he had played a short time previously in bringing about a stoppage of work against the advice and instructions of the union. The result of this was that in February, 1948, Mr. Bannard questioned the eligibility of the plaintiff, who had always obtained exemption from the obligation to contribute to the union's political fund (though he describes himself as "a practical socialist"), to hold the office of chairman of the branch. The matter was referred to the general secretary of the union for his ruling, and on Feb. 16, 1948, he replied that a member who had "contracted out" of the political fund was not eligible to serve as a branch officer. A protest was sent to the general secretary by the plaintiff, but the general secretary confirmed this ruling on Mar. 12, 1948. The plaintiff ceased to act as chairman of the branch in view of this ruling.

The relevant rule is r. XXI, cl. 8, of the Rules of the National Union of Railwaymen which is in the following terms:

"A member who is exempt from the obligation to contribute to the political fund of the union shall not be excluded from any benefits of the union, or placed in any respect, either directly or indirectly, under any disability or disadvantage as compared with other members of the union

by reason of his being so exempt, except that such member shall take no part in the control or management of the political fund of the union, and shall be ineligible to occupy any office or representative position involving any such control or management."

A The plaintiff complained to the Registrar of Friendly Societies under the jurisdiction conferred on the registrar by the Trade Union Act, 1913, s. 3 (2), that there had been a breach of the rules, and on Nov. 8, 1948 a decision was given by the Chief Registrar of Friendly Societies who was of opinion that the office of chairman of the branch involved control or management of the political fund so that the plaintiff under the above-mentioned rule was not eligible for that office, and the registrar, therefore, ruled that no breach of the rule had been committed. The plaintiff, however, now brings this action against the National B Union of Railwaymen, the three general trustees of the union and the three trustees of the Woodford Halse branch, for certain relief, based on the contention that the provisions of r. XXI, cl. 8, do not comply with the requirements of the Trade Union Act, 1913.

C The Trade Union Act, 1913, was passed in consequence of the decision in *Amalgamated Society of Railway Servants v. Osborne* (1) that nothing in the Trade Union Acts justified a trade union in having a fund for political purposes. There is no doubt that the intention of the Act of 1913 was to enable a trade union to apply funds collected from its members to political objects, subject to certain limitations and safeguards for members who did not wish to contribute to funds for such objects. Section 1 and s. 2 (1) of the Act enabled a combination D to be registered as a trade union notwithstanding that its objects or powers included the furtherance of political objects, provided that the principal objects of the combination were those objects (described in this Act as "statutory objects") which are to be found in the Trade Union Amendment Act, 1876, and are the regulation of the relations of workmen and masters and the like. Section 2 of the Act provides:

E "(2) The Registrar of Friendly Societies shall not register any combination as a trade union unless in his opinion, having regard to the constitution of the combination, the principal objects of the combination are statutory objects . . ."

and provides for the withdrawal of the certificate in certain circumstances. Section 2 (3) enables an unregistered trade union to obtain a certificate that it is a trade union. Sub-section (4) provides for an appeal to the court from F a refusal of the registrar to register. Sub-section (5) provides that:

"A certificate of the registrar that a trade union is a trade union within the meaning of this Act shall, so long as it is in force, be conclusive for all purposes."

G Section 3 is the section under which the questions in this action primarily arise. Sub-section (1) is in the following terms:

H "The funds of a trade union shall not be applied, either directly or in conjunction with any other trade union, association, or body, or otherwise indirectly, in the furtherance of the political objects to which this section applies (without prejudice to the furtherance of any other political objects), unless the furtherance of those objects has been approved as an object of the union by a resolution for the time being in force passed on a ballot of the members of the union taken in accordance with this Act for the purpose by a majority of the members voting; and where such a resolution is in force, unless rules, to be approved, whether the union is registered or not, by the Registrar of Friendly Societies, are in force providing— (a) That any payments in the furtherance of those objects are to be made out of a separate fund (in this Act referred to as the political fund of the union), and for the exemption in accordance with this Act of any member

of the union from any obligation to contribute to such a fund if he gives notice in accordance with this Act that he objects to contribute; and (b) That a member who is exempt from the obligation to contribute to the political fund of the union shall not be excluded from any benefits of the union, or placed in any respect either directly or indirectly under any disability or at any disadvantage as compared with other members of the union (except in relation to the control or management of the political fund) by reason of his being so exempt, and that contribution to the political fund of the union shall not be made a condition for admission to the union."

Sub-section (2) contains the provisions under which the registrar dealt with the complaint made to him by the plaintiff in the present case. The terms of the sub-section are as follows:

"If any member of a trade union alleges that he is aggrieved by a breach of any rule made in pursuance of this section, he may complain to the Registrar of Friendly Societies, and the Registrar of Friendly Societies, after giving the complainant and any representative of the union an opportunity of being heard, may, if he considers that such a breach has been committed, make such order for remedying the breach as he thinks just under the circumstances; and any such order of the registrar shall be binding and conclusive on all parties without appeal and shall not be removable into any court of law or restrainable by injunction, and on being recorded in the county court, may be enforced as if it had been an order of the county court. In the application of this provision to Scotland the sheriff court shall be substituted for the county court, and 'interdict' shall be substituted for 'injunction'."

Sub-section (3) defines the political objects to which the section applies, and sub-s. (4) provides that a resolution under this section approving political objects as an object of the union shall take effect as if it were a rule of the union. Section 4 of the Act requires a ballot for the purposes of the Act to be taken in accordance with rules of the union to be approved for the purpose, whether the union is registered or not, by the Registrar of Friendly Societies, and the registrar is directed not to approve any such rules

"... unless he is satisfied that every member has an equal right, and, if reasonably possible, a fair opportunity of voting, and the secrecy of the ballot is properly secured."

Section 4 (2) provides:

"If the Registrar of Friendly Societies is satisfied, and certifies, that rules for the purpose of a ballot under this Act or rules made for other purposes of this Act which require approval by the registrar, have been approved by a majority of members of a trade union, whether registered or not, voting for the purpose, or by a majority of delegates of such a trade union voting at a meeting called for the purpose, those rules shall have effect as rules of the union, notwithstanding that the provisions of the rules of the union as to the alteration of rules or the making of new rules have not been complied with."

"Rules made for other purposes of this Act which require approval by the registrar" in that sub-section appear to include the rules providing for paras. (a) and (b) in s. 3 (1). Section 5 and the form in the schedule to the Act provide for the manner in which a member who objects to contribute to the political fund of the union is to give notice and claim exemption. Section 6 provides for two alternative methods in which the exemption can be provided for. One method is by a separate, that is, additional, levy from members who are not exempt from contribution to the political fund, and the other method is by relief of the exempted members from part of the contributions

required from members of the union. In the present case, the defendant union, by r. XXI, cl. 7, has adopted the latter method. Counsel for the defendants placed some reliance on this feature, but, so far as management of the general fund of the union and of the political fund are concerned for practical bookkeeping purposes, I cannot see that it makes any difference whether the political fund is made up by taking additional contributions from members who are not exempted or by taking over a portion of the total contributions made by such members of the union.

In pursuance, or, at any rate, in purported pursuance of the Act, a political fund was established by the defendant union and rules were made for this political fund and were approved by the Registrar of Friendly Societies. Though later approvals have been given to the rules by the registrar on amendment, r. XXI, cl. 8, which is the subject of the plaintiff's attack in the present case, has existed in its present form since 1934, and was approved by the registrar on Nov. 21, 1934, when he gave a certificate for the purpose. The plaintiff contends that the rule does not satisfy the requirements of or offends against the provisions of para. (b) of s. 3 (1) of the Act, so that no part of the funds of the defendant union may lawfully be applied for political purposes, and, if this is a sound contention, it would appear that funds of the union may have been applied unlawfully to political purposes ever since 1934. This indicates the seriousness and importance of the questions which arise in this action. It is evident that, during this long period, the rule has been taken to have been unobjectionable. On the other hand, the plaintiff was believed to be qualified for office until Mr. Bannard was inspired to question his eligibility.

The amounts involved in each year, so far as this branch of the union is concerned, are comparatively small sums. In 1947 the branch had 476 members of whom 113 were exempt from contribution to the political fund. In 1948 the numbers were respectively 471 and 134. In 1947, the income of the general fund was £689 5s., and that of the political fund was £39 6s. 11d. In 1948 the figures were respectively £648 1s. and £38 1s. 8d. But the rule is one of the rules of the National Union of Railwaymen and the whole political fund of the union appears to be affected. Under s. 3 of the Act application of the funds of a trade union in furtherance of political objects is prohibited unless the conditions laid down in that section are satisfied. These conditions are that (i) furtherance of those objects has been approved as an object of the union by a resolution passed on a ballot of the members, and (ii) rules to be approved by the Registrar of Friendly Societies are in force, which must provide (a) that any payments are to be made out of a separate political fund in respect of which any member can obtain exemption from contribution by an appropriate notice, and (b) a non-contributing member shall not be excluded from benefits of the union or placed under any disability or disadvantage as compared with other members of the union (except in relation to the control or management of the political fund) and contribution must not be made a condition of admission to the union. If these conditions are satisfied, then, as observed by EVE, J., in *Forster v. National Amalgamated Union of Shop Assistants, Warehousemen and Clerks* (2) ([1927] 1 Ch. 546), the statutory restrictions cease to operate.

In the present case, the conditions as to approval of the furtherance of the objects by a resolution of the members of the union and the rules providing for a separate political fund and for exemption from contribution by notice and as regards admission to the union are satisfied. The difficulties arise in respect of para. (b) in s. 3 (1), but the rules have received the approval of the Registrar of Friendly Societies. In *Forster's case* (2), EVE, J., held that where a question as to a breach of a rule had been referred to the registrar under s. 3 (2) of the Act, it was not open to the parties to raise the same question in an action in the High Court of Justice. In the present case, therefore, I do think I am bound to proceed on the footing that the effect of r. XXI, cl. 8, is to disqualify

the plaintiff from holding the office of chairman of the branch because that office involves the control or management of the political fund of the branch. It is unnecessary, therefore, for me to consider in detail the rules which involve control or management of the political fund of the branch by the chairman. The point is that the same officers and committee manage both the general fund and the political fund. The issue in this action is not whether the plaintiff was unlawfully deprived of the office of branch chairman, but whether the political fund of the union is lawful. The registrar was solely concerned with the question whether there had been a breach of the rules, and he expressly disclaimed any intention to deal with the question whether the rule complied with the provisions of s. 3 of the Act, but the registrar did express the opinion that the rule, by making the plaintiff, as a non-contributing member, ineligible for the office of chairman, placed him under a disability as compared with other members of the union, and it appears obvious to me that this is so. The argument for the plaintiff is that the rule, so far from providing that the plaintiff, though exempted from contribution to the political fund, is not placed under any disability or at any disadvantage as compared with other members, in fact, by its concluding two lines, places the plaintiff under such a disability or at such a disadvantage. Accordingly (it is said) the second condition of the provisions of s. 3 (1) is not satisfied, and the prohibition against the application of the funds of the trade union in furtherance of political objects is fully operative. On behalf of the defendants it is submitted that (i) it is not now admissible to consider such criticisms of r. XXI, cl. 8, since the rules have received the approval of the Registrar of Friendly Societies, as required by the section, and (ii) the rule is not properly open to criticism because the ineligibility for office produced by the rule falls within the permitted exemption contained in para. (b) in sub-s. (1) of s. 3. If the effect of the registrar's approval is as contended, then, of course, it is an end of the matter, as the validity of the rule cannot be impugned. In sub-s. (1) of s. 3 of the Act, though the approval of the registrar is required, the result of such approval is not expressly stated.

In the course of the discussion, I was referred to a number of cases in which the effect of approval of rules, or a certificate in respect of them, was considered by the court. In *Dewhurst v. Clarkson* (3), the court was concerned with a certificate which a barrister was required to give under the Friendly Societies Act, 1834, s. 4, that the rules of a society were "in conformity to law and to the provisions of the said recited Act [10 Geo. IV, c. 56] and this Act," the section also providing that:

" . . . all rules, alterations and amendments thereof, from the time when the same should be certified by the said barrister or advocate, shall be binding on the several members and officers of the said society, and all other persons having interest therein."

The majority of the court thought that the barrister's certificate barred objection as to the regularity in which the rules had been made, but observed that the barrister was not required to inquire into the regularity of the making of the rules, so that his certificate was not to be considered a judicial determination of the matter. *ERLE, J.*, thought that the certificate only fixed the time when the rules became operative and so did not bar objection as to regularity. That case was followed or applied in *Rosenberg v. Northumberland Building Society* (4), a case on the Building Societies Act, 1874, which, by s. 17, provides that the registrar

" . . . if he finds that the rules contain all the provisions set forth in s. 16 of this Act, and that they are in conformity with this Act,"

is to register the rules. The decision of the court was that the registrar's certificate was conclusive as to the validity of the proceedings taken by the society for the passing of the new rules. In *Laing v. Reed* (5), a case on the

Building Societies Act, 1836, it was held that a certificate of a barrister given under that Act was not conclusive as to the validity of a rule authorising borrowing of money by the society, and that the certificate could not prevent the court deciding that such a rule was *ultra vires*. Criticisms of this case in respect of the decision that such borrowing was *ultra vires* have not touched the question as to the effect of the certificate. In *Re Guardian Permanent Benefit Building Society* (6), *Murray v. Scott* (7) and *Cullerne v. London and Suburban General Permanent Building Society* (8), the discussion does not appear really to have been directed to the conclusiveness or otherwise of the certificate which had been given. *Davie v. Colinton Friendly Society* (9) is a Scottish case in regard to the Friendly Societies Act, 1855, in which it was held that the certificate of the registrar, though essential to the validity of the rules, was no bar to a challenge of them in a court of competent jurisdiction. The court seems to have thought that it was the duty of the registrar to refuse a certificate if the rules were illegal on their face, and it is to be noted that the statute provided that

“ . . . as against such member or person such certificate shall be conclusive of the validity thereof.”

There is some basis for the contention of counsel for the plaintiff that the view of the court was that the object of the certificate was merely to show the date from which the rules came into effect.

So far as any principle can be ascertained from these cases, they indicate that such approval or certificate normally prevents inquiry into the regularity of the steps taken to pass the rules, but does not prevent judicial inquiry into the validity of the rules if it is contended that they are *ultra vires*. But these cases were decided in reference to different statutory provisions, and I cannot regard them as of great assistance on the question which I have to decide. The only reported case on the effect of the Trade Union Act, 1913, s. 3, appears to be *Forster's* case (2), and, as it was admitted in that case that rules had been passed by the members and approved by the registrar providing for paras. (a) and (b) of s. 3 (1), EVE, J., was not faced by the questions which I have to decide.

In the Trade Union Act, 1913, under s. 2 (2) and (3), the registrar has to be satisfied of certain matters requiring careful consideration before he grants his certificate, and by sub-s. (5) his certificate is then made conclusive for all purposes. Under s. 3 (2), the registrar's order for remedying a breach of any rule is made binding and conclusive on all parties without appeal, and it is a reasonable inference that his decision that there has not been a breach of a rule cannot afterwards be re-opened in court (as EVE, J., held in *Forster's* case (2)). The registrar has to be satisfied as to certain matters in connection with the ballot under s. 4 (1). Section 4 (2) requires the registrar to be satisfied that rules which require his approval have been approved by a majority of the members or delegates, and then his certificate bars objection on the ground that the provisions of the rules of the union as to the making or alteration of rules have not been complied with. All these sub-sections contain provisions showing what the registrar is to consider, or what the effect of his certificate is to be. In s. 3 (1) there is merely a provision that the relevant rules are “ to be approved ” by the registrar. It was contended on behalf of the defendants

that such approval must be meant to have some effect, and that the intention is that trade union officials might safely act on the rules and treat them as valid once they have been approved by the registrar. There is much force in this contention, and it is not unreasonable that trade union officials should suppose that, when rules have passed the scrutiny of the registrar, such rules can be treated as effective. On the other hand, the cases to which I have referred show that certificates of approval under a number of statutes have been treated as effective only to prevent subsequent allegations of failure to

comply with forms of procedure and not to prevent attack on the material validity of the rules. In the present case, the legislature has made it plain in other sections that certificates under this Act are to be conclusive, but has omitted any such provision in the present context. It seems to me that the approval mentioned in s. 3 (1) cannot be treated as conclusive, so as to preclude consideration by the court whether the conditions required by the sub-section have been satisfied.

I have, therefore, to consider whether r. XXI, cl. 8, is in accordance with the requirements of para. (b) of s. 3 (1). It is to be observed that, when first read, the rule appears to follow the requirements of para. (b) of s. 3 (1) and to confine discrimination and ineligibility to positions involving control or management of the political fund, which is the exception mentioned in the paragraph. It is not until it is discovered that an exempted member is disqualified from holding the office of chairman because that office involves control or management of the political fund as well as the general fund, that doubts begin to arise.

Counsel for the defendants contended (as I understood his argument) that (i) as a matter of practical administration of the affairs of the branch, it is necessary to combine the control and management of the general fund and the political fund in the hands of the same officials of the branch, and (ii) accordingly, the exempted member must suffer the disability or disadvantage of exclusion from office by reason of the exception permitting disability or disadvantage where the control or management of the political fund is involved. There is, he said, no provision confining the exception to functions solely concerned with control or management of the political fund. This is an ingenious argument, but be it observed that the effect is to exclude an exempted member from any part in the affairs of his branch as an officer or a representative by reason of the fact that the same persons administer (as the rules are constituted) both the general and the political funds. This appears to me to be equivalent to the exception swallowing the provisions of para. (b) which were primarily designed to prevent disability being imposed on the exempted member. In other words, as long as the constitution of the union fails to separate the control and management of the political fund from other functions of the union, there is no limit to the area of the exception and an exempted member might find himself excluded from practically all the activities of his branch. I cannot believe that this is the result of an exception introduced into a provision designed to protect the exempted member. It is entirely reasonable that a non-contributor should be excluded from control or management of the political fund; it is quite another matter that he should be excluded from any office in his union or branch.

I reach the conclusion, therefore, that cl. 8 of r. XXI, in conjunction with the other rules of the union, offends against the provisions of para. (b) of s. 3 (1) of the Act. Consequently, the conditions laid down by that section are not satisfied, and application of the funds of the defendant union in furtherance of political objects is prohibited by the section. It is regrettable that a fund which has been administered in good faith for so many years should be found to be unlawful. But that is the result of the way in which the rules of this union have been drafted, and its scheme of administration or government. It is the constitution of the union and its branches which cause r. XXI, cl. 8, to have an effect which was, I think, not anticipated, and which was not perceived when Mr. William Bannard took steps to have the plaintiff disqualified from the office of chairman of the Woodford Halse Branch of the union.

Judgment for the plaintiff with costs.

Solicitors: *Greenwood, Milne & Lyall* (for the plaintiff); *Pattinson & Brewer* (for the defendants); *Treasury Solicitor* (for the Chief Registrar of Friendly Societies).

[*Reported by R. D. H. OSBORNE, Esq., Barrister-at-Law.*]

ELECTRIC AND MUSICAL INDUSTRIES, LTD. v. INLAND REVENUE COMMISSIONERS.

[HOUSE OF LORDS (Lord Simonds, Lord Normand, Lord Morton of Henryton, Lord MacDermott and Lord Reid), May 8, 9, 10, June 23, 1950.]

Excess Profits Tax—"Income received from investment"—*Fees from licences to perform gramophone records in public collected and distributed to members by company limited by guarantee—Finance (No. 2) Act, 1939 (c. 109), sched. VII, Part I, para. 6 (1).*

To protect themselves against infringement of their copyright entitling them to the exclusive right of the performance in public of their records, groups of gramophone record manufacturers incorporated a company limited by guarantee and not having a share capital, with power under its memorandum of association to exercise and enforce on behalf of its members all their rights and remedies under the Copyright Act, 1911; to grant, on behalf of its members individually, licences for public performance of records, and to recover royalties, fees and other moneys, and damages for infringement; to obtain from the proprietors of the copyright such authorities as might be necessary or expedient for enabling the company to acquire the legal estate in the copyright, and to enforce the rights and remedies in its own name; to regulate the manner in which, the period for which, and the conditions under which the proprietors should authorise the company to exercise their rights and remedies; and to distribute the net moneys so received by the company among the members in accordance with the rules for the time being in force. By its articles of association members were bound to assign their interest in the copyrights to the company in certain circumstances, and until such assignment each member granted to the company sole power to grant licences on its behalf for public performances; all moneys received by the company were to become its property; and the company was authorised, before recommending any distribution among its members, to set aside a reserve fund.

HELD: on the true construction of the company's memorandum and articles of association, the amounts received by the members of the company as such did not constitute "income from an investment" within the meaning of the Finance (No. 2) Act, 1939, sched. VII, Part I, para. 6 (1), but fell to be included in the computation of the members' profits for the purposes of excess profits tax, because (*per* LORD SIMONDS and LORD MACDERMOTT) the company merely acted as the agent of its members, or (*per* LORD NORMAND, LORD MORTON OF HENRYTON and LORD REID) because, whether or not the company was merely an agent, the members thereof had made no investment in the ordinary business sense.

Decision of COURT OF APPEAL ([1949] 1 All E.R. 120), affirmed.

Gas Lighting Improvement Co., Ltd. v. Inland Revenue Comrs. ([1923] A.C. 723) and Inland Revenue Comrs. v. Tootal Broadhurst Lee Co., Ltd. ([1947] 2 All E.R. 409), explained.

[FOR THE FINANCE (No. 2) ACT, 1939, sched. VII, Part I, para. 6 (1), see HALSBURY'S STATUTES, Second Edn., Vol. 12, p. 455.]

Cases referred to:

- (1) *Gas Lighting Improvement Co., Ltd. v. Inland Revenue Comrs.*, [1923] A.C. 723; 92 L.J.K.B. 665; 129 L.T. 481; 12 Tax Cas. 503; Digest Supp.
- (2) *Inland Revenue Comrs. v. Tootal Broadhurst Lee Co., Ltd.*, [1947] 2 All E.R. 409; 29 Tax Cas. 352; 2nd Digest Supp.

APPEAL by the taxpayers from an order of the Court of Appeal dated Dec. 13, 1948, reported [1949] 1 All E.R. 120, affirming an order of SINGLETON, J.,

dated July 6, 1948, reported [1948] 2 All E.R. 514, on a Case stated by the Special Commissioners of Income Tax.

The Special Commissioners held that money received by the taxpayers from a company limited by guarantee, incorporated to protect their copyright interests in respect of the performance in public of their gramophone records, was income from an investment within the meaning of the Finance (No. 2) Act, 1939, sched. VII, Part I, para. 6 (1), and, therefore, was to be excluded from their profits for the purposes of excess profits tax. SINGLETON, J., reversed the decision of the Special Commissioners.

Grant, K.C., P. Sykes and Tribe for the taxpayers.

The Solicitor-General (Sir Frank Soskice, K.C.), Cyril King, K.C., J. H. Stamp and R. P. Hills for the Crown.

The House took time for consideration.

June 23. The following opinions were read.

LORD SIMONDS: My Lords, the question for determination in this appeal is whether the appellant company is assessable to excess profits tax in the chargeable accounting period ending June 30, 1944, in respect of £17,265 received by its subsidiary company, Gramophone Co., Ltd. (which I will call "the Gramophone Company"), from Phonographic Performance, Ltd. (which I will call "the Phonographic Company"). If this sum was income from an "investment" within the meaning of para. 6 (1) of Part I of sched. VII to the Finance (No. 2) Act, 1939, the answer to this question is in the negative. Otherwise, it is in the affirmative.

The question arises in this way. The business of the Gramophone Company includes the manufacture of gramophone records, and when it had been judicially decided in 1934 that manufacturers of such records have copyright therein entitling them to exclusive right of public performance the company with other manufacturers formed a committee to co-ordinate the arrangements for granting licences for such public performance. It soon appeared, however, that this committee could not adequately perform the duty assigned to it, and on May 12, 1934, the Phonographic Company was incorporated under the Companies Act, 1929, as a company limited by guarantee without a share capital with the objects which I must state. At all material times the Gramophone Company was a member of the Phonographic Company as were a number of other companies which manufactured records. The objects of the Phonographic Company according to cl. 3 of its memorandum of association were as follows:

"(a) To exercise and enforce on behalf of members of the company, being manufacturers of gramophone records, perforated rolls and other contrivances by means of which sounds may be mechanically reproduced (all of which contrivances are hereinafter included in the term 'record') and/or the owners of or being otherwise entitled to the benefit of or interest in the copyrights in such records (hereinafter called 'the proprietors') all rights and remedies of the proprietors by virtue of the Copyright Act, 1911, or otherwise in respect of the public performance of records. (b) In the exercise or enforcement of such rights and remedies to grant licences and to make and from time to time to rescind, alter or vary any arrangements and agreements with respect to the public performance of such records in any and every respect whatsoever, and to collect and receive and give effectual discharges for all royalties, fees and other moneys payable under any such licences, agreements or arrangements or otherwise in respect of such public performances by all necessary actions or other proceedings, and to recover such royalties, fees and other moneys, and to restrain and recover damages for the infringement by means of such public performances as aforesaid of the copyrights of such records or any

other rights of the proprietors or of the company on their behalf in respect of such records, and to release, compromise or refer to arbitration any such proceedings or actions or any other disputes or differences in relation to the premises. (c) To obtain from the proprietors such assignments, assurances, powers of attorney, or other authorities or instruments as may be deemed necessary or expedient for enabling the company to acquire the legal estate in the copyrights of such records, and to exercise and enforce in its own name or otherwise all such rights and remedies as aforesaid, and to execute and do all such assurances, agreements and other instruments and acts as may be deemed necessary or expedient for the purpose of the exercise or enforcement by the company of such rights and remedies as aforesaid. (d) To make and from time to time alter or vary any rules for regulating (i) the manner in which the period or periods for which, and the conditions under which the proprietors shall authorise the company to exercise and enforce the rights and remedies aforesaid of the proprietors in respect of such records as aforesaid; (ii) the method and proportions by and in which and the times at which the net moneys received by the company in respect of the public performance of any such records as aforesaid shall be divided and apportioned among the members of the company; (iii) the administration of the property or business of the company and any matters incidental thereto. (e) To distribute the net moneys received by the company in the exercise of the foregoing powers after making provision thereout for the expenses and liabilities of the company incurred in such exercise or in otherwise carrying out the purposes and operations of the company, and for any contributions or payments for any of the purposes specified in the next following sub-clause hereof, amongst the members of the company entitled thereto in accordance with the rules for the time being in force with respect to the distribution thereof."

By cl. 4 of the memorandum the liability of the members was limited, and by cl. 5 each member undertook to contribute to the assets of the company in the event and for the purposes therein specified such sum as might be required not exceeding £1.

Before referring to the articles of association I pause to observe that nothing could be clearer than that the company was formed for the purpose of acting as agent for its several members in the exercise of its rights, and I do not use "agent" in any loose sense as it might sometimes be used to describe the relation which a so-called "one man company" bears to its founder. Nor is this strict relation of agency affected by the fact that under cl. 3 (d) of the memorandum it was for the company to make the rules therein referred to.

I do not think it necessary to refer in detail to many of the articles of association. They appear to me to confirm and emphasise the relation in which the company stood to its members. Learned counsel for the appellant company particularly relied on art. 9, which provides that all moneys received by the company in respect of the exercise of the rights, licence or authority granted by the member shall be the property of the company and shall be by them dealt with in accordance with the rules for the time being in force. I do not think that in its context this article can affect the conclusion to which the memorandum and the articles as a whole clearly point. To this question I return later.

The Gramophone Company did not, in fact, assign to the Phonographic Company the copyright in records manufactured by it. It was held by the Special Commissioners (to whose determination I shall presently refer) that what the company did amounted to an equitable assignment of copyright, but this view was not seriously maintained before your Lordships and cannot be upheld. The Phonographic Company did just what it was formed to do, exercising the

authority to grant licences on behalf of its members and collecting the fees. The distribution of the net moneys received by the Phonographic Company among its members proceeded in accordance with resolutions of the company which were passed from time to time. I take as typical of its proceedings a minute of the tenth annual general meeting held on Oct. 4, 1944:

"3. *The Directors' Report and the Accounts.* The report of the directors and accounts were read by the acting secretary. It was then proposed by the chairman, seconded by Mr. E. R. Lewis and unanimously resolved that notwithstanding the provisions of the extraordinary resolution passed on Mar. 15, 1937, the sum of £66,577 10s. 10d. (sixty-six thousand five hundred and seventy-seven pounds ten shillings and ten pence) being the net moneys available for distribution in respect of the period of twelve months ended May 31, 1944, should be distributed among the members entitled thereto in the proportions next stated:

As to 11 per cent. of the whole		} To be subdivided and paid as such members direct."
Electric and Musical Industries, Ltd.	50 per cent.	
The Decca Record Co., Ltd.	50 per cent.	
As to the remaining 89 per cent.		
The Gramophone Co., Ltd.	} 66 $\frac{2}{3}$ per cent.	
Columbia Graphophone, Ltd.		
The Parlophone Co., Ltd.	} 33 $\frac{1}{3}$ per cent.	
The Decca Record Co., Ltd.		
Brunswick, Ltd.		

It appears that a minute similar to the above was passed in each year. Agreements were also made for further sub-division of the shares distributed to the members according to these minutes.

It was in these circumstances that in the assessment of the appellant company to excess profits tax in respect of the profits of the Gramophone Company for the chargeable accounting period July 1, 1943, to June 30, 1944, the sum of £17,265 received by the latter company from the Phonographic Company was brought into account as part of the profits liable to be charged to the tax and that the appellant company challenged the assessment on the ground that that sum constituted the income of an investment within the meaning of the relevant section to which I referred at the beginning of this opinion. The Special Commissioners before whom the matter came for determination were in favour of the appellant company. They held that

"for the Crown to succeed in this appeal it is necessary to establish that the Phonographic Company was throughout acting as an agent for its members including the Gramophone Co., Ltd., in granting licences and collecting payments."

And they held that the circumstances of the case and, in particular, cl. 3 (d) (i) and (ii) of the memorandum and arts. 9 and 46 of the articles of association negated the existence of an agency. They were of opinion that there was an equitable assignment by the Gramophone Company of the whole of its beneficial interest in the copyright as regards public performance of records, and that its interest was confined to membership of the Phonographic Company and the obtaining of its share of the profits available for distribution. On this view they regarded the receipt of the sum of £17,265 as in the nature of a dividend from an investment. At the request of the respondents the Special Commissioners stated a Case for the opinion of the High Court. Before the Case was heard the respondents, who appear to have so far relied only on what I may call the agency point, gave notice that they would rely on an alternative contention in these terms:

A "That the Gramophone Company handed over its property in its copyrights to be managed by the Phonographic Company along with the property of other members of the Phonographic Company upon the terms of receiving a share of the profits to be derived from the management of the property; that the sum of £17,265 17s. 1d. was the consideration received by the Gramophone Company in respect of the accountable period for the right of the Phonographic Company to collect the royalties for the period under the Gramophone Company's copyrights; and that the relation between the two companies was a contractual relation of trader and customer."

B When the case was heard before SINGLETON, J., that learned judge allowed the appeal of the present respondents. Inevitably, perhaps, the original contentions and the new alternative contention of the respondents overlapped, and the learned judge expressed his view of the relation between the Gramophone Company and the Phonographic Company as ([1948] 2 All E.R. 522)

" . . . beginning with something in the nature of an agency but ending rather as contractual relation of trader and customer."

C He was clear, at least, that the sum in question could not, according to the ordinary use of language, be described as income from an investment.

D The appellant company appealed to the Court of Appeal which unanimously dismissed the appeal, the judgment of the court being given by COHEN, L.J. I find it convenient first to say that I agree with the learned lord justice in rejecting the contention put forward on behalf of the appellant company that the finding of the commissioners was a finding of fact with which the court cannot interfere. Their decision was based on, and vitiated by, a view which is erroneous in law that there was an equitable assignment of copyright to the Phonographic Company. It was, therefore, incumbent on the court to determine what was the legal relation between the parties established by the memorandum and articles of association and their subsequent transactions. E This course was pursued by the learned lord justice, who, after a penetrating and exhaustive analysis of the relevant provisions, sums up the position in these words on which I cannot improve ([1949] 1 All E.R. 126):

F " . . . the articles coupled with the contract of membership arising from the application for membership and the acceptance thereof constitute an arrangement between each member and the Phonographic Company and also between the members *inter se*, under which the members agreed to pool the proceeds of exploitation of the copyright on the terms recorded in the articles and art. 9 is mere machinery to enable the Phonographic Company to give effect to the pooling agreement."

G This summing up is directed mainly to the contention on which learned counsel so strongly relied that art. 9 coupled with cl. 3 (d) of the memorandum displaced the view that the relation between the Phonographic Company and its members *quoad* the exploitation of copyright and collection and distribution of the net proceeds was that of agency, and follows on the expression of an opinion, in which I entirely concur, that apart from those specific provisions the true construction of the documents points to an agency relation.

H I am, therefore, content to adopt the reasons and conclusion of COHEN, L.J., finding, as I do, that the Phonographic Company, though, no doubt, a separate legal entity from its members, was formed to act and did act as agent for them on terms which they agreed with it and with each other. It was, I suppose, from some vague notion that a contractual relation was created, as it, undoubtedly, was, that the respondents thought it necessary to formulate their alternative plea, but I do not myself attach any importance to it.

I think it right to add some observations on an argument which, if I understood it, was of this character. The Phonographic Company, it was said,

happens to be a company limited by guarantee. It might, however, equally well have been a company limited by shares with precisely the same objects, functions and machinery. If it had been a company limited by shares, then it would follow from what was said in *Gas Lighting Improvement Co., Ltd. v. Inland Revenue Comrs.* (1) and in *Inland Revenue Comrs. v. Tootal Broadhurst Lee Co., Ltd.* (2) that shares in such a company must be regarded as an investment within the relevant section. I am by no means satisfied that the same considerations would in all respects apply to a company limited by shares as to one limited by guarantee, but, however this may be, the observations of the noble and learned Lords who took part in the case first cited, and of those, particularly myself, who took part in the later case, were not directed to a company limited by guarantee and must not be divorced from their context. I adhere to the view which I conceive to be the basis of the decisions in both cases that ultimately the test must be, which (if any) of its assets, having regard to the nature of the trade carried on by the assessed subject, a business man would regard as an "investment," and I cannot suppose that such an interest as the Gramophone Company had in the Phonographic Company would be so described by him. I do not read the decisions in either of the cases cited as involving that the shares in any and every company limited by shares, much less the interest of a member in a company limited by guarantee, must necessarily be regarded as an "investment." In my opinion, the appeal must be dismissed with costs.

LORD NORMAND: My Lords, I agree with the judgment of my noble and learned friend, LORD REID, which I have had the advantage of reading in print. I agree also with the observations of my noble and learned friend on the Woolsack on the decisions of this House in *Gas Lighting Improvement Co., Ltd. v. Inland Revenue Comrs.* (1) and *Inland Revenue Comrs. v. Tootal Broadhurst Lee Co., Ltd.* (2).

LORD MORTON OF HENRYTON: My Lords, I agree with the decision of the Court of Appeal, affirming SINGLETON, J., and I shall not detain your Lordships for long. The question in issue is whether the sum of £17,265 paid over by the Phonographic Company to the Gramophone Company in the accounting period July 1, 1943, to June 30, 1944, is or is not "income received from investment . . ." under para. 6 of Part I of sched. VII to the Finance (No. 2) Act, 1939. I venture to quote the words which I used in *Inland Revenue Comrs. v. Tootal Broadhurst Lee Co., Ltd.* (2) ([1949] 1 All E.R. 267):

" . . . the word 'investment' in this context is not a word of art, and . . . the question whether or not a particular piece of income is 'income received from an investment' must be decided on the facts of each case. I think that the question must be approached from the standpoint of an intelligent man of business . . ."

In the present case I think that such a man, on being fully informed of the relevant facts, would say: "This is not what I call income from an investment." He would, I think, be impressed at the outset by the fact that the Gramophone Company put no money into the Phonographic Company, held no shares in the Phonographic Company, and, consequently, could receive no dividends, in the ordinary sense of the word, from that company, and further study of the memorandum and articles of the Phonographic Company and of the events leading up to the formation of that company would, I think, lead him still further away from the view that the sum in question was income received from an investment. I need not elaborate the matter further, as I have had the privilege of reading in print the opinion which is about to be delivered by my noble and learned friend LORD REID. I agree with his reasoning, and with his conclusion that this appeal should be dismissed. I am also in agreement with the observations of my noble and learned friend

on the Woolsack as to the decisions of this House in *Gas Lighting Improvement Co., Ltd. v. Inland Revenue Comrs.* (1) and *Inland Revenue Comrs. v. Tootal Broadhurst Lee Co., Ltd.* (2).

LORD MACDERMOTT (read by LORD MORTON OF HENRYTON): My Lords, the issue in this appeal is whether a sum of £17,265 received by the Gramophone Company from the Phonographic Company in respect of the year ended May 31, 1944, was "income received from investments" within the meaning of para. 6 (1) of Part I of sched. VII to the Finance (No. 2) Act, 1939. The Gramophone Company was admittedly a subsidiary of the appellant company, within the meaning of s. 17 (6) of the said Act, throughout the relevant accounting period, and it was common ground that if the sum mentioned was not such income the present appeal could not succeed. The material facts have been fully set out in the Case Stated and I need not recapitulate them. The decision of the Special Commissioners was in favour of the appellant company, but I am satisfied that their finding was based on the construction of the memorandum and articles of association of the Phonographic Company and that the whole question remains open to consideration.

My Lords, the "investment" of the Gramophone Company was said to be its interest as a member of the Phonographic Company, and, as it was a company limited by guarantee without a share capital, the interest therein of the Gramophone Company could not readily be measured or defined. This circumstance and the character of the relationship existing between the two companies make it convenient to follow the course pursued in the courts below and to consider first of all the nature of the income received rather than that of what was alleged to be the investment within the meaning of the statute. The rival contentions on this aspect may be briefly summarised. For the appellant company it was said that the income in question was a dividend paid by the Phonographic Company out of its divisible profits to a member as such. For the respondents, on the other hand, it was submitted that this payment was of quite a different order in that it was made by the Phonographic Company, not out of *its* profits, but as the Gramophone Company's share of the net amount of the proceeds received by the Phonographic Company, as agent for its members, from the issue of licences on their behalf. This point turns on the true construction of the memorandum and articles of association of the Phonographic Company, and the Court of Appeal, so regarding it, accepted the contention of the respondents. I think this decision was right and I find myself so fully in agreement with the reasoning of COHEN, L.J. (who delivered the judgment of the court), as regards the interpretation of these documents that I do not propose to enter on a detailed examination of their various clauses, or to add more than a few observations by way of supplement to what the learned lord justice has already said on this particular matter.

In my opinion, the memorandum conferred no power on the Phonographic Company to turn to its own account the net amount of the moneys it obtained by dealing in the rights and remedies granted to its members, in respect of the public performance of their records, by the law of copyright. Clause 3 (d) (ii), it is true, empowered the Phonographic Company to determine how and when such net moneys were to be "divided and appropriated among the members of the company." "The members," however, are in effect defined by cl. 3 (a) as those with rights and remedies in respect of the public performance of records—they are referred to as "the proprietors"—and I do not think this power can be taken as pointing clearly either one way or the other. To my mind, the whole tenor of the document is crystallised in the words of cl. 3 (a):

"To exercise and enforce on behalf of members of the company, being manufacturers of gramophone records . . . and/or the owners of . . . the copyrights in such records (hereinafter called 'the proprietors') all

rights and remedies of the proprietors by virtue of the Copyright Act, 1911, or otherwise in respect of the public performance of records."

These are apt words to confer a power to act as agent. That, I think, is clearly their *prima facie* meaning, and I do not see anything in the rest of the memorandum to modify it. Clause 3 (c), which provides for acquisition by the company of the legal estate in the copyrights, and cl. 3 (d) (i), which provides for the manner in which the proprietors "shall authorise the company to exercise and enforce the rights and remedies aforesaid of the proprietors . . ." are but alternative means of accomplishing this end, and it is not without significance that the choice between them seems in no way to affect the applicability of cl. 3 (e) which deals with the distribution of "the net moneys received by the company . . ."

The articles, in my judgment, are consistent with this view of the memorandum. I will only refer to two of them. Article 9 provides that all moneys received by the company in respect of the exercise of the rights, etc., "shall be the property of the company." This, of course, if contrary to the true meaning of the memorandum, could avail the appellant nothing. In my opinion, however, it is quite compatible with what I may call the agency construction. An agent's ownership of moneys received for his principal may facilitate the agency and be agreed for that purpose, and such ownership is entirely consistent with a duty to account. Article 8 (d) provides that the membership of any member is to cease

"upon the expiration of the period for which copyright subsists in all the records in respect of which such member is entitled to participate in the distribution of moneys received by the company."

I mention this provision as reflecting in a sentence the view of the memorandum which, in my opinion, ought to be accepted. It recognises the essential linking of membership and proprietorship, and its concluding words cannot well be regarded as intended to refer to the distribution of profits earned by the company. Had that been the intention there is no reason why it should not have been expressed in the terms usual and appropriate for the purpose. It was conceded that, if the agency construction prevailed, the sum in question could not be treated as income from an investment within the meaning of the Act of 1939, and the conclusion I have reached is, therefore, sufficient to dispose of the appeal. For this reason I do not express any opinion on an alternative argument advanced by the Crown which, as I understand it, was to the effect that, even if there was no agency, the income in question arose from the exploitation of trading assets of the Gramophone Company in the course of a commercial relationship with the Phonographic Company, and could not be regarded as income from an investment for the purposes of the statute. That argument appears to involve inquiry not only as to the true source of the income but also as to the scope of the decision of this House in *Gas Lighting Improvement Co., Ltd. v. Inland Revenue Comrs.* (1), and that is a matter which can best be dealt with when it becomes necessary to do so. I agree that the appeal be dismissed.

LORD REID: My Lords, the sole question at issue in this case is whether £17,265, which was received by the Gramophone Co., Ltd. from Phonographic Performance, Ltd., in respect of the year ending May 31, 1944, was received by the Gramophone Company as income from an investment within the meaning of the Finance (No. 2) Act, 1939, sched. VII, Part I, para. 6 (1). If it was income from an investment it is excluded from profits which are subject to excess profits tax. "Investment" is not defined in the Act, and the word is not used in any special or technical sense. It is used as an ordinary word of the English language and, being used in connection with business transactions, it must be interpreted as an ordinary English word used in connection with

business affairs. To see whether in a particular case something is an investment it is, therefore, necessary to consider and weigh all the facts which can assist towards a decision of this practical question. Stated briefly, the facts which appear to me to be material in this case are as follows. A number of companies, including the Gramophone Company, manufactured gramophone records. It has been decided that manufacturers of such records have a copyright which entitles them to the exclusive right of performance of their records in public and thus enables them either to restrain such performance or to draw revenue by licensing public performance. It was soon found convenient by the manufacturers to establish one organisation which would act for all of them in maintaining their rights and drawing revenue for them from this source. A committee was first set up, but it was found to be inadequate, and in its place the manufacturers, seven in number and including the Gramophone Company, set up Phonographic Performance, Ltd., which was incorporated on May 12, 1934, as a company limited by guarantee. It is the interest of the Gramophone Company in this company which is said to be the investment which yielded the income in question in this case. So it is necessary to see just what that interest was. The nature of the interest must be sought in the memorandum and articles of association of the Phonographic Company. It is not suggested that the formation and operation of this company was a cloak or device. It was a perfectly proper use of the Companies Act, 1929, for business purposes and it is not suggested that the memorandum and articles do not truly exhibit and define the rights of the Gramophone Company.

The main objects of the Phonographic Company as set out in its memorandum of association are to exercise and enforce on behalf of its members their rights and remedies in respect of the public performance of records; in the exercise of such rights and remedies to grant licences, to collect royalties and to restrain infringements; to make rules for regulating

“(i) the manner in which, the period or periods for which, and the conditions under which the proprietors shall authorise the company to exercise and enforce the rights and remedies aforesaid of the proprietors in respect of such records as aforesaid; (ii) the method and proportions by and in which and the times at which the net moneys received by the company in respect of the public performance of any such records as aforesaid shall be divided and apportioned among the members of the company:”

and to distribute the net moneys received by the company

“among the members of the company entitled thereto in accordance with the rules for the time being in force with respect to the distribution thereof.”

The articles of association permit the directors at their discretion to admit an owner of performing right as a new member and provide that members grant to the company the sole right and authority to authorise, permit or forbid public performance of their records and authorise the company to collect fees, institute proceedings, and protect generally a member's interest in records of which performing rights are controlled by the company. Article 9 provides:

“All moneys received by the company in respect of the exercise of the rights, licence or authority granted by the member shall be the property of the company, and shall be by them dealt with in accordance with the rules for the time being in force.”

There are provisions authorising the directors to set aside a reserve fund and requiring income and expenditure accounts and balance sheets to be kept. Article 28 provides that every member shall have one vote.

I have no doubt that the substance of the matter was that the seven manufacturing companies which became members of the Phonographic Company, trusting each other, empowered a body controlled by the majority of their number not only to collect the revenue which each could have collected for

itself, but also (and this is the peculiar feature of this case) empowered that body to determine whether or not the whole of the revenue was to be distributed, and in what proportions the revenue to be distributed was to be divided among them. No doubt there were good practical reasons against providing that each member should receive each year precisely what had been collected in respect of that member's records, less expenses of collection, and the expectation was that the sum paid to each member would roughly represent what that member's records had earned. In fact, this expectation appears to have been realised, but it need not have been. If a majority of the members had chosen to use their voting power to cause the Phonographic Company to distribute on some other basis, there does not appear to be anything in the memorandum or articles which would have prevented that. The decision how much any member should get was the decision of the Phonographic Company, an independent person in law. It is this feature which makes me doubt whether this case can properly be brought within the category of agency, but I do not think it necessary to determine that question. The question under the statute is whether there was an investment. It may well be that where there is agency there is no investment, but it does not at all follow that if the case is not one of agency it must, therefore, be one of investment. The commissioners appear to me to have misdirected themselves on this matter in deciding in favour of the appellant. A

If the Gramophone Company invested anything, it can only have been the right to collect and deal with a part of its trading income, and the investment which resulted can only have been the rights and interests which the Gramophone Company had in the Phonographic Company. The only money in the hands of the Phonographic Company was the proceeds of the exercise by that company of the rights which it had acquired to collect part of the trading income of the Gramophone Company and the other companies which were members of the Phonographic Company, and, even on the construction most favourable to the appellant, the only substantial right or interest which the Gramophone Company had in the Phonographic Company was the right to receive such part of that money as the Phonographic Company might decide to pay to it. I cannot believe that any business man would call this an investment, and that, in my opinion, would be an end of the case but for one argument which I must now notice. B

It was said that, instead of setting up a company limited by guarantee, the manufacturing companies could have achieved the same result in substantially the same way by setting up an ordinary limited company of which they would have become shareholders, and that, if they had done that, their holdings in such a company must, on the authority of decisions of this House, have been held to be investments, and the sums paid to them by the company must have been held to be income from such investments. I am by no means satisfied that it would have been possible by setting up a company limited by shares to achieve the result that payments similar in character to those in this case could be made as dividends and income from investments, but if it were possible, it could I think be only by such unusual provisions as to raise the question whether the use of such machinery was a mere device. I agree with what has been said on this matter by my noble and learned friend, LORD SIMONDS, about the decision of this House in *Inland Revenue Comrs. v. Tootal Broadhurst Lee Co., Ltd.* (2), a decision to which I was a party. I am unable to accept this argument for the appellant as sufficient to affect the decision of what otherwise appears to me to be a clear case. I agree that the appeal should be dismissed. C

Appeal dismissed with costs.

Solicitors: *Broad & Son* (for the taxpayers); *Solicitor of Inland Revenue* (for the Crown). D

[Reported by J. D. PENNINGTON, ESQ., Barrister-at-Law.] E

INLAND REVENUE COMMISSIONERS v. SILVERTS, LTD.

[CHANCERY DIVISION (Romér, J.), May 22, June 13, 1950.]

Profits Tax—Computation of profits—Deduction of directors' remuneration—
reversed. C.A. [1951] 1 All E.R. 703. st " of directors—*Shares registered in name of custodian*
under Finance Act, 1937 (c. 54), sched. IV, para. 11.

A In June, 1940, the shares of a company consisted of A, B and C shares
 of which the C shares carried no voting rights and the A and B shares
 each carried one vote. The whole of the six thousand B shares were held
 by S. the managing director. Of the six thousand A shares, some were
 registered in the name of P. and the remainder in the name of Q., both
 of whom held the shares on trust for R. The directors of the company
 B at all material times, besides S., were P., Q. and R. On June 27, 1940,
 R., by a deed which recited the intention that P. and Q. should transfer
 the A shares into the name of a banking company as custodian trustee
 under the Public Trustee Act, 1906, s. 4 (3), settled the A shares for the
 benefit of his son. On Dec. 16, 1940, the A shares were transferred into
 the name of the bank as custodian trustee, P. and Q. thereafter acting
 C as managing trustees. In assessing the company to profits tax in respect
 of the chargeable accounting period Jan. 1, 1947, to Dec. 31, 1947, the
 revenue authorities claimed to restrict the deduction of directors' remunera-
 tion under the Finance Act, 1937, sched. IV, para. 11, on the ground that
 the directors had a controlling interest in the company.

D HELD: the bank as a custodian trustee was a "bare trustee" of the
 shares vested in it in the sense that it had no independent will of its own
 in relation to the control of the company afforded by the trust holding
 of shares, but was bound to operate it in accordance with the directions
 of P. and Q., and, therefore, the company was one the directors whereof
 had a controlling interest therein within the meaning of para. 11.

E *Inland Revenue Comrs. v. Clark (F. A.) & Son, Ltd.* ([1941] 2 All E.R.
 651) and *British-American Tobacco Co., Ltd. v. Inland Revenue Comrs.*
 ([1941] 2 All E.R. 651), applied.

Bibby (J.) & Sons, Ltd. v. Inland Revenue Comrs. ([1944] 1 All E.R. 550),
 distinguished.

[FOR THE FINANCE ACT, 1937, sched. IV, para. 11, see HALSBURY'S
 STATUTES, Second Edn., Vol. 12, p. 385.]

F Cases referred to:

- (1) *Inland Revenue Comrs. v. Clark (F. A.) & Son, Ltd.*, [1941] 2 All E.R.
 86, 651; [1941] 2 K.B. 270; 111 L.J.K.B. 1; 165 L.T. 275; 29 Tax
 Cas. 49.
- (2) *British-American Tobacco Co., Ltd. v. Inland Revenue Comrs.*, [1941]
 2 All E.R. 86, 651; [1941] 2 K.B. 270; 111 L.J.K.B. 1; 165 L.T.
 G 275; 29 Tax Cas. 49.
- (3) *Inland Revenue Comrs. v. Bibby (J.) & Sons, Ltd.*, [1945] 1 All E.R. 667;
 114 L.J.K.B. 353; 173 L.T. 17; 29 Tax Cas. 167; affg. *Bibby (J.)*
 & *Sons, Ltd. v. Inland Revenue Comrs.*, [1944] 1 All E.R. 548; 170
 L.T. 370; 29 Tax Cas. 167; revsg., [1943] 2 All E.R. 419; 170 L.T. 8;
 29 Tax Cas. 167; 2nd Digest Supp.
- H (4) *Pulbrook v. Richmond Consolidated Mining Co.*, (1878), 9 Ch.D. 610;
 48 L.J.Ch. 65; 28 Digest 476, 316.
- (5) *Puddephatt v. Leith*, [1916] 1 Ch. 200; 85 L.J.Ch. 185; 114 L.T. 454;
 28 Digest 398, 266.

CASE STATED by the Special Commissioners of Income Tax.

Silverts, Ltd., appealed to the Special Commissioners against an assessment
 to profits tax for the chargeable accounting period Jan. 1, 1947, to Dec. 31,
 1947, on the ground that the company was not one the directors whereof had

a controlling interest therein within the meaning of the Finance Act, 1937, sched. IV, para. 11, and that, therefore, the restrictions set out in that paragraph on the deduction of directors' remuneration in computing the profits of the company did not apply to the company*. The Special Commissioners found that the company was not one in which the directors had a controlling interest, and reduced the assessment. The Crown appealed.

Donovan, K.C., J. H. Stamp and R. P. Hills for the Crown.
Pennycuik, K.C., and Honeyman for the company.

Cur. adv. vult.

June 13. **ROMER, J.**, read the following judgment. This is an appeal by the Crown against a decision by the Special Commissioners to the effect that the respondent company is not a company the directors whereof have a controlling interest therein within the meaning of the Finance Act, 1937, sched. IV, para. 11.

The matter arises in relation to an assessment of the company to profits tax. That tax, under the name of national defence contribution, was imposed by the Finance Act, 1937, s. 19, and s. 20 of the Act provided that for the purpose of the tax the profits arising from a trade or business in each chargeable accounting period should be separately computed and should be so computed on income tax principles as adapted in accordance with the provisions of sched. IV to the Act. Paragraph 11 of this schedule, in effect, restricts the extent to which, in the cases of companies whereof the directors have a controlling interest therein, the remuneration of directors (other than whole-time service directors) may be treated as a deduction for the purpose of arriving at the taxable profits of such companies.

Immediately prior to the execution of a deed of June 27, 1940, the A shares and B shares of the company (each of which carried one vote) were held as follows. The whole of the B shares (six thousand) were held by Mr. S. J. Silvert, the managing director; the whole of the A shares (six thousand) belonged in equity to a Mr. Ross; three thousand five hundred of the A shares were registered in the name of Mr. Lancashire; and the remaining two thousand five hundred were registered in the name of Mr. Lewis. Each of these gentlemen had executed declarations of trust in favour of Mr. Ross of the shares respectively registered in their names as aforesaid. The only other shares which had been issued by the company were two thousand C shares, and these carried no voting rights. By the deed of June 27, 1940, which was made between Mr. Ross, as settlor, of the first part, the National Provincial Bank, Ltd. (therein and hereinafter called "the bank"), of the second part, and Mr. Lancashire and Mr. Lewis (thereinafter called "the trustees"), of the third part, after reciting that six thousand A shares of the company ("the trust shares") were registered in the names of the trustees as nominees for the settlor, that the settlor was desirous of settling the trust shares for the benefit of his son, and that it was intended that the trustees should transfer the trust shares into the name of the bank, it was witnessed (so far as material), first, that the bank should be the custodian trustee of the trusts thereby declared, with such functions, duties and powers as appertain to a custodian trustee under the Public Trustee Act, 1906, s. 4, and the authorised rules under such Act or the statutory regulations and authorised rules for the time being in force respecting custodian trustees, and, secondly, that the trustees should stand possessed of the trust shares on the trusts therein declared, being trusts for the benefit of the settlor's son. On Dec. 16, 1940, the trust shares, *i.e.*, the six thousand A shares, were transferred into the name of the bank and

* The provisions of the Finance Act, 1937, sched. IV, relate to national defence contribution. By the Finance Act, 1946, s. 44, it was provided that the national defence contribution should be re-named "profits tax."

the bank thenceforward held the same in the capacity of custodian trustee. The incidents of this office are prescribed by the Public Trustee Act, 1906, s. 4. So far as material, this section provides that the management of the trust property shall remain vested in the "managing trustees" (*viz.*, the trustees other than the custodian trustee), but the custodian trustee is to have the custody of the trust documents and securities, and the custodian trustee is to

A " . . . concur in and perform all acts necessary to enable the managing trustees to exercise their powers of management or any other power or discretion vested in them . . . unless the matter in which he is requested to concur is a breach of trust, or involves a personal liability upon him in respect of calls or otherwise . . . "

B The custodian trustee is to receive and make payments in respect of the trust property, but may allow the trust income to be paid to the managing trustees, and, finally, a custodian trusteeship may be determined, if expedient, by the court.

C In addition to the managing director, Mr. S. J. Silvert, the other directors of the company were Mr. Lancashire, Mr. Lewis and Mr. A. H. Silvert, and the short question is whether, in the circumstances outlined above, the measure of control attached to the trust holding is to be regarded as vested in Mr. Lancashire and Mr. Lewis as the managing trustees under the settlement, or whether it is to be regarded as vested in the registered holder, *viz.*, the bank. If it is vested in the managing trustees then, having regard to Mr. S. J. Silvert's holding, the directors of the respondent company have a controlling interest in it. Otherwise, they have not. The Crown's case is that the bank is a bare trustee of the shares for Mr. Lancashire and Mr. Lewis, and that it is a mere medium through which these gentlemen operate the measure of control of the company's affairs which the trust holding affords, and which I will hereafter, for convenience, refer to as "the trust control." Inasmuch, therefore, as the bank is bound to comply with any directions properly given to it by the managing trustees, it follows, according to the Crown's contention, that it is the director trustees, and not the bank, who effectively operate the trust control. The company's argument, on the contrary, is that a custodian trustee cannot properly be regarded, in view of the statutory provisions to which I have referred, as a bare trustee, and that, even if they are wrong as to this, it is not legitimate to go behind the company's register or to inquire what beneficial or other interests may exist in relation to the shares of which the bank is the registered holder.

F The question what constitutes a controlling interest in a company for the purposes of paras. 4, 7 and 11 of sched. IV to the Finance Act, 1937, was considered in two cases which were heard and determined together, first, by LAWRENCE, J., and, subsequently, by the Court of Appeal, and one of which went to the House of Lords. These cases are *Inland Revenue Comrs. v. Clark (F. A.) & Son, Ltd.* (1) and *British-American Tobacco Co., Ltd. v. Inland Revenue Comrs.* (2). The headnote in *Clark's* case (1) (29 Tax Cas. 49) is as follows:

H " . . . the issued share capital of the respondent company was £22,600 divided into 22,500 preference shares and one hundred ordinary shares both of £1 each, each share carrying the right to one vote at general meetings. Under the terms of a deed of trust made in 1927, 14,999 of the preference shares were held by the two directors of the company and another individual upon trust to pay the income therefrom to one of the directors (the settlor) during his life, and after his death to transfer the shares or the proceeds thereof to the second director. It was a term of the trust deed that during the life of the settlor the trustees, who were the registered proprietors of the shares, would at his request attend

meetings of shareholders and vote as previously directed by him or, if required to do so, execute proxies so as to enable the settlor to vote at such meetings in place of the trustees. The two directors of the respondent company were also the sole directors of and shareholders in the F.C.B.C. (Phoenix) No. 1 company (hereinafter called the 'Phoenix company'), and on Dec. 7, 1936, they sold their respective life and reversionary interests in the 14,999 preference shares of the respondent company to the Phoenix company, undertaking as a term of the agreement of sale to execute and procure to be executed such transfers as the Phoenix company might reasonably require in order that the legal property in the 14,999 shares might vest in that company. The shares thereafter remained registered in the names of the trustees until Dec. 23, 1937, when they were transferred to the Phoenix company. An assessment to profits tax (then known as national defence contribution) was made for the chargeable accounting period commencing Apr. 1, 1937, and ending Dec. 31, 1937, on the footing that the respondent company was a company the directors whereof had a controlling interest therein, and that certain remuneration, interest and annuities paid to the directors of the company were not allowable as a deduction in computing the company's profits for the purposes of national defence contribution in view of the provisions of paras. 4 and 11 of sched. IV to the Finance Act, 1937. On appeal against this assessment it was contended on behalf of the respondent company that as from Dec. 7, 1936, the Phoenix company, a legal entity separate from its shareholders, alone was beneficially entitled to the voting rights annexed to the 14,999 shares, and that accordingly the directors of the respondent company did not at any material time have a controlling interest therein."

The Special Commissioners held that during no part of the accounting period in question did the directors of the respondent company have a controlling interest therein for the purposes of paras. 4 and 11 of sched. IV to the Act of 1937. On appeal, LAWRENCE, J., took a different view. He said ([1941] 2 All E.R. 90):

"The word 'controlling' is not a term of art, nor is the word 'interest' necessarily so, and, when the word 'controlling' is used to qualify 'interest,' I think that the phrase in its ordinary meaning covers both direct and indirect control."

An appeal from this decision to the Court of Appeal was dismissed. In the leading judgment, SCOTT, L.J., after dealing with the *British-American Tobacco* appeal (2), said ([1941] 2 All E.R. 655) with regard to the appeal in *Clark's* case (1):

"It is the same question as that in the *British-American Tobacco Company's* case (2), except that the phrase 'controlling interest' is applied to directors who control the company, instead of to one company controlling another. The judge could find no sufficient legal ground for giving the phrase one meaning in para. 7 and another in paras. 4 and 11, and we agree with him. In each case, the decision must depend on the meaning of the phrase. In my opinion, when standing alone in the context of any one of the three paragraphs, it contemplates such a relationship as brings about a control in fact, by whatever machinery or means that result is effected."

CLAUSON and GODDARD, L.JJ., agreed.

In *British-American Tobacco Co., Ltd. v. Inland Revenue Comrs.* (2) (29 Tax Cas. 50), the headnote is as follows:

"... the appellant company received dividends from eleven companies carrying on business outside the United Kingdom and not liable to be

assessed to national defence contribution. The vote-carrying shares in these companies were owned as follows:

(a) by the appellant company alone ... amounts varying from 0.4 per cent. to 70.24 per cent.

(b) by the appellant company and a company in which more than fifty per cent. of the voting power belonged to the appellant company and/or a company in which more than fifty per cent. of the voting power belonged to a company in which the appellant company held more than fifty per cent. of the voting power

... amounts varying from sixty per cent. to one hundred per cent.

The articles of association of the eleven companies required that for certain purposes—e.g., a winding-up—a seventy-five per cent. majority of votes was necessary, but for all ordinary purposes a bare majority was sufficient. An additional assessment to national defence contribution was made for the chargeable accounting period commencing Apr. 1, 1937, and ending Sept. 30, 1937, on the footing that the dividends received from the eleven companies not liable to be assessed to national defence contribution were required to be included in computing the profits of the appellant company for the purposes of national defence contribution by para. 7 (b) of sched. IV to the Finance Act, 1937. On appeal against this assessment it was contended on behalf of the appellant company (i) that the words ‘controlling interest’ implied a proprietary right and that before it could be claimed that the appellant company had a controlling interest in any one of the eleven companies it must be shown that the appellant company did, in fact, itself own beneficially a controlling number of shares or votes in the respective companies; (ii) that in no one of the eleven companies did the appellant company beneficially own such a preponderance of shares or votes as was necessary in order to give the appellant company control, and (iii) that the appellant company did not have a controlling interest in any of the eleven companies. The Special Commissioners dismissed the appeal.”

These were not the same Special Commissioners as had dealt with *Clark’s* case (1). An appeal by the British-American Tobacco Co. to LAWRENCE, J., failed, and on the same grounds as he allowed the Crown’s appeal in *Clark’s* case (1). The Court of Appeal dismissed an appeal by the British-American Tobacco Co., from the decision of LAWRENCE, J. SCOTT, L.J., in the course of his judgment, said that the whole appeal turned on the question: What did the phrase “controlling interest” mean in its context in the Finance Act, 1937, sched. IV, para. 7. The learned lord justice proceeded to the view that the phrase included indirect control and gave his reasons for thinking so, and the other lords justices agreed. A final appeal by the British-American Tobacco Co. to the House of Lords also failed. The relevant argument before the House on behalf of the appellant company was, as stated in his speech by VISCOUNT SIMON, L.C., that in order that one company should have a controlling interest (for the purposes of para. 7 (b) of sched. IV to the Act of 1937) it must be the beneficial owner of a requisite number of shares in the other company, either registered in its own name or in the name of its nominees, and that, if company No. 1 owns all the shares in company No. 2, which in turn owns all the shares in company No. 3, company No. 1 has no interest,

controlling or otherwise, in company No. 3. The Lord Chancellor then dealt with this argument in the following words ([1943] 1 All E.R. 15):

"It is true that in such circumstances company No. 1 owns none of the assets of company No. 2, and *a fortiori* owns none of the assets of company No. 3, and in that sense neither owns, nor has an interest in, company No. 3. But that is to treat the phrase 'controlling interest' as capable of connoting only a proprietary right, that is, an interest in the nature of ownership. The word 'interest,' however, as pointed out by LAWRENCE, J., is a word of wide connotation, and I think the conception of 'controlling interest' may well cover the relationship of one company towards another, the requisite majority of whose shares are, as regards their voting power, subject, whether directly or indirectly, to the will and ordering of the first-mentioned company. If, for example, the appellant company owns one-third of the shares in company X, and the remaining two-thirds are owned by company Y, the appellant company will none the less have a controlling interest in company X if it owns enough shares in company Y to control the latter. In my opinion this is the meaning of the word 'interest' in the enactment under consideration, and, where one company stands in such a relationship to another, the former can properly be said to have a controlling interest in the latter. This view appears to me to agree with the object of the enactment as it appears on the face of the Act. I find it impossible to adopt the view that a person who, by having the requisite voting power in a company subject to his will and ordering, can make the ultimate decision as to where and how the business of the company shall be carried on, and who thus has, in fact, control of the company's affairs, is a person of whom it can be said that he has not in this connection got a controlling interest in the company."

The other noble and learned Lords concurred.

It would appear at first sight that the decisions in these two cases, and the grounds on which those decisions were based, are conclusive against the company in the case now before me, for, first, they interpret the phrase "controlling interest" as used in the same enactment as is in question in the present appeal, and, secondly, they so interpret it as including indirect as well as direct control. The bank is bound to exercise the trust control (subject to certain limitations on which the company relies and which I consider later) as the managing trustees direct. It is, accordingly, these trustees (in conjunction with Mr. S. J. Silvert) and not the bank who (in the words of VISCOUNT SIMON, L.C.)

"... can make the ultimate decision as to where and how the business of the company shall be carried on, and who thus has, in fact, control of the company's affairs . . ."

and it is accordingly they, and not the bank, who, with the managing director, has a controlling interest in the company within the meaning of para. 11 of sched. IV to the Act of 1937.

The Special Commissioners, however, came to a contrary conclusion by reason of the speeches in the House of Lords in *Inland Revenue Comrs. v. Bibby (J.) & Sons, Ltd.* (3). This case came before their Lordships' House some two-and-a-half years after the appeal in the *British-American Tobacco* case (2) and was much discussed before me in argument. The question in issue in *Bibby's* case (3) was whether shares in a company which were held by three directors of the company as trustees of a marriage settlement should be taken into account in considering whether the company was "a company the directors whereof have a controlling interest therein" within the meaning of the Finance (No. 2) Act, 1939, s. 13 (9). In addition to being trustees of the settlement the three directors had a contingent interest in the trust shares, in that the trust

A fund would be divisible among them in the event of their sister, on whose marriage the settlement had been made, dying without issue. MACNAGHTEN, J., affirming the Special Commissioners, held that, in order to ascertain whether the directors of the company had a controlling interest therein, the shares held by them as trustees must be excluded. The company appealed to the Court of Appeal and the appeal was allowed. In delivering the judgment of the court, LORD GREENE, M.R., said ([1944] 1 All E.R. 549):

B “If the reference to ‘controlling interest’ in s. 13 (9) had stood alone, we should have found little difficulty in deciding that the contention of the company was the correct one. Subject to the one case of a bare trustee who is bound to vote in accordance with the directions of his beneficiary, we can find nothing in the language of the sub-section which points to an intended distinction between a beneficial interest and an interest held by a trustee. A trustee in whom shares are vested in such circumstances that he has the usual discretion to vote as he thinks fit in the interests of the beneficiaries as a whole appears to us to be a person who, if he holds more than half the voting power, is properly and naturally described as a person who has a controlling interest in the company. He is commonly so described in the language of those familiar with the law and practice relating to companies. Thus, if a shareholder owning more than fifty per cent. of the voting power were to die and bequeath his shares to trustees on trust for his widow and children, and the question were asked: ‘Who now has the controlling interest in the company?’ no person familiar with company affairs would, I think, answer it otherwise than by saying: ‘The trustees.’ It was suggested that this answer would be incorrect in that the trustees are subject to the control of the court. We do not agree with this suggestion. The controlling interest must obviously be somewhere: it cannot be *in nubibus*; and to say that it is *in gremio judicum* appears to us to violate one’s common sense. The distinction between a legal and a beneficial interest is sufficiently well-known to justify the belief that, if the legislature had intended to draw it, it would have said so in express terms. The case of a bare trustee is not, of course, before us. But it seems to us that, in such a case, the control would naturally be said to be in the beneficial owner and not in the trustee; so that if the shares carried more than half the voting power and the beneficial owner was a director, he would properly be described as having a controlling interest in the company . . . It appears to us that, apart from the special case of a bare trustee, there is no half-way house between an interpretation which limits the expression to the case of beneficial ownership and one which includes ownership by trustees, irrespective of the fact whether or not they also have some beneficial interest in the shares which give control.”

G In conclusion, the Master of the Rolls referred to the *British-American Tobacco* case (2) and *Clark’s* case (1) and said that those cases were concerned with “controlling interest” in connection with the national defence contribution under the Act of 1937, but the questions arising for decision were of a quite different character from that which was then before the court. The House of Lords unanimously upheld the decision of the Court of Appeal. LORD RUSSELL OF KILLOWEN, in the course of his speech, said ([1945] 1 All E.R. 669):

H “When the section [the Finance (No. 2) Act, 1939, s. 13] speaks of directors having a controlling interest in a company, what it is immediately concerned with in using the words ‘controlling interest’ is not the extent to which the individuals are beneficially interested in the profits of the company as a going concern or in the surplus assets in a winding-up, but

the extent to which they have vested in them the power of controlling by votes the decisions which will bind the company in the shape of resolutions passed by the shareholders in general meeting. In other words, the test which is to exclude a company's business from sub-s. (9) (a) and include it in sub-s. (9) (b), is the voting power of its directors, not their beneficial interest in the company. For the purpose of such a test the fact that a vote-carrying share is vested in a director as trustee seems immaterial. The power is there, and though it be exercised in breach of trust or even in breach of an injunction, the vote would be validly cast *vis-a-vis* the company, and the resolution until rescinded would be binding on it. The contention that upon the wording of s. 13 the interest must be confined to beneficial interests appears to me to be but a repetition of the argument which was rejected by this House in *British-American Tobacco Co., Ltd. v. Inland Revenue Comrs.* (2) in relation to national defence contribution and the Finance Act, 1937."

Towards the end of his opinion, LORD RUSSELL said ([1945] 1 All E.R. 670):

"The words 'controlling interest' mean 'controlling voting power': that is the interest in view, not beneficial interest. As at present advised I agree with the Court of Appeal in the view that there is no half-way house between a construction which restricts the controlling interest to shares which are in the absolute beneficial ownership of the trustees and a construction which includes all shares of which the directors are registered holders. It is true that the Court of Appeal except the case of what they describe as a bare trustee, but express a view that the control would reside in the beneficial owner of the shares. The case envisaged is no doubt the case of the director who puts shares into the name of a nominee, taking probably a blank transfer executed by the nominee. I prefer to express no definite opinion in relation to this question, but to keep it as an open question to be debated when the necessity for a decision thereon in fact arises."

LORD WRIGHT concurred in the judgment of LORD RUSSELL OF KILLOWEN. LORD MACMILLAN said ([1945] 1 All E.R. 670):

"The control of a company resides in the voting power of its shareholders. In the respondent company the ordinary shares alone confer a right to vote at a general meeting. The directors are the registered proprietors of a majority of the ordinary shares. It would, therefore, appear to follow that the directors have a controlling interest in the company . . . The question whether the directors of the respondent company have the control of it by their voting power as shareholders must in my view, be determined by the memorandum and articles of the company and by the register of shareholders. By the constitution of the company, as I have already mentioned, the voting power is vested in the ordinary shareholders and the register shows that the directors hold a majority of these shares. As was said by SIR GEORGE JESSEL, M.R., in *Pulbrook v. Richmond Consolidated Mining Co.* (4): 'The company cannot look behind the register as to the beneficial interest but must take the register as conclusive and cannot inquire . . . into the trusts affecting the shares.' So far as the company is concerned the relation between such of its shareholders as happen to be trustees and their beneficiaries is *res inter alios*. It may be that a trustee shareholder may, as between himself and his *cestui que trust*, be under a duty to exercise his vote in a particular manner, or a shareholder may be bound under contract to vote in a particular way (compare *Puddephatt v. Leith* (5)). But with such restrictions the company has nothing to do. It must accept and act upon the shareholder's vote, notwithstanding that it may be given contrary to some duty which he owes to outsiders. The remedy for such breach lies elsewhere."

LORD MACMILLAN made no mention of LORD GREENE's reference in the Court of Appeal to the case of a bare trustee. LORD PORTER, after expressing his agreement with the opinions of LORD RUSSELL OF KILLOWEN and LORD SIMONDS, said ([1945] 1 All E.R. 672):

A "I cannot doubt that by the expression 'a company the directors whereof have a controlling interest therein' is meant a company in which the directors by means of their shareholding are able to direct the affairs of the company according to their will. This is, in my view, the natural meaning of these words."

After stating his reasons for rejecting the contention of the Crown that the words should receive a narrower meaning, LORD PORTER said (*ibid.*, p. 672):

B "The Court of Appeal qualify the meaning of the phrase by excepting 'bare trustee' from those having a controlling interest. As to this qualification I desire to reserve my decision. In a case such as the present however where the shares giving control are held by the directors not merely as trustees but also with some personal interest as well I cannot doubt that the holders have a controlling interest."

C LORD SIMONDS, in the course of his speech, said (*ibid.*, p. 672):

D "What, my Lords, constitutes a controlling interest in a company? It is the power by the exercise of voting rights to carry a resolution at a general meeting of the company. Can the directors of the respondent company by the exercise of their voting rights carry such a resolution? Yes: for they are the registered holders of more than half the ordinary shares of the company. Therefore they have a controlling interest in the company."

Then, after referring to the argument of the Crown, LORD SIMONDS proceeded (*ibid.*, p. 673):

E "My Lords, in my opinion the Crown's contention cannot be sustained. Those who by their votes can control the company do not the less control it because they may themselves be amenable to some external control. Theirs is the control, though in the exercise of it they may be guilty of some breach of obligation whether of conscience or of law. It is impossible (an impossibility long recognised in company law) to enter into an investigation whether the registered holder of a share is to any and what extent the beneficial owner. A clean cut there must be. It is for this reason that, while respectfully concurring in every other line of the judgment of LORD GREENE, M.R., I would reserve further consideration of that part of it which deals with the case of the so-called bare trustee. His case is not yet before your Lordships and perhaps never will be. If and when it is, the validity of the distinction made by LORD GREENE, M.R., will have to be considered and I should myself require a more satisfactory explanation than has yet been given of a term which, though it has statutory sanction, has never, I believe, received statutory definition."

G LORD SIMONDS then referred to the argument of the Crown that the purpose of the Act would be defeated unless the beneficial interest alone was regarded and the fiduciary interest disregarded, and proceeded (*ibid.*, p. 673):

H "This is a cogent argument, if two conditions are satisfied, first, that the words in dispute fairly admit an alternative construction, and, second, that the purpose of the Act can be so clearly seen that one construction will serve it and the other defeat it. Neither of these conditions is in my opinion satisfied. I cannot ascribe to the words 'controlling interest' a meaning which would impose alike on the tax-payer and the tax-collector the duty of searching out the beneficial interest behind the veil of legal forms. For it is to be observed that, if this argument is to be effective, it

is not sufficient to say that the controlling interest lies not with the legal owner, but with the beneficial owner; the next step is to determine who, amidst all the complexities of successive interests, discretionary interests, mortgage and other interests, is for this purpose to be regarded as the beneficial owner. I must decline to admit an alternative construction which, departing from the plain and simple meaning of familiar words, requires such an unravelling."

The noble Lord added that, in fact, it was not clear to him that, at least, in respect of the provision under review, the construction which he adopted was not consonant with what appeared to be the purpose of the Act.

The actual question for decision in that case arose under a different statute and was quite distinct in character from the point that is in issue in the present appeal. Nevertheless, the company strongly relies on it as affording a guide to a decision in its favour. The company contends, first, that the essential basis of all the speeches in the House of Lords is that, for the purpose of inquiring whether the directors of a company have a controlling interest therein, one must look to the company's share register and to that alone; secondly, that the speeches (especially, perhaps, that of LORD MACMILLAN) do not fairly permit of the exception to the general rule, namely, that of a bare trustee, which was recognised in the judgment of the Court of Appeal; and, thirdly, that, although LORD RUSSELL OF KILLOWEN, LORD WRIGHT, LORD PORTER and LORD SIMONDS refrained from expressing any concluded view as to this possible exception, they at least entertained some doubt as to its legitimacy. Counsel for the company submitted, in the first place, that the bank, as custodian trustee, is not "a bare trustee" at all, and, therefore, I am only concerned with the general rule and not with the question whether such a trustee does or does not constitute an exception to it. He pointed out that a custodian trustee, whose functions are prescribed and delimited by the Public Trustee Act, is in a different position in many respects from that of a mere nominee such as LORD RUSSELL OF KILLOWEN referred to in his speech. A nominee such as this, it is said, is bound to obey any directions with regard to the shares that are registered in his name as his principal may from time to time think proper to give him, provided only that the directions are not in conflict with the criminal law. A custodian trustee, on the other hand, says counsel, is in a fiduciary position towards the beneficiaries and is under an obligation, concurrent with that of the managing trustees, towards them. If the custodian trustee is told by the managing trustees to act in breach of trust, it is its duty to disobey, or, at the least, to obtain the directions of the court. I respectfully share the doubt expressed by LORD SIMONDS as to what precisely is meant by the phrase "bare trustee," and, indeed, it may well convey different meanings to different minds. I think there is force in the distinction contended for by counsel for the company between a custodian trustee, on the one hand, and a mere nominee, on the other. Nevertheless, I feel that the bank, as custodian trustee, is within the phrase as used by LORD GREENE, M.R., in the *Bibby* case (3) in that it has no independent will of its own in relation to the trust control, but is bound to operate it in accordance with its principals' directions. The fact that it can, and, indeed, must, refuse to commit a breach of trust adds substantially nothing to its independent control over the company's affairs. It merely diminishes, in a manner more theoretical than practical, the directive rights of the managing trustees over the custodian. It appears to me, then, that the bank is a "bare trustee" for the managing trustees within the contemplation of that phrase by the Court of Appeal in *Bibby's* case (3). If so, it is *a fortiori* the mere vehicle of the trustees' wishes for the purposes envisaged in the *Clark* (1) and *British-American Tobacco* (2) cases; and it is, after all, as it seems to me, the *ratio decidendi* of those cases rather than that of *Bibby's* case (3), which, in this court, governs the present appeal.

I have dealt with *Bibby's* case (3) at length, not only because it was relied on by the Special Commissioners, but because it was relied on so strongly in argument before me. And, apart altogether from the *dicta* regarding bare trustees, there is, indeed, much in the speeches in the House of Lords which, if detached from the subject-matter of the case and regarded as being of general application, undoubtedly supports the company's case. But, as I have already indicated, *Bibby's* case (3) arose under the statute of 1939 and involved a totally different question from that which arises in the present appeal. The two previous cases, on the other hand, necessitated a consideration of and decisions on the same schedule of the same Act as is in question on this appeal. Counsel for the company argued that these cases were concerned, not with who controlled a particular company, but with the indirect control of one company by another, and that, accordingly, different considerations arise. This comment is true with regard to the *British-American Tobacco* case (2), but is not justified as to *Clark's* case (1); and each of the cases was regarded both by LAWRENCE, J., and by the Court of Appeal as involving the same principles. It seems to me that I cannot, without violating those principles, support the conclusion at which the Special Commissioners arrived. Whether or not the bank is strictly a "bare trustee", its relation to the managing trustees is, in my judgment, such that it is the latter, and not the former, who can make "the ultimate decision" to which LORD SIMON referred in his speech in the *British-American Tobacco* appeal (2). If so, it follows that the trust control is vested in the managing trustees for the purposes of para. 11 of sched. IV to the Act of 1937, and that the company is, for those purposes, a company the directors whereof have a controlling interest therein, and I propose, accordingly, so to hold.

I would add in conclusion that a decision in this case adverse to the Crown would have rather startling results. The object of para. 11 of the schedule is to prevent avoidance of profits tax by the expedient of directors, in director-controlled companies, voting themselves excessive remuneration. If it were possible for directors to evade this restrictive provision by merely transferring their shares into the hands of nominees the provision would be rendered utterly ineffective. It is for this reason that, in my judgment, the court is both entitled and bound to look behind the register of the company concerned and see in whom the real control is vested. Wholly different considerations were before the House of Lords in *Bibby's* case (3), and it is in relation to those considerations alone, as I respectfully think, that the reasoning and the *dicta* of the law Lords who determined that case fall to be regarded and applied. I will, accordingly, remit the case to the Special Commissioners with a direction that the profits tax of the company for the chargeable accounting period in question, *viz.*, Jan. 1, 1947, to Dec. 31, 1947, should be assessed on the basis that the company is a company the directors whereof have a controlling interest therein within the meaning of the Finance Act, 1937, sched. IV, para. 11.

Appeal allowed with costs.

Solicitors: *Solicitor of Inland Revenue; Clifford-Turner & Co.* (for the company).

[*Reported by C. N. BEATTIE, Esq., Barrister-at-Law.*]

R. v. MINISTER OF TOWN AND COUNTRY PLANNING.

Ex parte MONTAGUE BURTON, LTD. AND OTHERS.

[COURT OF APPEAL (Tucker, Asquith and Jenkins, L.J.J.), June 20, 1950.]

Town and Country Planning—War damage—Compulsory purchase order—Direction by Minister that application for order under Act of 1944 be continued after Act of 1947 came into force—Direction given before Act of 1947 came into force—Validity—Interpretation Act, 1889 (c. 63), s. 37—Town and Country Planning Act, 1944 (c. 47), s. 1 (1)—Town and Country Planning Act, 1947 (c. 51), s. 113 (2) (5), sched. X, para. 16.

The applicants owned land in areas in respect of which the local planning authorities applied to the Minister of Town and Country Planning for orders under s. 1 (1) of the Town and Country Planning Act, 1944, declaring the land subject to compulsory purchase for dealing with war damage. On Aug. 6, 1947, before proceedings on the applications were completed, the Town and Country Planning Act, 1947, was passed. Under that Act s. 1 of the Act of 1944 was repealed, though power was given to the Minister under s. 113 (5) and sched. X, para. 16, to direct that proceedings on applications which had not been determined at the appointed day when the Act of 1947 came into force should be continued. The Act of 1947 came into operation on July 1, 1948, but before that date, in a letter dated June 16, 1948, the Minister had directed that the proceedings on the applications should be continued. The applications were proceeded with and orders were made after the Act of 1947 came into force. The applicants moved for orders of *certiorari* to quash these orders, contending that the direction of June 16, 1948, was bad in law because at the time it was given sched. X, para. 16, of the Act of 1947 had not come into force and by virtue of s. 120 could not be brought into force. The Divisional Court held that under s. 37 of the Interpretation Act, 1889, the Minister had power to make directions under sched. X, para. 16, before the Act of 1947 came into force and that the orders made were valid. On appeal,

HELD: the preservation of applications which had been made under the Act of 1944 was "necessary or expedient for the purpose of bringing the Act" of 1947 "into operation," within the meaning of s. 37 of the Interpretation Act, 1889, and, therefore, the Minister had power to give the directions contained in the letter of June 16, 1948.

Decision of the Divisional Court, sub nom. R. v. Minister of Town and Country Planning, Ex parte C. B. North, Ltd. and Others ([1950] 1 All E.R. 163), *affirmed*.

[FOR THE INTERPRETATION ACT, 1889, s. 37, see HALSBURY'S STATUTES, Vol. 18, p. 1005; FOR THE TOWN AND COUNTRY PLANNING ACT, 1944, s. 1 (1), see *ibid.*, Vol. 37, p. 423; FOR THE TOWN AND COUNTRY PLANNING ACT, 1947, s. 113, s. 120, and sched. X, para. 16, see *ibid.*, Vol. 40, p. 849, p. 859, and p. 882, respectively.]

APPEAL from the decision of a King's Bench Divisional Court refusing an application for orders of *certiorari* to quash two orders, No. 75 and No. 269 of 1949, made by the Minister of Town and Country Planning on the applications of Liverpool corporation and Kingston-on-Hull corporation. The orders were made under the Town and Country Planning Act, 1944, s. 1 (1), for the compulsory purchase of land belonging to the applicants in the areas of the two local planning authorities which had been subject to war damage. The facts are set out in the judgment of TUCKER, L.J.

Glidewell for the applicants.

The Attorney-General (Sir Hartley Shawcross, K.C.) and *J. P. Ashworth* for the Minister of Town and Country Planning.

Maurice Lyell for Kingston-on-Hull corporation.

P. M. O'Connor for Liverpool corporation.

TUCKER, L.J.: These are appeals from orders of the Divisional Court dismissing applications for orders of *certiorari* to quash two orders made by the Minister of Town and Country Planning. The orders in question relate to applications which had been made under the Town and Country Planning Act, 1944, by the corporations of Liverpool and Hull. The Liverpool order is No. 75 of 1949, made on Jan. 20, 1949, and the Hull order is No. 269 of 1949, made on Feb. 22, 1949. Both were declaratory orders for compulsory purchase, and the point raised on the applications to the Divisional Court was whether directions made by the Minister of Town and Country Planning, dated June 16, 1948, were valid under the Town and Country Planning Act, 1947.

Section 1 (1) of the Town and Country Planning Act, 1944, provides:

“(1) Where the Minister of Town and Country Planning (in this Act referred to as ‘the Minister’) is satisfied that it is requisite, for the purpose of dealing satisfactorily with extensive war damage in the area of a local planning authority, that a part or parts of their area, consisting of land shown to his satisfaction to have sustained war damage or of such land together with other land contiguous or adjacent thereto, should be laid out afresh and re-developed as a whole, an order declaring all or any of the land in such a part of their area to be land subject to compulsory purchase for dealing with war damage may be made by the Minister if an application in that behalf is made to him by the authority before the expiration of five years from such date as the Minister may by order appoint as being the date when the making of such applications has become practicable.”

It was under that section that the corporations of Liverpool and Kingston-on-Hull made application with regard to areas which included properties owned or occupied by the applicants for *certiorari* in the present cases. After the applications had been made, a public inquiry was held, in the case of Kingston-on-Hull between June 1 and 24, 1948, and in the case of Liverpool on June 29, 1948. Those inquiries were conducted as a result of letters dated June 16, 1948, the validity of which is in question in these proceedings. It is headed: “Town and Country Planning Acts, 1944 and 1947. Application for an order under s. 1 of the 1944 Act. Reconstruction Area No. 1 (Central Areas).” The letter says:

“I am directed by the Minister of Town and Country Planning to refer to the application by your council dated Dec. 23, 1947, for an order under s. 1 of the Town and Country Planning Act, 1944, declaring land to be subject to compulsory purchase under Part I of that Act. In exercise of the power conferred upon him by para. 16 of sched. X to the Town and Country Planning Act, 1947, the Minister hereby directs that proceedings on the application shall be continued under the Act of 1944 after the appointed day for the coming into force of the Act of 1947, *viz.*, July 1, 1948.”

The inquiries were held and the orders were made on the dates I have stated.

It is said, in the first instance, that under the provisions of the Act of 1947, standing alone, the Minister could never bring that Act into operation at all. The argument is as follows. Section 120 (2) of the Town and Country Planning Act, 1947, provides:

“This Act shall come into force on the appointed day: Provided that” [certain sections there referred to] “shall come into force on the date of the passing of this Act.”

The sections referred to as coming into force on the date of the passing of the Act do not include s. 120, and, accordingly, it is said that the Minister cannot appoint a day until the Act has come into operation and the Act cannot come

into operation until he has appointed a day, with the result that the Act can never come into operation. That ingenious argument does not appeal to me because I think that an ordinary and natural interpretation must be given to a section which itself brings the Act into operation, namely, that it must necessarily come into operation with the passing of the Act, which was on Aug. 6, 1947. Any other interpretation would really make nonsense of the provisions of the Act.

However that may be, it is conceded by counsel for the applicants that the appointed day was effectively made, but he says that that was only done by virtue of s. 37 of the Interpretation Act, 1889, which provides:

"Where an Act passed after the commencement of this Act is not to come into operation immediately on the passing thereof, and confers power to make any appointment, to make, grant, or issue any instrument, that is to say, any Orders in Council, order, warrant, scheme, letters patent, rules, regulations, or byelaws, to give notices, to prescribe forms, or to do any other thing for the purposes of the Act, that power may, unless the contrary intention appears, be exercised at any time after the passing of the Act, so far as may be necessary or expedient for the purpose of bringing the Act into operation at the date of the commencement thereof, subject to this restriction, that any instrument made under the power shall not, unless the contrary intention appears in the Act, or the contrary is necessary for bringing the Act into operation, come into operation until the Act comes into operation."

Counsel for the applicants concedes that that gives to the Minister power to appoint a day under the Act of 1947. On Feb. 9, 1948, he did make an order under which the appointed day was July 1, 1948. It is, however, said that the letter of June 16, 1948, was invalid because the direction made by it was not a direction made for the purpose of bringing the Act into operation, and that that is the only direction which can properly be made by virtue of s. 37 of the Act of 1889.

In order to consider that point it is necessary to refer to s. 113 (2) of the Act of 1947 which provides:

"Subject to the provisions of this section, the enactments specified in sched. IX to this Act are hereby repealed in the case of enactments specified in Part I of that schedule, as from the passing of this Act, and in the case of the enactments specified in Part II of that schedule, as from the appointed day, to the extent specified in relation thereto in the third column of that schedule."

When Part II of sched. IX is examined, it is found that the Town and Country Planning Act, 1944, ss. 1 to 14, are repealed. Section 1 is the section under which the applications were originally made. Section 113 (5) provides:

"Without prejudice to the provisions of s. 38 of the Interpretation Act, 1889 (which relates to the effect of repeals), the provisions of sched. X to this Act (being transitory and consequential provisions) shall have effect in relation to the repeals effected by this section."

Schedule X, para. 16, reads as follows:

"Where, at any time before the appointed day, application has been made to the Minister for an order under s. 1 of the Act of 1944 declaring any land to be subject to compulsory purchase under Part I of that Act, the Minister may, if he thinks fit, direct that proceedings on the application shall be continued under that Act after that day; and where any such direction is given, s. 1 of the Act of 1944, and s. 13 of that Act and sched. I to that Act so far as they relate to an order under the said s. 1, shall continue to apply in relation to the application, and an order may be made thereon accordingly."

The argument is that the letter of June 16, 1948, being before the appointed day, is not authorised by para. 16 of that schedule and that it does not come within the language of the Interpretation Act, 1889, s. 37.

In my view, s. 37 applies to the present case. It clearly gives power to take the necessary steps to set up the machinery for bringing the Act of 1947 into operation as well as for doing such an act as appointing a day for the Act to come into operation. The words in s. 37 dealing with regulations, byelaws, notices, prescribed forms, and so forth, make it, I think, clear that matters of that kind may be dealt with under the provisions of s. 37 so that the necessary machinery will function as soon as the Act comes into operation and things shall not come to a standstill by reason of the repeal of an existing Act. In the present case these applications were pending under s. 1 of the Act of 1944. I think that that is just the kind of thing which is contemplated by s. 37 of the Interpretation Act, 1889, and that, having regard to the provisions of para. 16 of sched. X, the order contained in the letter of June 16, 1948, was a valid order although it was made before the appointed day.

For the reasons which I have stated, I agree with the judgment of the Divisional Court and think that these appeals must fail.

ASQUITH, L.J.: I agree. I think that the only point of substance raised by counsel for the applicants was when he argued that s. 37 of the Interpretation Act, 1889, did not apply because the giving of the directions contained in the letter of June 16, 1948, was not necessary or expedient for the purpose of bringing the Act of 1947 into operation. He appeared to submit that nothing could be necessary or expedient for this purpose except such a thing as fixing the appointed day. I cannot agree that the words should receive so restricted an interpretation. It seems to me that the preservation of applications made under the Act of 1944 was necessary and expedient for the purpose of giving the Act of 1947 material on which to operate, and that this is enough to satisfy the words "for the purpose of bringing the Act into operation." For those reasons and the other reasons given by **TUCKER, L.J.**, I agree that the appeals should be dismissed.

JENKINS, L.J.: I also agree.

Appeal dismissed.

Solicitors: *Warren, Murton & Co.*, agents for *H. A. Dodman*, Leeds (for the applicants, *Montague Burton, Ltd.*); *Warren, Murton & Co.* (for the other applicants); *Treasury Solicitor* (for the Minister of Town and Country Planning); *Sharpe, Pritchard & Co.*, agents for *E. H. Bullock*, town clerk (for the *Kingston-on-Hull* corporation); *Cree, Godfrey & Wood*, agents for *Thomas Alker*, town clerk (for the *Liverpool* corporation).

[Reported by J. D. PENNINGTON, ESQ., *Barrister-at-Law.*]

Re HICKMAN'S WILL TRUSTS. Re PLAYFAIR (deceased).

PALMER v. PLAYFAIR AND OTHERS.

[CHANCERY DIVISION (Danckwerts, J.), June 7, 1950.]

H *Will—Lapse—Gift of £20,000 to be held on trusts of daughter's marriage settlement—Covenant by testator in settlement to bring £10,000 into the settlement—£20,000 declared to be "in addition" to the £10,000—Settlement trust fund vested in daughter's son—Death of son before death of testator—Destination of £20,000 on daughter's death.*

By the terms of a marriage settlement, dated Jan. 11, 1888, and made on the marriage of the testator's daughter, the "wife's trust fund" was to be held on trust for the wife for life and after her death on trust for

the husband during his life, and, subject to the interests of the husband and wife and in default of any appointment by them in favour of the issue of the marriage, on trust for the children of the marriage who attained the age of twenty-one. If there were no child of the marriage who attained a vested interest under the trusts of the settlement, the wife's trust fund was to be held, subject to the husband's and wife's interests therein, on trust for the wife's brothers, A. and H. (the testator's two sons). By the settlement the testator covenanted that, within six months of his death, his executors would pay £10,000 to the trustees of the settlement to be held on the same trusts as the wife's trust fund under the settlement, or as near thereto as circumstances would permit. There was only one child of the marriage, L., who attained a vested interest in the wife's trust fund and the £10,000, but died on Apr. 20, 1915, at the age of twenty-six. By his will, made on May 17, 1915, the testator gave £20,000 to the trustees of his daughter's marriage settlement "to be held by them on the trusts of the settlement," and he declared that the sum of £20,000 was "in addition to the sum of £10,000 covenanted by me to be settled upon her by the . . . settlement." He gave his residuary personal estate on trust for his son, H. The testator died in 1917 and the daughter died in 1948, her husband having predeceased her. The question was whether, on the true construction of the will and in the events which had happened, the £20,000 was to be held, on the daughter's death, on the same trusts as the "wife's trust fund" under the marriage settlement, or whether it passed (a) to the estates of A. and H. under the ultimate trust of the wife's fund under the settlement, or (b) to H. under the residuary bequest in the testator's will. It was contended by the personal representatives of H. that there was a referential trust in regard to the sum of £20,000, so that the trusts of the marriage settlement had to be written out in the will, and, therefore, as L. was dead at the date of the testator's death, the principle of lapse applied and L. could take no interest under the will, and, accordingly, the £20,000 was not disposed of effectively after the daughter's death, but devolved as part of the testator's residue.

HELD: as the testator was the settlor of the £10,000 as well as of the £20,000, and had clearly indicated in his will that he was treating the two sums as one fund by declaring that the sum of £20,000 was "in addition" to the sum of £10,000 covenanted by him to be settled on the trusts of the marriage settlement, there was an accretion of the £20,000 to the £10,000 and the sum of £20,000 went on the same trusts as the "wife's trust fund" under the settlement, these trusts having been effectively declared by the settlement in favour of L., whose interest passed to his estate.

[AS TO REFERENTIAL TRUSTS, see HALSBURY, Hailsham Edn., Vol. 29, pp. 803, 804, para. 1110; and FOR CASES, see DIGEST, Vol. 43, pp. 602-606, Nos. 492-518.]

Cases referred to:

- (1) *Re Beaumont*, [1913] 1 Ch. 325; 82 L.J.Ch. 183; 108 L.T. 181; 43 Digest 602, 494.
- (2) *Trew v. Perpetual Trustee Co.*, [1895] A.C. 264; 64 L.J.P.C. 49; 72 L.T. 241; 43 Digest 607, 525.
- (3) *Re Slade*, (1919), 89 L.J.Ch. 412; 122 L.T. 321; 44 Digest 417, 2478.
- (4) *Re Fraser*, [1913] 2 Ch. 224; 82 L.J.Ch. 406; 108 L.T. 960; 40 Digest 568, 1053.
- (5) *Re Campbell's Trusts*, [1922] 1 Ch. 551; 91 L.J.Ch. 433; 127 L.T. 236; 40 Digest 568, 1054.
- (6) *Re Shelton's Settled Estates*, [1945] 1 All E.R. 283; [1945] Ch. 158; 114 L.J.Ch. 198; 172 L.T. 237; 2nd Digest Supp.

- (7) *Re Gooch*, [1929] 1 Ch. 740; 98 L.J.Ch. 285; 141 L.T. 150; Digest Supp.
 (8) *Re Paul's Settlement Trusts*, [1920] 1 Ch. 99; 88 L.J.Ch. 530; 121 L.T. 544; 44 Digest 784, 6414.
 (9) *Re Currie's Settlement, Re Rooper*, [1910] 1 Ch. 329; 79 L.J.Ch. 285; 101 L.T. 899; 44 Digest 492, 3111.
 (10) *Culsha v. Cheese*, (1849), 7 Hare 236; 18 L.J.Ch. 269; 68 E.R. 97; 44 Digest 494, 3133.

A ADJOURNED SUMMONS to determine the destination of a sum of £20,000, given by the will of Henry Thomas Hickman to the trustees of his daughter's marriage settlement to be held by them on the trusts of the settlement. By the settlement Henry Hickman had covenanted to bring the sum of £10,000 into the settlement, and by his will he declared that the sum of £20,000 was "in addition" to the sum of £10,000. Henry Hickman died in 1917, and his daughter, Lady Playfair, died in 1948, having survived her husband. Her only child attained a vested interest in her trust fund under the settlement, but died, intestate and a bachelor, on Apr. 20, 1915, leaving his father, Lord Playfair, as his sole next-of-kin. By his will Lord Playfair purported to give to his wife all moneys that should have passed to the marriage settlement trustees through her and which vested in him as his son's next-of-kin. The report deals with the question whether, on the true construction of the will of Henry Hickman and in the events which had happened, the £20,000 was to be held, on Lady Playfair's death, on the trusts of the marriage settlement, or whether the principle of lapse applied, and (a) an ultimate trust in the settlement, in favour of Lady Playfair's brothers, came into operation, or (b) the money devolved as part of Henry Hickman's residuary estate. The facts and the relevant provisions of the settlement and of the wills appear in the judgment.

H. E. Francis for the plaintiff, the trustee of the marriage settlement.

Wilfrid Hunt for the first defendant, a personal representative of Lady Playfair.

E *H. A. Rose* for the second defendant, Lloyds Bank, Ltd., personal representative of Harry Hickman.

Dunbar for the third defendant, beneficially interested in the estate of Arthur Hickman.

Myles for the fourth and fifth defendants, interested in the residuary estate of Lord Playfair.

F DANCKWERTS, J.: By a marriage settlement, dated Jan. 11, 1888, and made between George James Playfair, who afterwards became Lord Playfair, of the first part, Augusta Mary Hickman, who became Lady Playfair, of the second part, Henry Thomas Hickman, her father (hereafter referred to as "the testator"), of the third part, and certain trustees, of the fourth part, funds were settled, on the occasion of the marriage of George Playfair and G Augusta Hickman, on certain trusts.

H The material trusts are those relating to a sum of £5,000, brought into settlement by the wife and described for the present purpose as "the wife's trust fund." The trusts of the wife's trust fund were for the wife for life and after her death for her husband during his life or until he should re-marry, and, subject to those interests, on trust for the issue of the marriage as the husband and wife should appoint. They never executed any appointment. Then the trusts of the wife's fund proceed:

"And it is hereby agreed that the capital and income . . . of the wife's trust fund in default of and until and subject to any such appointment as aforesaid . . . shall be held in trust for all or any of the children or child of the said intended marriage who being sons or a son attain the age of twenty-one years or being daughters or a daughter attain that age or marry under it and if more than one in equal shares . . ."

In the event of there not being any child of the said intended marriage who should attain a vested interest in the trust therein contained

" . . . the wife's trust fund and the income and statutory accumulations (if any) of the income thereof or so much thereof as shall not have become vested or been applied under any of the trusts or powers affecting the same shall after the death of the said George James Playfair and such failure of children as aforesaid be held in trust for . . . Arthur Percy Hickman and Harry Otho Devereux Hickman, brothers of the said Augusta Mary Hickman, in equal shares."

By the same settlement the testator covenanted with the trustees, and also, as a separate covenant, with Augusta Mary Hickman:

" . . . that if the said intended marriage shall be solemnized . . . the executors or administrators of him the said Henry Thomas Hickman shall within six calendar months from his death pay to the trustees or trustee the sum of £10,000 with interest for the same in the meantime at the rate of three per cent. per annum . . ."

It was declared:

" . . . that the trustees or trustee . . . shall stand possessed of the said sum of £10,000 upon the trusts and subject to the powers provisos agreements and declarations hereinbefore declared and contained concerning money forming part of the wife's trust fund or as near thereto as circumstances will permit."

Therefore, the fund of £10,000, when paid over after the testator's death, went on the same trusts as the wife's trust fund.

The marriage was solemnized on Jan. 12, 1888, *i.e.*, the day after the settlement. There was only one child of the marriage, a son, Lyon Playfair, who was killed in action on Apr. 20, 1915. He was then aged twenty-six years and, therefore, there is no doubt that, under the trusts of the wife's trust fund contained in the marriage settlement, he obtained a complete and vested interest in the wife's trust fund, including the £10,000 which the testator had covenanted to be paid over. On May 17, 1915, the testator made his will under which he bequeathed his residuary personal estate on trust for his son, Harry Otho Devereux Hickman, absolutely, and he bequeathed to his trustees a sum of £20,000 on trust which he declared, near the end of his will, in these words:

" And I declare that my trustees shall stand possessed of the said sum of £20,000 on trust to pay the same to the trustees for the time being of the settlement dated Jan. 11, 1888, made on the marriage of my said daughter, Lady Playfair, and to be held by them on the trusts of the said settlement and I declare that the said sum of £20,000 is in addition to the sum of £10,000 covenanted by me to be settled upon her by the said settlement."

The testator died on Jan. 14, 1917, having had two sons, Harry Otho Devereux Hickman, who died on Apr. 5, 1946, and whose personal representative is Lloyds Bank, Ltd., and Arthur Percy Hickman, who died on June 6, 1888, and, therefore, predeceased his father.

Lord Playfair predeceased his wife and died on Dec. 25, 1939, having made a will, dated Dec. 28, 1933, in which he refers, in cl. 8, to the death of his son and makes a provision, consequential on the son's death, in these terms:

" Whereas through the death of my son the only child of my marriage with my said present wife the moneys inherited by her from any of her family and her father and subsequently from her mother but subject to the precedent life interests therein created by our marriage settlement have become vested in me as administrator and sole next-of-kin of my said son now I hereby give and bequeath to Lady Playfair or if she shall

predecease me then to her personal representatives to be administered as part of her estate all moneys that shall have passed to our marriage settlement trustees through her my said wife whether by the assignment therein or through the covenant for settlement of her after-acquired property therein contained . . .”

A He gave his residuary estate on certain trusts under which the Honourable Lucy Jessie Lyon Soltau Symons, the fourth defendant, is now tenant for life in possession, and eventually the capital is to go to the sons of his uncle, Sir Lambert Playfair. Lady Playfair died on Dec. 9, 1948, and, as her life interest under the marriage settlement of 1888 thus came to an end, the question arises what is to be done with the moneys which were directed to be held on the same trusts as the wife's trust fund under the settlement. There is no doubt that the £10,000, which the testator covenanted to bring into the settlement, was absolutely vested in Lord Playfair's only son, Lyon, and, on Lyon's death, his interest therein passed to his father, Lord Playfair, and passes under Lord Playfair's will.

B The question which I have to decide is whether the same result occurs in respect of the sum of £20,000 which was bequeathed by the testator's will.

C It is contended by counsel for Lloyds Bank, Ltd., the personal representative of the testator's son, Harry Hickman, that that £20,000 forms part of the estate of Harry Hickman, passing either by virtue of the residuary bequest contained in the testator's will, or by addition, which has the same result. Counsel for Lloyds Bank, Ltd., contends that this is a case of referential trusts, and, therefore, under the principle which has been established by a number of authorities, one has to write out, in the will, the relevant trusts of the marriage settlement. One then writes out a trust in favour of Lyon Playfair, but, as he was dead at the date of the testator's death, the principle of lapse applies and Lyon can take no interest under the will. Therefore, the £20,000 is not disposed of effectively after the death of Lady Playfair and devolves as part of the residuary bequest. In *Re Beaumont* (1), FARWELL, L.J., sitting as an additional judge of the Chancery Division, stated that principle quite clearly and applied ([1913] 1 Ch. 328) certain observations of an Australian judge, MANNING, J., cited by the Privy Council in *Trew v. Perpetual Trustee Co.* (2), to the effect that the only safe course is to write out the trusts of the settlement to which reference is given and which are brought in referentially in the manner which I have described. Counsel for Lloyds Bank, Ltd., argues that the same principle is recognised plainly by LORD BUCKMASTER (89 L.J.Ch. 416) in *Re Slade* (3), and he also referred me to the observations of SARGANT, J. ([1913] 2 Ch. 236) in *Re Fraser* (4); *Re Campbell's Trusts* (5) per RUSSELL, J. ([1922] 1 Ch. 562); *Re Shelton's Settled Estates* (6), a decision of VAISEY, J.; and *Re Gooch* (7), a decision of CLAUSON, J. On the other hand, *Re Paul's Settlement Trusts* (8), a decision of P. O. LAWRENCE, J., is cited as an authority for the argument that there is an accretion of the £20,000 to the £10,000 which the testator covenanted to bring into the settlement, but counsel for Lloyds Bank, Ltd., said that that case was disapproved of by RUSSELL, J., in *Re Campbell* (5) and by VAISEY, J., in *Re Shelton's Settled Estates* (6). Whether RUSSELL, J., and VAISEY, J., exactly disapproved of the decision seems to be open to doubt. They certainly distinguished it, and, as was pointed out by H counsel for Lloyds Bank, Ltd., they recognised the general principle that, if there were referential trusts, one had to write them out, and, therefore, the funds settled by reference did not necessarily follow the destination of the funds originally settled *i.e.*, they were not so amalgamated with those funds that they would devolve with them in all respects. There is certainly support for the principle contended for by counsel for Lloyds Bank, Ltd., that, where the writing out of trusts involves a gift to a person who predeceased the testator, then that part of the trust must, at any rate, fail. There seems quite clear

authority for the proposition in *Re Currie's Settlement* (9), and in *Culsha v. Cheese* (10), which is referred to in JARMAN ON WILLS, 7th ed., vol. 1, p. 403.

I think that, if I came to the conclusion that the trusts in this case are simply referential trusts—the case of a settlor referring to trusts contained in another document and settled by another person in a separate instrument—it may be that the result contended for by counsel for Lloyds Bank, Ltd., might occur, though I cannot help observing that the cases which he cited in support of his argument were all cases in which the circumstances were very substantially different. In *Re Currie's Settlement* (9), a decision of JOYCE, J., the effect of the trust would have been to return the property to the testator, and, therefore, it would obviously have produced an ineffective trust, and there was a direction in the referential provisions whereby only the trusts which were effective were to be incorporated. It seems to me, therefore, that the circumstances are so different in those cases that it does not follow that I ought to apply to the present case the rule applied in them.

In the present case, I find indications which enable me to come to the conclusion that there is an accretion of the £20,000 bequeathed by the will to the £10,000 which the testator covenanted to bring into settlement by the terms of the settlement of 1888. As was pointed out by counsel for Lady Playfair's personal representative, the settlor is the same person in each case. The testator was the person who covenanted to settle the sum of £10,000, and who made the will bequeathing to his trustees the sum of £20,000, and that £20,000 is to be handed over by his trustees to the trustees of the settlement to be held by them on the trusts of the settlement. He then went on to declare in his will that the sum of £20,000 was in addition to the sum of £10,000 covenanted to be settled by him. It seems to me that, although a provision referring to the fund as being in addition to other funds is not regarded as conclusive by RUSSELL, J., in *Re Campbell* (5), yet in the present case it shows that the testator is treating the £20,000 and the £10,000 as one fund. In those circumstances, it seems to me that the £20,000 follows the destination of trusts which were effectively declared by the settlement, because under the settlement there is no doubt that the trust in favour of Lyon Playfair was fully effective. He had an indefeasible interest and that passed to his estate. Therefore, I come to the conclusion that, in the event which has happened, the £20,000 goes on the same trusts exactly as the £10,000 and the wife's trust fund under the marriage settlement of 1888.

[HIS LORDSHIP then dealt with cl. 8 of Lord Playfair's will and held that, on the true construction thereof, the sum of £10,000, which Henry Hickman covenanted to bring into the marriage settlement, and the sum of £20,000, bequeathed by Henry Hickman's will to the trustees of the settlement to be held on the trusts thereof, passed under the gift to Lady Playfair in cl. 8, and not under the residuary bequest, and, accordingly, in the events which had happened, the investments and moneys in the hands of the settlement trustees and representing these sums were now to be paid or transferred to the personal representatives of Lady Playfair as part of her estate.]

Declaration accordingly. Costs of all parties, as between solicitor and client, to be paid out of the capital of the £20,000.

Solicitors: *Golding, Hargrove & Palmer* (for the plaintiff and the first defendant); *Field, Roscoe & Co.* (for the second defendant); *Stevens & Bolton*, Farnham, Surrey (for the third defendant); *Burton, Yeates & Hart*, agents for *Winterbotham, Ball & Gadsden*, Stroud (for the fourth and fifth defendants).

[Reported by R. D. H. OSBORNE, Esq., Barrister-at-Law.]

R. v. HUNT AND ANOTHER.

[COURT OF CRIMINAL APPEAL (Lord Goddard, C.J., Humphreys and Parker, JJ.), May 15, 1950.]

Criminal Law—Gross indecency—No actual physical contact proved—Criminal Law Amendment Act, 1885 (c. 69), s. 11.

A The appellants were charged with committing acts of gross indecency with one another, and evidence was given that they were found in a shed indulging in a grossly indecent exhibition, but that there was no physical contact between them. The jury, after having retired to consider their verdict, returned to court and informed the deputy chairman of quarter sessions that, though satisfied that the appellants intended to commit an offence, they wanted to know whether it was necessary for the prosecution to prove that there had been actual physical contact between the appellants. B The deputy chairman directed them that actual contact was not a necessary ingredient of the offence.

HELD: the direction given was correct.

C [AS TO GROSS INDECENCY WITH A MALE PERSON, see HALSBURY, Hails-ham Edn., Vol. 9, p. 399, para. 676; and FOR CASES, see DIGEST, Vol. 15, p. 753, Nos. 8122-8127 and Digest Supp.]

APPEALS against conviction and applications for leave to appeal against sentence.

D The appellants were convicted at Wiltshire Quarter Sessions of committing an act of gross indecency with each other and were sentenced to twelve months' imprisonment. The facts appear in the judgment of the court delivered by LORD GODDARD, C.J.

Rountree for the appellants.

Ackner for the Crown.

E LORD GODDARD, C.J., delivered the following judgment of the court. The appellants were convicted at Wiltshire Quarter Sessions of an act of gross indecency. I do not propose to go through the disgusting evidence. They are two grown men, and they were watched by the police because their movements caused suspicion, and they were found in a shed in positions which can only be described as constituting filthy exhibitions by the one to the other.

F The point on the appeal arises from the fact that the jury, having retired to consider their verdict, returned to court and asked for a direction whether, to constitute the offence of committing gross indecency between the appellants, it was necessary for the prosecution to prove that there had been some actual physical contact between them—touching their private parts, or something of that sort, with their hands. It is quite clear that physical contact is not necessary to constitute the offence. If two men put themselves in such a position that it can be said that there is a grossly indecent exhibition going on, G they can be found Guilty of committing an act of gross indecency. If a third person had walked into this shed, he would have seen the most shocking indecency between the appellants.

The deputy chairman, in dealing with the matter, put it in this way:

H "I do not know whether you mean that you are quite satisfied that no contact had taken place. Do you mean that? You are satisfied, I gather, that there was the intention there?"

The foreman of the jury: Yes.

The deputy chairman: But you are not satisfied that any actual act, any contact, had taken place?

The foreman of the jury: That is right."

The deputy chairman then told the jury that it was not necessary that there should be actual contact, but they had to decide whether or not there was

an act of gross indecency. The act of gross indecency could, of course, be supported on the evidence that the appellants were indulging in a grossly indecent exhibition. In those circumstances, we cannot say that there was anything irregular at the trial. The jury came back and said they wanted further direction. Further direction was given to them, and we cannot say that it was otherwise than accurate. Therefore, the verdict must stand.

With regard to the sentence, it is a very different matter. This was a matter between two grown men, who, no doubt, are thoroughly ashamed of themselves. One of them has suffered a penalty in the loss of his occupation. The deputy chairman, however, has reported that the bench took a very serious view of this case, and he sentenced the appellants to twelve months' imprisonment each. In the opinion of the court, those sentences were not ones which the offence justified, because there was no element of corruption in it. The place where the appellants performed this act was not a public urinal. It was late at night and in a shed. It was an offence against the statute, but the court thinks that justice will be done if we reduce each sentence to one of three months' imprisonment to run from the date of conviction.

Appeal against conviction dismissed. Appeal against sentence allowed.

Solicitors: *Taylor, Willcocks & Co.*, agents for *Kinneir & Co.*, Swindon (for the appellants); *Townsend*, Swindon (for the Crown).

[*Reported by H. McL. MORRISON, Esq., Barrister-at-Law.*]

Re MILL'S DECLARATION OF TRUST. MIDLAND BANK EXECUTOR AND TRUSTEE CO., LTD. v. MILL AND OTHERS.

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Cohen and Singleton, L.JJ.), June 14, 1950.]

Perpetuities—Settlement—Limitation dependent on void limitation—Accord with previous valid limitations—"Issue."

By a deed of declaration of trust a settlor settled certain investments (called "the trust fund") on trust to pay one half of the annual income thereof to his wife during her life and the other half thereof to his daughter during her life, and to pay the whole of the income to the survivor of his wife and his said daughter. By cl. 4 the settlor provided: "From and after the death of the survivor the trustees shall stand possessed of the trust fund in equal shares for all or any the children of his said daughter living at the death of the survivor who attain the age of twenty-one years or being female marry under that age." By cl. 5 he directed that each such child's share should be held on trust to pay the income thereof to such child for life, and by cl. 6 he provided: "After the death of each of such children the capital and income of the share of such child shall be held in trust for all or any one or more exclusively of the others or other of the issue of such child (whether children or remoter descendants) at such time and if more than one in such shares with such provisions for maintenance education advancement and otherwise at the discretion of any persons and with such gifts over and generally in such manner for the benefit of such issue or some or one of them as such child shall by deed revocable or irrevocable or by will or codicil appoint but so that under any appointment a child of the appointor shall not (otherwise than by way of advancement) take a vested interest except upon attaining the age of twenty-one years or upon marriage And in default of and until and subject to any such appointment in trust for all or any the children or child of such child who attains the age of twenty-one years or being

female marry under that age and if more than one in equal shares . . .” By cl. 8: “Upon the death of the survivor of the wife and the said daughter and in the event of the said daughter dying without leaving issue who attains a vested interest the trustees shall sell and convert into money such part of the trust fund as does not consist of money and shall distribute the proceeds in manner following . . .” and the settlor gave sums of money to various charities and directed that the balance of the trust fund be distributed among certain named persons. On May 11, 1939, the settlor died. On Nov. 10, 1948, the settlor's daughter died, having married, but without there having been issue of her marriage. The settlor's widow survived the daughter.

HELD: on construction, the word “issue” in cl. 8 referred to grandchildren of the daughter and did not include children of the daughter; cl. 8, therefore, could not be regarded as alternative to cl. 4, but must be linked with cl. 6 and was a limitation to take effect on the failure of the events referred to in cl. 6; and, as those events were such as to transgress the rule against perpetuities, cl. 8 failed.

Decision of ROMER, J. ([1950] 1 All E.R. 789), *affirmed*.

[AS TO APPLICATION OF RULE AGAINST PERPETUITIES TO ALTERNATIVE LIMITATIONS, see HALSBURY, Hailsham Edn., Vol. 25, pp. 143-145, paras. 240-243; and FOR CASES, see DIGEST, Vol. 37, pp. 102-106, Nos. 374-398.]

Case referred to:

(1) *Lassence v. Tierney*, (1849), 1 Mac. & G. 551; 15 L.T.O.S. 557; 41 E.R. 1379; 37 Digest 99, 346.

APPEAL by the second defendant, the Jewish Board of Guardians, from an order of ROMER, J., dated Mar. 8, 1950, and reported [1950] 1 All E.R. 789.

The summons was issued to determine the construction of certain clauses in a deed of declaration of trust executed by one Henry Mill. The arguments were directed to the question whether the fact that cl. 6 was admittedly void for perpetuity also caused cl. 8 (under which, among others, the Jewish Board of Guardians was beneficially interested) to fail. ROMER, J., held that cl. 8 did so fail. The Jewish Board of Guardians appealed.

R. S. Lazarus for the second defendant.

Cross, K.C., and *B. S. Tatham* for the first defendant, the settlor's widow.

The trustees of the deed and the daughter's personal representatives were not parties to the appeal.

SIR RAYMOND EVERSHERD, M.R.: This appeal arises out of a voluntary settlement made on Jan. 23, 1936, by the settlor, Mr. Henry Mill, who has since died. Broadly, the object was to make provision for his wife and descendants, and the present question has arisen because of the failure of his family. The first operative clause to which I need refer is that which provided for the income of the trust fund being payable to the wife during her life as to one-half and to his daughter, Agnes Martha Mill, during her life as to the other half and then for the whole income to be paid to the survivor. The daughter, Agnes Martha Mill, predeceased her mother, dying without issue.

Clause 4 of the settlement provides:

“From and after the death of the survivor [of the wife and daughter] the trustees shall stand possessed of the trust fund in equal shares for all or any the children of [the settlor's] said daughter living at the death of the survivor who attain the age of twenty-one years or being female marry under that age.”

It is the first limb of the argument of counsel for the second defendant that that clause, considered by itself, is a gift absolutely of the corpus of the fund in equal shares to such of the children, if any, of Agnes Martha Mill who (a)

survive Agnes Martha Mill and their grandmother, the settlor's wife, and (b) attain twenty-one or, if female, marry under that age. I shall assume that part of the argument in counsel's favour, and I will next take cl. 5 which, on the assumption I make, is a limitation or cutting down of the absolute interest which has been previously conferred. That clause provides:

"The trustees shall stand possessed of the share of each of such children . . . upon trust to pay the income thereof to such child for his or her life."

Therefore, on the assumption on which I am proceeding, if there is a child who survives both mother and grandmother and is twenty-one, or, if a female, has married, that child takes a life interest only and not an absolute interest. Clause 6 is designed to provide for the ultimate destination of the corpus of the share of each child, and this clause, it is conceded, offends against the perpetuity rule. It provides:

"After the death of each of such children the capital and income of the share of such child shall be held in trust for all or any one or more, exclusively of the others or other of the issue of such child (whether children or remoter descendants) at such time and if more than one in such shares . . . as such child shall by deed . . . or by will appoint but so that under any appointment a child of the appointor shall not (otherwise, than by way of advancement) take a vested interest except upon attaining the age of twenty-one years or upon marriage."

As the argument has it, and I assume has it correctly, "each of such children" at the beginning of this clause again means such of the children of Agnes as survive and attain the age to which I have referred. There follows a provision that in default of appointment the share goes to the child's children at twenty-one, or earlier marriage in the case of a female, in equal shares. So, cl. 6 purports to postpone the vesting of the capital of these shares until the children of the daughter's child should attain at the earliest twenty-one years or marry below that age. The daughter was living at the date of the settlement, but she was unmarried and it needs no further reference to point out that this provision clearly went far beyond the limits allowed by the rule.

Then there is a hotchpot clause, over which I shall pass, and then comes the clause which has given rise to the present problem. In its composition the settlor has, indeed, wandered somewhat sadly from clear expression. He has forgotten that he is making a settlement and not a will, because he speaks of legacies and residue, but these imperfections, I think, do not make any difference to the present problem. Clause 8 is:

"Upon the death of the survivor of the wife and the said daughter and in the event of the said daughter dying without leaving issue who attains a vested interest the trustees shall sell . . ."

and then there is a provision for the distribution of the proceeds of sale (which in the event have turned out to be about £23,000) among a large number of bodies of persons of whom the second defendant is one, an order having been made that the second defendant should represent all persons interested under cl. 8. I need only refer to one other clause, *viz.*, cl. 9:

"The statutory power of advancement shall apply for the benefit of any child or other issue of the said daughter."

I have observed in the course of my narrative that the argument of counsel for the second defendant must pre-suppose (and, as I have already stated, I am prepared to assume in his favour that he is right) that no interests under cll. 4, 5 and 6 are taken by any issue of the daughter save such children or descendants of such children as survive their mother and grandmother and also attain the age of twenty-one years or marry under that age. It is further assumed that cl. 4 did operate, save to the extent that the later clauses cut

it down, to confer absolute interests, but the absolute interest is only an absolute interest in favour of children who qualify in the way I have stated. The result, without doubt, might have been highly capricious. To take one example, suppose that the daughter, Agnes, had had a son, that that son married and had children, and then, though, let us say, of ripe years, had died while his mother was still alive. The astonishing result would have been that the grandchildren of the daughter, the son's children, who were the only descendants of the settlor

A would be absolutely excluded from taking under this settlement. That result, however, is obviously possible to justify by the language the settlor has chosen to use. It is on that language and on the assumptions in regard to it which I have made that counsel for the second defendant has so neatly founded the rest of the argument.

B The rest of the argument is this. When you come to the vital cl. 8 you have there a double event supposed—first, the death of the survivor of the wife and daughter and “the event of the said daughter dying without leaving issue who attains a vested interest.” The settlor, says counsel, had indicated both before and after this clause that he understood quite well what is meant by the word “issue.” He has said in terms in cl. 6, “the issue of such child (whether children or remoter descendants)” and again in cl. 9 he uses the

C phrase “for the benefit of any child or other issue of the said daughter”. So, says counsel, there is no room for doubt that in cl. 8, when this phrase is used “of the said daughter dying without leaving issue,” he means without leaving children or more remote descendants. Counsel says there is no justification for departing from that *prima facie* meaning of the word “issue.” It will be useful if at this point I say that in the court below counsel preferred

D an argument based on the phrase “leaving issue” and said that it ought to be confined to “leaving issue living at the daughter's death,” and with that point ROMER, J., dealt. We have not been troubled with it in this court. I will return to the point that has been argued, and let me suppose that counsel is right. All else, I think, follows quite neatly from the assumption. In terms it is true that the settlor has stated the contingency to be that of the daughter

E dying without leaving children or more remote issue to take a vested interest, an event which on the face of it might happen a long way ahead, and would, therefore, be equally defeated by the operation of the rule against perpetuities as cl. 6 is defeated. But when the practical operation of the clause is examined in the light of what I have indicated, it emerges, says counsel, that the only event on which this clause can take effect, save the death of the survivor of

F the wife and daughter, is the death of the daughter without leaving children who attain the age of twenty-one or otherwise attain a vested interest under cl. 4, and, since that event must be within the period allowed by law, then in practice, though not in terms, cl. 8 is shown only to be capable of operation within the permitted period, and is, therefore, effective. The result depends on the various points I have already indicated and the fact that the settlor

G has chosen to make use of a series of provisions on which the so-called rule in *Lassence v. Tierney* (1) produces the result that the only circumstance in which there could be a total failure of the provisions in cl. 4, 5 and 6 is the failure of the daughter to have children who qualify under cl. 4. Once they have qualified under cl. 4 then, though cl. 5 and 6 may fail (and I assume for this purpose, as one must, that no question of perpetuities arises under

H cl. 6), still the only effect of that failure would be to revive the original interest under cl. 4. If, on the other hand, there are never children under cl. 4 to take, then none of the other provisions of cl. 5 and 6 comes into operation at all and one passes, so to speak, straight from cl. 4 to cl. 8.

Counsel further says that the fact that cl. 8 opens with the phrase “upon the death of the survivor of the wife and the said daughter” shows that it is linked back to cl. 4, which opens with the phrase “from and after the death of the survivor,” and is not to be treated as part of the superimposed

limitations which open with cl. 5, and that cl. 8, so to speak, is alternative to cl. 4, and, therefore, within the period. The argument has been further narrowed as the result of the argument in answer, which was no less brief and no less clear, and I am persuaded by it that ROMER, J., was right, for on this part of the case the learned judge said, after referring to the way in which the rule in *Lassence v. Tierney* (1) might work ([1950] 1 All E.R. 792):

"As a question of construction, however, I am of opinion that the word 'issue' in cl. 8 is referable exclusively to cl. 6 and was not intended to include children of the daughter. There is a clear distinction drawn in the settlement between children of the daughter and more remote issue. It is to the latter alone that the enjoyment of the capital was intended to pass, and it is with reference to them alone that the words 'vested interest' had previously been used. Accordingly, in my judgment, the event referred to in cl. 8 is the event of the daughter dying without leaving grandchildren or remoter issue who attain a vested interest under cl. 6."

In my judgment, that is correct, and for the reasons which the learned judge gives. If that is correct, it seems to me, and, indeed, counsel for the second defendant concedes, the foundation of his argument has gone.

I should, I think, be merely repeating what fell from the learned judge if I went more elaborately into this matter. It is sufficient for me to say that when in this clause the settlor speaks of the daughter dying without leaving issue who attain a vested interest, it seems to me he is referring, as the learned judge said, to the provisions of cl. 6 in which, for the first time, one finds a reference to taking a vested interest. It seems to me that, by using that language, the settlor is in effect saying: "in the event of the daughter dying without leaving issue who, as provided by cl. 6 of the settlement, attain an indefeasibly vested interest under that clause." I think it must mean that. I agree that it is no answer and is not fair to the argument of counsel for the second defendant to say that "issue" is confined to or means children. I agree that the language covers children and remoter issue, but, if he is right, the only practical effect it can have is as though "children" were written for "issue." I think the testator has shown that he knows what "issue" means—in other words, that the argument counsel used earlier in the case may now be turned somewhat against him. By this formula the settlor has indicated plainly that he is referring to the failure of the events for which he has provided in cl. 6, and I think that the opening language of cl. 8, though not particularly apposite in the circumstances, does not prevent cl. 8 being still part of what, after all, are the engrafted trusts—part of the provisions which the settlor is making for disposing of his corpus after the children's life interests, and are not intended to be alternative, so to speak, to cl. 4. For these reasons, I think the learned judge rightly determined this point and that the declaration he made was right.

COHEN, L.J.: I agree.

SINGLETON, L.J.: I agree.

Appeal dismissed. Costs of all parties as between solicitor and client to be paid out of the settled fund.

Solicitors: *Stephenson, Harwood & Tatham* (for the second defendant); *W. R. Bennett & Co.* (for the first defendant).

[Reported by F. GUTTMAN, ESQ., Barrister-at-Law.]

KENWARD v. KENWARD.

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Bucknill and Denning, L.JJ.), June 6, 7, 8, 1950.]

Nullity—Conflict of laws—Marriage of British subject in Russia—Validity—Requirements of Soviet law not observed—No intention by Soviet officials that ceremony should be effective marriage—Mistake—No right to consortium—Wife forbidden to leave Russia—Avoidance for failure of condition.

The husband, while serving in the Royal Navy, met his wife, a Russian subject, at Archangel, and they agreed to marry with the intention of living together in England. On Oct. 16, 1945, they went through a ceremony of marriage before a Russian official. No consent to the marriage was asked for or given, the parties did not make the declarations, and the official did not ask the questions, required by the Soviet Marriage Code, but a marriage certificate was issued and the marriage was registered. Two days later the husband left Russia. In April, 1947, marriages between Russian citizens and foreigners were forbidden, and the Russian government prevented the parties from making a matrimonial home together by refusing to allow the wife to leave Russia or to permit the husband to go there. It was contended on behalf of the husband (i) that the marriage was void or voidable because of the failure to comply with the *lex loci celebrationis*; (ii) that there was a want of consent because the parties entered into the marriage in the mistaken belief that the administrative Soviet practice of granting permission to wives of foreigners to leave the Soviet Union with their husbands would continue as it existed before the marriage or that the husband would be permitted to go and see his wife; (iii) that under English law marriage imposed a duty on the spouses to live together, whereas the Russian code did not impose such duty, and, therefore, the marriage did not comply with the essentials of marriage as understood by English law; and (iv) that the subsequent Russian government ban preventing the spouses from living together frustrated the marriage. HODSON, J., held that the marriage had not been invalidated for want of formalities. The husband appealed.

HELD: (i) several formalities essential to a valid marriage in Russia had not been observed, and, as in the circumstances it appeared clear that the Soviet officials did not intend the ceremony to be an effective and valid marriage and so intentionally omitted to comply with those formalities and to fulfil other requirements of the Code, the absence of the formalities resulted in the marriage not conforming with the *lex loci celebrationis* and so being invalid.

Decision of HODSON, J. ([1949] 2 All E.R. 959), reversed on this point.

(ii) although the Soviet Code laid down that the keeping of a common matrimonial home should be fixed by mutual agreement and that a change of residence by one spouse did not impose a duty on the other to follow, there was no evidence to support the proposition that the present marriage according to the law laid down by the Russian courts involved so great a denial of the elementary principle of *consortium* as would justify the English court in saying that it was no marriage at all.

(iii) there was no ground for holding that the parties married under a mistake because they believed that the Soviet practice of granting permission to wives of foreigners to leave Russia would continue to exist as it had existed before the marriage took place, because such beliefs and hopes about the future conduct of the Soviet government could not be classified as mistakes of fact or mistakes as to the nature of the transaction into which the parties were entering.

Decision of HODSON, J. ([1949] 2 All E.R. 959), affirmed on this point.

Per DENNING, L.J.: assuming that the marriage was not invalid for want of formalities, it was voidable by reason of a condition that had

failed. A marriage of persons with different domicils might be voidable for failure of a condition imported by the personal law of one of the parties if they married on the basis of that law. It was a condition of the marriage in dispute that the parties should be allowed to live together. That condition had been destroyed by the subsequent action of the Soviet government, and, consequently, as an essential condition of the marriage had failed, the marriage was voidable in the English court on that ground.

[AS TO THE GENERAL PRINCIPLES OF VALIDITY OF MARRIAGE IN ENGLISH LAW, see HALSBURY, Hailsham Edn., Vol. 6, pp. 283-294, paras. 340-348; and FOR CASES, see DIGEST, Vol. 11, pp. 417-420, Nos. 835-864 and Digest Supp. and 2nd Digest Supp.]

APPEAL by the husband from a decision of HODSON, J., dated Nov. 9, 1949, refusing a declaration that his marriage contracted in October, 1945, in Archangel with a Russian citizen was void or voidable on the ground that the essential formalities for a valid marriage required under Soviet law had not been fulfilled, or, alternatively, that the marriage was invalidated for want of consent.

Cases referred to:

- (1) *Nachimson v. Nachimson*, [1930] P. 217; 99 L.J.P. 104; 143 L.T. 254; 94 J.P. 211; Digest Supp.
- (2) *Warrender v. Warrender*, (1835), 2 Cl. & Fin. 488; 6 E.R. 1239; 11 Digest 333, 218.
- (3) *Smith v. Brown*, (1705), 2 Salk. 666; 91 E.R. 566; 43 Digest 16, 86.
- (4) *Baindail (otherwise Lawson) v. Baindail*, [1946] 1 All E.R. 342; [1946] P. 122; 115 L.J.P. 65; 174 L.T. 320; 2nd Digest Supp.
- (5) *Re Bethell*, (1888), 38 Ch.D. 220; 57 L.J.Ch. 487; 58 L.T. 674; 11 Digest 413, 801.
- (6) *Connolly v. Woolrich and Johnson*, (1867), 11 L.C.J. 197; 3 C.L.J.N.S. 14; 11 Digest 328, 156 *ii*.

Idelson, K.C., and *Simon* for the husband.

The wife did not appear.

SIR RAYMOND EVERSLED, M.R.: This appeal raises matters of some little importance. Plainly they are matters of the utmost importance to the parties concerned, but the significance of the appeal may well be said to go beyond that which attaches to the individual characters in the case. The appeal arises out of one of a number of petitions that came before HODSON, J., all being petitions of British subjects who, during short sojourns in the dominions of the Union of Socialist Soviet Republics, entered into transactions of the nature of marriages with Russian women. It subsequently appeared that the authorities in Russia were unwilling either, on the one hand, to allow the wives to leave the Union and join their husbands, or, on the other hand, to permit the husbands to re-visit Russia. The husbands, therefore, found themselves, if the marriages were valid marriages, in the unhappy position of being, so far as can be seen, permanently deprived of any opportunity for further *consortium* with the women of their choice, but at the same time remaining in England with the status of married men and, therefore, unable to marry anyone else. In his judgment HODSON, J., noted that the conduct of the authorities in Russia might well be said to have shocked the conscience of civilised humanity, and no one approaching these cases can fail to be most sensible of sympathy for the persons concerned, but it has been said by a distinguished judge that it is no part of the judicial function to indulge in unregulated benevolence, and the question, therefore, in this case, as in the other cases which came at the same time before HODSON, J., is whether the husband can make good the case he has set forth to make and persuade this court to

declare either that the so-called marriage was a nullity or that it should be dissolved.

In October, 1945, the husband was serving in the Royal Navy, and, as one of a party of two hundred sailors, he found himself in Archangel. He met there a woman who is the respondent to his petition and whose name is Nina Nikolaevna. After they had been acquainted for some time they came to the conclusion that they would like to be married. It is, I think, clear from the evidence that it was in the mind of the wife that, if she were married, she would, hostilities being ended, be able to leave Russia and live with her husband in England. There are some grounds for supposing that she was afraid that she might suffer at the hands of her fellow citizens as a result of the fact that she had associated with a British sailor in Archangel. However, apparently she took the lead in the proceedings which culminated at 9.30 p.m. on Oct. 16, 1945, in the ceremony or formality which I have described as being the marriage with which this petition is concerned.

It is right to say (because in justice both to the husband and the wife there should be no suggestion to the contrary) that no intimacy had occurred between them before the marriage, but for that night and the night of Oct. 17, they did sleep together in Archangel. Neither could speak, with any kind of fluency, the language of the other, but, as I have already said, the arrangements for the so-called marriage were largely undertaken by the wife. The evidence shows that she approached the official who conducted the marriage ceremony in Russia on a number of occasions. It is apparent from what the husband has said that some difficulty was encountered, and I think it fair to assume that the official, who was a woman, was seeking and taking instructions from higher authority. Eventually, the official notified the wife that, if she and the husband attended on Oct. 16, the ceremony would be performed. On Oct. 18 the husband rejoined his ship and shortly afterwards he sailed from Archangel. From that day to this he has never seen the wife. It appears from the evidence that the wife was genuinely anxious to join him. She wrote him letters in affectionate terms. When he got home and was discharged from the service he approached the Soviet Embassy officials in England and took such other steps as he could to see whether the wife would be allowed to come to England. She herself appears to have visited an institution, which possesses the cryptic initials of O.V.I.R. We know nothing of its composition or its duties, but it appears to have given her short shrift. It eventually told her not to come again and made it plain to her that she should not have gone through this form of marriage, and that no notice whatever would be taken of her requests to be allowed to leave Russia and join the husband. It has been made equally plain to the husband that he would not be permitted to re-enter Russia. Finally, there was evidence from an official of the Foreign Office from which we can properly take it as proved that the British government themselves intervened, and that, in the view of the Foreign Secretary, there is no hope of the Soviet authorities resiling in any way from the attitude which they have adopted.

On those facts various points have been submitted to us. In the first place, it was submitted here and in the court below that there was an absence of compliance with the necessary form which was required according to the law of Russia, the *lex loci celebrationis*, for a valid marriage in that country. Secondly, it was said that there was an absence of any such consent on the part of the two parties to this ceremony of marriage as to suffice to create the status of marriage. Both these arguments were rejected by HODSON, J. It had been intimated to him that other grounds might be available, though they were not taken. One ground was that, apart altogether from the question of formalities and consent, there was still no marriage, because, when regard is had to the local law of Russia, the union created, assuming it was effective at

all, by the ceremony on Oct. 16, though called a marriage, did not satisfy the essential requirements of marriage as understood in these courts. To that argument the judge thought *Nachimson v. Nachimson* (1) was an answer. The second point intimated to the judge, but also not taken, was that the subsequent actions of the Soviet authorities were such that the marriage must be regarded as having been frustrated. That argument also the judge rejected, stating that there was no instance in the books of the doctrine of frustration ever having been applied to marriage as distinct from a marriage contract. Counsel for the husband asked to be given leave to put both those two latter points in addition to the ones debated before HODSON, J., and in the circumstances we gave him leave to do so.

I will deal with all these matters, but, anticipating at this stage the conclusion which I have reached, I am prepared to hold that, in all the circumstances, there was here no marriage. It is plain—and I shall develop the point presently—that all the formalities required by the law of Russia were not complied with. For my part I should be inclined to think that those matters of themselves might not go sufficiently to the root of the matter to enable the marriage to be challenged, assuming it to be open to challenge having regard to other parts of the Code. It is, however, not merely a matter of failure to comply with certain formal requirements of the Russian Marriage Code. It is necessary to judge, as it seems to me, whether or not that failure was essential by considering it in the light of other facts and (again I am anticipating my conclusion) two other very important facts in particular. The first is that, not long after this so-called marriage had occurred, the law of Russia was amended by adding a provision to the Code that all marriages between Russian citizens and foreigners were altogether forbidden. Secondly, the Russian authorities from the first moment when they were approached made it as plain as human agency can make it that, in no circumstances whatever, would they permit the two parties to this so-called marriage to rejoin each other. When those two matters are added to the absence of formalities, the inference I draw is that the authorities responsible in this case, though they eventually, if somewhat casually, carried through the necessary ceremony on Oct. 16, never intended or thought or supposed that the transaction would ever have effective form or consequence. In other words, the subsequent actions of the authorities seem to me to give the absence of formalities an importance which they might otherwise not possess.

At this stage, I should refer to the necessary Russian decrees. They are set out at length in the judgment of HODSON, J., and I should be taking up time unnecessarily if I read them again. The vital sections of the Code are s. 132 and s. 133 as amended. The substance of them is this. Section 132 puts on the parties intending to marry the obligation to subscribe to certain declarations as to the state of their health, physical and mental, and also whether they have been previously married, and so on. Section 133 imposes on the celebrating official or registrar the duty of reading to the happy pair the appropriate extracts from the Code, which are intended, among other things, to warn them of the grave consequences of making false declarations and also of the limits of the rights to *consortium* and other rights which a Russian marriage imposes on those who marry in Russia. By the amended provisions of s. 133 it is also incumbent on the registrar to enter on the passports of both parties an entry to the effect that they are married. The sections of the Code which the registrar has to read include those which state what are the essential requisites for a valid marriage in Russian law. They include mutual consent, the reaching of marriageable age, and matters of that kind. There are further provisions of the Code to which I must refer a little more fully, namely, s. 1 and s. 2. In Russia marriages are purely civil transactions, having no religious significance. Therefore, it is provided, first, that registration is the essential condition

of marriage, and, secondly, that registration is "indisputable evidence of the existence of a marriage." Section 1 provides:

"Registration of marriage is established in State and social interests and also with the purpose of protecting the person and property, rights and interests of the spouses and the children. Only registered marriage creates the rights and duties of the spouses provided for by the present Code."

By s. 2:

"The registration of marriage in the departments of civil status is an undisputable evidence of the existence of a marriage."

I have referred to s. 1 because, in considering what was in the minds of those who played a part in the so-called marriage of these two persons, it is, I think, significant that the whole law of marriage in Russia opens with this phrase:

"Registration of marriage is established in State and social interests and also with the purpose of protecting the person and property, rights and interests of the spouses and the children."

It will be convenient that I should also here add a reference to two other sections which played some part in the debate. The first is s. 7 which is not very important except that it shows the emphasis which the new order in Russia lays on the equality of the sexes. Either of the two spouses may as his or her married name choose his or her existing name or any other name. Section 9 is more important:

"Both the spouses have complete freedom in the choice of occupation and professions. The order of keeping the common household is fixed by mutual agreement of the spouses. A change in place of residence of one of the spouses does not impose on the other a duty to follow the one."

In a book produced in court containing these various sections, there is a note to the effect that in 1931 there was a decision of the Supreme Court of the Union, the Civil Cassation Collegium of the Supreme Court of R.S.F.S.R., which is alleged to have laid down that "marriage does not impose on the spouses the duty of living together." I have referred to s. 9 and that decision because they play an important part in the argument, and I shall return to them. Having read the laws laying down the necessary formalities, it is right that I should state plainly that those formalities in certain respects were not complied with in this case. No declarations were called for from either of the spouses in accordance with s. 132, stating what was their condition of mind and body, whether they had been married before, and so forth. Equally, the registrar forbore to read to the parties any of the relevant parts of s. 4, s. 5 and s. 6 of the Code as she was enjoined to do by s. 133. Finally, though she appears to have had in her possession at one time the English and Russian passports of the husband, she also forebore, contrary to the provisions of s. 133 (1), to make any entry therein of the marriage ceremony or the marriage that she had purported to celebrate. The transaction of the marriage ceremony took a very short time. Although allowance must be made for the fact that the husband's knowledge of the Russian tongue was extremely imperfect, I see no reason why his evidence should not be accepted when he described the ceremony. He said that they arrived at 9.30 p.m., and that the only other person present was the young woman behind the desk whom I have described, I hope correctly, as the registrar. The wife opened the conversation by saying that they had come along as arranged and that the young woman knew all about it. The young woman, says the husband, "asked for my British passport and my Russian passport, which I handed over." Then:

"(Q.) Can you remember anything else being said? (A.) No, I do not remember anything else being said except that after she had written out the

document she wished us luck, apparently, and we went on our way . . . I cannot recollect her signing anything."

Then he said he did not sign anything, but they did get a certificate. That was the whole thing. It took, apparently, about five minutes, and no questions were asked of the parties about their state of health, family, and so on, and there were no instructions in the proper way of living as married people according to the laws of Russia.

Those are all the facts. On them counsel for the husband argued that there was here so great a failure to comply with the formalities that the court should say that there was no marriage as provided by the local Russian law. My own conclusion is that these matters, when taken with others, are sufficient to produce the result that we can say here that there was no marriage. It will, however, be convenient, before I state my conclusions a little more precisely on that point and also deal particularly with the provision of s. 2 that the registration should be "indisputable" evidence of the existence of a marriage, that I should deal with the other arguments out of respect to them, though, because I do not accept them, I shall not deal with them very fully.

First, let me take this matter of no consent. HODSON, J., dealt with that by saying that he thought it was open to the husband to argue the point of no consent on the footing that the relevant law to be applied in judging whether or not there was consent on his part was English law, and I assume that that is correct. Then the judge goes on—as I have said, there were several petitioners before him—to say ([1949] 2 All E.R. 963):

" . . . the law of England, therefore, applies to the question whether or not they consented to their marriages, and the section of the Russian Code as to the conclusiveness of registration does not shut the door against argument directed to want of consent. It is clear that, if there is a mistake as to the identity of the person with whom the contract is made or an erroneous belief as to the ceremony—for example, a belief that the ceremony was one of betrothal, not of marriage—the marriage is void for want of consent. No such mistake can be put forward here, but it is said that in these four cases the marriages were entered into in the mistaken belief: (a) That the administrative Soviet practice of granting permission to wives of foreigners to leave the Soviet Union with their husbands would continue as it had done before the marriages took place; (b) that they would be permitted to go and see their wives after they had parted from them; and (c) that the marriages entered into imposed a duty on the spouses to live together, whereas in each case, in fact, by s. 9 of the Code no such duty was imposed on them."

A little later on he says (*ibid.*, 963):

"There is no authority for introducing into the law of England mistakes of this kind invalidating marriage."

I agree. I cannot see myself that there was here so great, so fundamental a mistake as to the essentials of this transaction that the court would be justified in saying that the transaction had no binding or operative effect on the husband whatever. These beliefs and hopes about the future conduct of the Soviet government were merely beliefs and hopes. They cannot be classified as mistakes of fact or mistakes as to the nature of the transaction into which the husband was entering. I think the main idea in the mind of both parties was that they would live together in the way, according to the ordinary acceptance of humanity, that husbands and wives do live together. That fact, I think, is not affected by the circumstance that in Russia, if they chose to live there (which they did not contemplate in any circumstances), one party or the other could not have obtained relief in the courts for reasons or on grounds which could give a right to relief in these courts. I, therefore, leave that point.

It is sufficient for me to say that I entirely agree with and accept the conclusion of HODSON, J.

A I will now pass to the two points with which the judge did not deal or only dealt with summarily in the way I have earlier indicated. I will deal with them in the order in which counsel for the husband argued them. In formulating his first point he said: "Where a British subject domiciled in England enters into a marriage abroad, even though both parties are capable of marrying each other by their own personal laws, and even though the marriage complies *quoad* formalities with the local law, still the transaction is examinable in this court to ascertain if it also complies with the essentials of marriage as understood by the law of England." That is his first proposition, and I am prepared, for the purposes of argument at any rate, to accept it. In order to arrive at the conclusion sought, I think the argument eventually came down to this, B that the marriage here entered into did not comply with the essentials of marriage as understood by the English law because of the provisions of the Russian Code as regards *consortium*. I have already read s. 9 and the reference to the decision of the Civil Cassation Collegium, and, if I have understood the argument correctly, it is on that section and that decision that counsel for the husband has based this part of his case. I agree with him that the matter is not determined against him by the decision in *Nachimson v. Nachimson* (1). That was also a case of a Russian marriage, but was one of a marriage between two persons domiciled in Russia at the relevant date. The law as to dissolution of marriage in Russia appears to have been different in 1930 (when the case was decided) from what it is today. At that time, it appeared, the marriage could be dissolved by the simple expedient of one party stating in the form of C a declaration to the other: "This marriage is to end." It is, perhaps, not surprising that such a matrimonial system was found highly inconvenient in Russia and has been altered. Though marriages may be dissolved, as we understand, by the courts of Russia on any ground which the court thinks justifies the conclusion that the marriage has become distorted, nevertheless, in order to have the marriage dissolved a decree of the court is required. D E The making of a marriage was done in much the same way as now, that is to say, by appearing before a registrar. In *Nachimson v. Nachimson* (1) the two Russian parties having been married by going before a registrar in much the same way as the present husband, having afterwards left for Paris, and having ceased to hold the affection for each other that they had previously possessed, one of the parties, at the Soviet Consulate in Paris, wrote out a declaration F stating that the marriage was at an end. The question before the court in *Nachimson v. Nachimson* (1) was in the form of a Special Case: Had the petition and the respondent ever been husband and wife? If yea, was the marriage dissolved on the day on which the declaration was executed in Paris? The relevance of the case here is on the main question: Had the petitioner and respondent ever been husband and wife? G HILL, J., was of opinion that a negative answer should be given to that question on the ground that, since, according to the English conception of marriage, marriage is a voluntary union for life of one man and one woman to the exclusion of all others, the fact that the *Nachimson* marriage was dissoluble in so cavalier and perfunctory a manner meant that it failed to satisfy the English definition. This court came to a different conclusion. In the opinion of the Court of Appeal, the fact that a marriage could be dissolved easily according to the local law of the country H which had jurisdiction to dissolve it had nothing to do with whether the marriage had been validly created in the first instance. After all, in England it is now not so difficult in certain circumstances to dissolve a marriage. That fact does not alter the fundamental conception that marriage still is a union for life of one man and one woman to the exclusion of all others. The parties enter into matrimony in that state of mind. In the course of their judgments, all the judges referred to the well-known passage from LORD

BROUGHAM's opinion in *Warrender v. Warrender* (2). I will refer to a sentence from it which I take from the judgment of ROMER, L.J. ([1930] P. 236), because it is significant on another aspect of this case. In *Warrender v. Warrender* (2) the Scottish court had to consider whether they could entertain a suit to dissolve a marriage entered into in England between a domiciled Scotsman and a domiciled Englishwoman, so that the case obviously has a relevance to the present case. LORD BROUGHAM uses general terms in thus expressing his opinion (2 Cl. & Fin. 530):

"This marriage, good by the laws of one country, is held good in all others where the question of its validity may arise. For the question always must be, Did the parties intend to contract marriage? And if they did that which in the place they were in is deemed a marriage, they cannot reasonably, or sensibly, or safely, be considered otherwise than as intending a marriage contract. The laws of each nation lay down the forms and solemnities, a compliance with which shall be deemed the only criterion of the intention to enter into the contract."

Counsel for the husband was entitled to point out that the decision in *Nachimson v. Nachimson* (1) does not determine the question whether, though the form was good, if the marriage nevertheless on other grounds does not satisfy the requirements of the English conception of marriage it will be upheld in these courts. The court decided that simplicity in dissolubility does not invalidate the existence of the marriage. If counsel for the husband is entitled to say that the English conception of marriage involves necessarily the conception of the mutual rights and obligations of *consortium*, and if the so-called Russian marriage denies those rights and obligations, then, as he said, it is for a domiciled Englishman no more a marriage, whatever you may call it, than would be a polygamous marriage.

I do not think that *Nachimson v. Nachimson* (1) is an answer to this point. On the other hand, it seems to me the argument on this part of the case places a greater emphasis than it will bear on the language which I have read from s. 9 of the Code and the somewhat cryptic note of the decision of the Supreme Court of Russia. The last sentence of s. 9, which was much pressed by counsel for the husband, is:

"A change in place of residence of one of the spouses does not impose on the other a duty to follow the one."

That sentence immediately follows this sentence:

"The order of keeping the common household is fixed by mutual agreement of the spouses."

I should find it difficult to say with any confidence that the two sentences read together amount to anything substantially very different from the law of England as it is today as regards residence. It is true that the decision of the Supreme Court of Russia, if it means what the sentence at first sight seems to suggest, goes a good deal further: "Marriage does not impose on the spouses a duty of living together." What exactly does that mean? We have no evidence as to the facts of the case or any explanation of what the decision really lays down. The witness Wolff was only able to say when the case was brought to his attention: "I accept the reference." I am unable to derive from that brief note a proposition anything like sufficient to support the view that the husband's marriage, according to the law as laid down by the courts of Russia, involves so great a denial of the elementary principles of *consortium* as would justify this court in saying that on that ground it is no marriage at all. I, therefore, cannot accept the first of the points made for the husband.

As to the question of frustration, there is, I think, at first sight a considerable attraction in the argument. Whatever may have been in the mind of any of the persons who had any part in this so-called marriage on Oct. 16, 1945, the

subsequent ban of the Soviet authorities renders it difficult to refute the proposition as an ordinary matter of language that this marriage has been frustrated, by which I mean that there is no possibility now of any practicable effect being given to it. As on another part of the case counsel for the husband adopted as part of his own argument certain passages from an earlier number of the LAW QUARTERLY REVIEW, it may not be inapposite to note that in the course of a reference to this very case, the editor or commentator says (April, 1950, p. 157):

"The learned judge [HODSON, J.] also held that the doctrine of frustration had never been applied to the status of marriage as opposed to a contract of marriage: 'to such a status the doctrine of frustration has no application.' If the world continues in its present unhappy state it may be become necessary for the law to accept such a doctrine because, without palliating the position assumed by the U.S.S.R., we must recognise that there are other governments, such as the United States, which, in certain circumstances, refuse to admit the foreign wives of their citizens. As these marriages have been frustrated in fact it is arguable that they should also be held to have been frustrated in law."

I am far from saying that any of those sentences are more persuasive than any of the arguments of counsel for the husband, but the point is obviously one of some significance today. As that reference indicates, it would be wrong, and, indeed, unjust to the Soviet authorities, to suppose that what they have done in this case is something the like of which is to be found nowhere else in the world.

It is unnecessary for the reasons I have indicated for me to express any final conclusion on this matter of frustration. As it has been argued, and as it is important, I think I should say just a word or two about the character of the argument for the husband. So far as its novelty is concerned, it is said that that is attributable to the history of our marriage law—for one thing, to the old ecclesiastical notion that marriage is a sacrament indissoluble in

all circumstances; for another, to the fact that the doctrine of frustration as applied in a *nexus*, contractual or otherwise, is itself a recent innovation; and, thirdly, that in any case the doctrine, when applied to marriages, would in any case be of very limited scope and would necessarily require a condition of things in which none of the rights and obligations of the marriage was capable of continuing. So counsel for the husband formulated his case in

language which I hope I have correctly noted as follows: "If, owing to the occurrence of an irresistible and extraneous event, neither party can thenceforward enjoy any of the rights or fulfil any of the obligations of the marriage state, the marriage is frustrated, and the court in the interests of common-sense and justice will declare that the marriage has terminated on the occurrence of that event." I record that argument as we have had the advantage of

hearing it (and it may be necessary hereafter for a court to pronounce finally on it), but I think there are difficulties about it. I am not satisfied that a case such as *Smith v. Brown* (3) about slaves forms a true analogy. I think that even the careful language chosen by counsel for the husband might lead to some remarkable consequences. How is the court to decide whether the event which has happened is not only extraneous but irresistible? If the doctrine is to be

applied to marriages between domiciled Englishmen and foreigners, there is no reason why it should stop there and should not apply to marriages between two domiciled English persons. If the latter, then it would appear to introduce a ground for dissolution of marriage which is not found in the statute. I will say no more about it.

I will come back to the first ground which I stated and give my reasons more precisely for concluding, as I do, that, in the light of all the facts in this case, the failure to comply with the formalities laid down in the sections of the

Russian Code was more than incidental, but that it was essential and shows as a matter of necessary inference that the officials who were concerned in this matter did not themselves regard this marriage as being more than a casual affair, not in the least likely to last more than some forty-eight hours, and that it was for that reason they thought that there was no point in writing entries in the passports and reading extracts from the Russian Code or asking questions as to whether the husband had at any time been a lunatic or previously married. A

The first question (and it is on this matter that I venture to form a different view from HODSON, J.) is what is the effect of s. 2 of the Code which states that registration is indisputable evidence of the existence of a marriage? HODSON, J., having observed on the absence of compliance with the statutory requirements, said ([1949] 2 All E.R. 962):

"This opinion [*i.e.*, the opinion mentioned hereafter] assuming its authoritativeness, does not, to my mind, assist the parties to the marriage or either of them to dispute the existence of a registered marriage, since such dispute is forbidden to them by the terms of s. 2 of the law of 1926. I think this section is conclusive against the argument directed against the validity of the act of registration and it is irrelevant that the registrars omitted to perform some of the duties imposed on them by the Code as a preliminary to the registration itself. The essential feature existed that prior to the registration there was, subject to the argument with which I will deal hereafter regarding 'mutual consent to marry.' The registration even if no more than a ministerial act, is conclusive as between the parties, at any rate as to matters of form." B

With all respect to the judge, I do not accept that view, and it does not seem to me to be in accordance with the evidence and the opinion expressed by Mr. Wolff, the expert witness. It would, I think, be very surprising if it were so. As I have already said, there are certain essential requirements to a valid marriage in Russia. One is that the parties are not already married to somebody else. It would be obvious, that if, in fact, it turned out that one of the parties was already married, the appropriate proceedings could then be taken to set aside the certificate which had been given by the registrar. On other grounds relative to the requirements of a valid marriage, I should suppose that the court, on an appropriate application, could, if necessary, declare the marriage invalid notwithstanding the registration. That natural assumption seems to me to be in accordance with the evidence. Mr Wolff was asked this question: C
"I want to ask you about that word 'indisputable.' I have before me an official publication of the Commissar of Justice in R.S.F.S.R.", and that was handed up. The witness's answer is this: "The pronouncement comes from the first department of the Ministry of Justice, which department was entitled to give comments on the law, and explanations of the law. Mr. Idelson directs my attention to the explanation of this law which was given by this department. Here one sees that s. 2 of the Code of Marriage, Family and Guardianship Laws must be understood in this sense, that the registration of a marriage for the inscription of civil status is indisputable evidence of the existence of the marriage, and can be upset only in a court of law. That is the first, and the second thing is that the department established for the drafting of the laws and the codification of the laws states that the disputing of a registered and of an unregistered marriage can take place in a law court at the demand of all interested State bodies." Then this question is put: "Mr. Wolff, is it fair to sum up this authoritative interpretation of the law in this way—that a certificate of registration is proof and indisputable proof as the law says, and if anyone wishes to attack its validity the doors of the court are not closed to him?" and he says: "That is so." Later, HODSON, J., in reference to the question what the registrar should have done and did not do, asked this D
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question: "You are not trying to suggest, are you, that, if the registrar omits to ask some necessary questions, this affects the registration and the whole thing is invalid? (A.) On the contrary—" Then the witness is interrupted and HODSON, J., says: "I did not think it was. I suppose the same situation might arise as we are familiar with in this country. For example, supposing children marry under age without the consent of their parents, once they are married it cannot be undone. (A.) I go further with regard to the formalities. If something is omitted and nobody objects, it can be rectified by the registrar himself, but if it goes to the root of the matter it can go to the court like any other question."

I take that evidence to mean that the witness is supporting the opinion of the commissar (referred to by HODSON, J.), that, though for the purpose of ordinary human commerce the production of a certificate is conclusive evidence of the marriage as stated, it does not prevent either party to the marriage or some other interested party, such as the State, going to the court and saying: "This certificate was wrongly given and must be set aside." The witness clearly points out that such a result would only be obtained, where certain formalities had been omitted, if the omission went to the root of the matter. That I take as the premise upon which I shall proceed, and the question, therefore, is briefly in the circumstances of this case—and I emphasise that phrase—was the omission here essential? Did it go to the root of the matter? At one time in the argument it was suggested that there was at any rate a discretion in this court whether we should accept the validity of a foreign marriage at all as a matter of comity; but, having regard to the passage in LORD BROUGHAM's speech in *Warrender v. Warrender* (2) which I have already read, I do not think it is open to this court to say that the conduct of the Soviet authorities is such that we are not compelled by comity or by any other reason to accept the validity of a marriage if it was validly effected according to the local law. It is, therefore, a matter of essential formality. It is agreed that the form laid down was not adhered to. It is quite true that on the evidence it would not have made any difference, so far as I can see, to the conduct of these two parties if the registrar had required the husband to state whether he had ever had venereal disease, or whether there was insanity or tuberculosis in the family, or whether he had been married to somebody else, and, if so, how many children he had had, nor would it have impressed the mind of the husband, who would not have understood a word of what was said, if the registrar had read out s. 4, s. 5 and s. 6 of the Code. I attach more importance to the question of the entry on the passport, because once that entry was made it would be impossible for the husband, if he had been so minded, to conceal the fact that he had been married. Although it is true that the amended section requires the entry after the ceremony, still the fact that the entry was not made is one of the points which seems of real significance as throwing light on the question what view the Soviet authorities were taking of this so-called marriage. They deliberately forebore to do what they ought to have done and failed to make the entry which would have made plain to the world that the husband had married the wife.

The next thing that is important, and, to my mind, is of great significance, is that the evidence shows that from the start, as soon as the wife went to this mystical O.V.I.R. and made inquiry, and as soon as the husband made application through the Soviet Consulate Service, it was made plain that, in no circumstances whatever, would any facilities be given for the wife to join the husband or for him to join her. Nothing could be plainer than that. I draw the inference that that was the intention from the beginning. She had made the application to the registrar. Apparently, it was delayed and put off until she was told that, if they came on the evening of the following day, the ceremony would be performed, that is to say, on Oct. 16. It must have been known to the Russian authorities that the British ship would sail from Archangel on Oct. 18. They

must have realised that the sailors would then leave Russia. It seems to me plain from the whole nature of the proceedings that the authorities were taking the view: Well, we can allow them to go through the ceremony. Its practical effect will not be a union for life, but it will enable them to spend two nights together in Archangel. At that time or not very long afterwards, the law was amended, and it became part of the municipal law of Russia that marriages between citizens of the R.S.F.S.R. and foreigners were prohibited. It was stated that that prohibition came into effect on Apr. 1, 1947, which is eighteen months after this transaction. I take the view that we should infer that the Soviet authorities from the first took the view that marriages between British sailors and Russian girls were not marriages to which the smallest regard would thereafter be paid. If that is right, then, the absence of formalities and particularly the absence of any entry on the passport of the husband has so great a significance that I think they go to "the root of the matter" in the language of the expert witness. I conclude, therefore, that this so-called marriage was never a marriage which this court would recognise because it never conformed to the *lex loci celebrationis*. I would, therefore, allow the appeal and make a declaration according to the first prayer of the petition.

BUCKNILL, L.J.: I agree that the appeal should be allowed for the reasons given by SIR RAYMOND EVERSHED, M.R., and I will only add a few words in deference to the trial judge from whose views we are differing. In the first place, it is clear that, while the English courts recognise a foreign marriage, at the same time they scrutinise with care such a marriage, especially when one of the parties is a British subject domiciled and resident in this country. It is proper in those circumstances that the court should be satisfied that all the observances laid down by the foreign State as essential to create a valid marriage have been fulfilled. In the present case it is clear that nothing took place between the husband and the Russian girl which would constitute a marriage according to English law. I may just refer very shortly to what actually happened on Oct. 16, 1945, when they attended at the registry office. There was a young woman behind the desk. No one else was present. They said: "We have come along to get married." The young woman said she knew everything about it. She asked the husband for his British passport and his Russian passport. He handed them over. The woman then wrote out a document and wished them luck, and they went away. She did not ask the husband or the wife any questions. She did not ask either of them to sign the register, and she did not write anything on his passport. Proceedings of such a kind do not, in my opinion, amount to a valid marriage according to English law, and the question arises whether it was a valid marriage according to Russian law. It is clear, I think, from the evidence of the Russian legal expert that since 1926 the Russian government had intended to tighten up the essentials of a valid marriage. They intended to do that in the interests of the State and of society as a whole as well as in those of the parties. The Code, accordingly, laid great stress on registration. I think that "indisputable" does not mean indefeasible. It merely means that, *prima facie*, the document proves what is stated therein. It does not debar anyone from raising the point in a court of law that what is described as a marriage in the certificate was, in fact, not a valid marriage. For instance, the parties may have been incapable of contracting marriage. The Russian law also laid down strict rules as to what was to be done before the certificate was issued. The parties were to be questioned. Very sensible questions were to be put to them, not only whether they had been married or were married or what children they had, but whether they had ever suffered from venereal disease and whether they were, or had been, mentally deficient or lunatic. Not only were those questions to be asked, but the parties were to be told that it was a criminal offence not to answer them correctly. They were to sign the register and, what seems to me also important,

a copy of the register was to be made on the parties' passports so that wherever they went their passports would show that they were married. In fact, none of those things was done on this occasion, I think these rules and conditions are the essential requisites of a valid marriage according to Russian law. I do not think that they were unessential and that the only essential thing was that the parties before they went to the registrar should have consented to marry.

A It is clear that difficulties had arisen in the mind of the young woman who presided over this office whether a British sailor could marry a Russian girl, and the matter was put off from time to time and higher authorities were consulted. In face of the difficulty which had arisen, none of those essential requisites was complied with, and the Russian government then refused the so-called wife permission to join her husband. The conclusion which I draw is that the Russian officials in charge of the marriage registry at Archangel
B did not intend that these two people should contract a valid marriage, and it is for that reason that the Russian government is refusing to allow them any opportunity of coming together. It seems to me a strange state of things if proceedings which do not comply with the requisites of a valid marriage according to Russian law, should be regarded as a valid marriage binding on this young man in England, and that he should be tied for the rest of his life
C to somebody whom he is unable to see by the law of Russia and who is only a wife in name. I should be sorry to have to subscribe to such a doctrine. I think, for the reasons which SIR RAYMOND EVERSHED, M.R., has given, that this court is justified in declaring that this was no valid marriage, and that the husband is entitled to the declaration for which he asks.

D DENNING, L.J.: I do not differ from the views of my brethren that this marriage lacked some essential formalities, but I prefer to rest my opinion on a different ground. Some of these Russian marriages may not be invalid for want of formalities, and I am prepared to assume that this marriage is not invalid on that ground. Nevertheless, I think it is voidable by our law by reason of a condition which has failed. The English law of marriage is familiar with a condition which makes a marriage voidable. We grant a decree of nullity not only when a marriage is absolutely void from its inception, as in the case of a bigamous marriage, but also when it is only voidable for failure of some condition on which its validity depends. It may be voidable for some cause which is already existing at the date of the marriage, as when a husband has venereal disease of which he has not told his wife, or when a wife is pregnant by another man which she has not disclosed to her husband, or
E it may be voidable for a cause which only comes into being after the marriage, as when one of the parties wilfully refuses to consummate the marriage, or, after repeated efforts, turns out to be impotent. So far as English marriages are concerned, when both the parties are domiciled here, the various conditions of validity are well known. Indeed, they are for the most part prescribed by statute and we have no authority for introducing any new condition
F by way of frustration. So far as foreign marriages are concerned, when both the parties are domiciled in the country where they are married, we only look to the validity of the marriage by the laws of that country, and do not import additional conditions from our own jurisprudence. If it is valid there, then, even if it lacks in our eyes some of the essentials of marriage, as, for instance, if it is potentially polygamous, we still regard it here, for many purposes, as
G a valid marriage: *Baindail (otherwise Lawson) v. Baindail* (4).

H When we come to marriages between persons domiciled in different countries, the position is different. The formal validity of the marriage is, no doubt, governed by the law of the place where the marriage takes place, but the substantial validity of it may depend on the personal law of one or other of the parties to it, that is, on the law where he or she is domiciled. The personal law of one party may attach a fundamental condition to marriage which does not exist in the personal law of the other, and, if he marries on the basis that

that fundamental condition will apply, then it would be most unjust to hold him to the marriage after the condition has been broken or has failed. It all depends on whether the parties marry on that basis or not. If they do, then you may find that a marriage, although valid by the local law, is voidable by reason of a condition imported by the personal law of one of the parties.

I can best illustrate my meaning by marriages between a woman of a monogamous domicile and a man whose domicile is polygamous, and *vice versa*. When an Englishwoman marries a man of a polygamous race at a registry office in England, the substantial validity of the marriage as well as its formal validity depends on the personal law of the wife and not on the personal law of the husband. It is a condition of the marriage that it should be monogamous. Suppose that the couple afterwards go to live in the husband's homeland and he takes to himself another wife, as he may lawfully do there. The English wife cannot sue for divorce in England. She must bring a suit for divorce, as distinct from nullity, in his homeland because he is domiciled there, but she cannot succeed in it because polygamy is there permitted. Has she then no remedy? I say she clearly has a remedy in our courts. It was a condition of the marriage, imported by her personal law, that the man should not take to himself another wife during the lifetime of the first. When the man took a second wife, that condition was broken and the marriage was voidable at her instance in our courts for failure of the condition. She should get a decree of nullity. Now take a case where an Englishwoman domiciled here marries a man of a polygamous race in his homeland by the ceremonies of his country, well knowing that she is entering into a marriage that is potentially polygamous. The substantial validity of that marriage depends on the personal law of the husband and not on the personal law of the wife. The marriage is valid by the law of that country and is, I should have thought, valid here. There was no condition of the marriage that it should be monogamous. If he in his own country takes to himself another wife, the English wife cannot complain. She could not ask in these courts for the marriage to be avoided.

Re Bethell (5) supports the view that the substantial validity of a marriage may depend on the personal law of one of the parties to it, but I am not sure that the decision itself would be the same today. The case where a domiciled Englishman marries a woman of a polygamous race should, I think, be determined on the same principles as I have stated for the converse case. No differences of race or colour or religion entitle us to treat such a marriage on a different footing. If he marries a woman in her homeland by the ceremonies of her country, well knowing the kind of marriage into which he is entering, the substantial validity of the marriage, as well as its formal validity, should then depend on her personal law and not on his. The marriage is valid by the law of her country and should also for many purposes be regarded as valid here. It should not be treated as altogether invalid simply because it is potentially polygamous. If he has children by her they should be regarded as legitimate, and if he, during her lifetime, without dissolving the marriage, should come to England and go through a form of marriage here with another woman, the second marriage would be a nullity, because no one here can take to himself a second wife during the lifetime of the first: *Connolly v. Woolrich* (6) and *Baindail (otherwise Lawson) v. Baindail* (4).

These considerations lead me to the conclusion that a marriage may be voidable for failure of a condition imported by the personal law of one of the parties, if they married on the basis of that law. I turn, therefore, to this marriage in Russia between an English sailor and a Russian woman and ask myself: Was there any condition on which its validity depended? In my opinion, it was a condition of the marriage that the parties should be allowed to live together. The parties intended to come to England to live, and in England the right to matrimonial *consortium* is an essential condition of every marriage. The husband married his wife on the basis that that fundamental condition

should apply. It was a condition of the marriage, imported by his personal law. That condition has been utterly destroyed by the subsequent action of the Soviet government. This couple spent two nights together, and since then for the last five years they have never been allowed to meet, let alone come to this country as they intended. The husband has not been allowed to go to the wife, and she has not been allowed to come to him. There is no hope of their ever being allowed to meet again. An essential condition of the marriage has failed solely by the action of the Soviet government, and for failure of that condition the marriage is voidable in these courts. Justice requires that the husband should be free from this illusory marriage. I agree that the appeal should be allowed and a decree of nullity pronounced.

Appeal allowed. Declaration of nullity of marriage granted.

Solicitors: *Boyce, Evans & Sheppard* (for the husband).

[*Reported by F. GUTTMAN, ESQ., Barrister-at-Law.*]

ROSE v. ROSE.

[COURT OF APPEAL (Bucknill, Somervell and Denning, L.J.J.), June 15, 16, 1950.]

Divorce—Maintenance—Amount—Wife's earning capacity—When to be taken into account.

A wife, who had obtained a decree of divorce on the ground of her husband's adultery, applied for an order for maintenance. Her husband was employed at a salary of £735 a year. There were two children of the marriage, one of whom was an infant aged four and a half years and in the custody of the wife. The wife, aged forty-one, had no means of her own and was not trained for any work, and during the period of the marriage, which had existed for twenty years, she had not been required to earn any money. After the divorce, as a temporary measure, she obtained board and lodging with a friend who owned a school, where she assisted in cooking meals and her child obtained free education. It was contended for the wife that, in arriving at the amount of maintenance ordered to be paid to her, WILLMER, J., wrongly attributed a notional earning capacity to her and based his calculation on the husband's earnings plus that notional figure.

HELD: the question whether the earning capacity of a wife is to be taken into account in assessing maintenance depended on the facts of each case, and no general rule could be laid down. In the present case, where the wife had never been required to earn money during her married life, where she had to look after a young child, and where she had no normal trade or calling, her earning capacity should not be taken into account.

Per DENNING, L.J.: if a wife does earn, her earnings must be taken into account; if she is a young woman with no children and obviously ought to go out to work in her own interest, but does not, her potential earning capacity ought to be taken into account; if she has worked regularly during the married life and might reasonably be expected to work after the divorce her potential earnings ought to be taken into account. Except, however, in cases such as those, it does not as a rule lie in the mouth of a wrongdoing husband to say that the wife ought to go out to work simply in order to relieve him from paying maintenance.

[AS TO THE AMOUNT OF MAINTENANCE, see HALSBURY, Hailsham Edn., Vol. 10, pp. 790, 791, paras. 1252, 1253; and FOR CASES, see DIGEST, Vol. 27, pp. 502-504, Nos. 5379-5396 and Digest Supp.]

APPEAL by the wife from an order of WILLMER, J., made on Mar. 10, 1950, whereby he had reduced to £3 a week, subject to deduction of tax, an order made by Mr. Registrar HAWKES for payment of maintenance at the rate of £4 a week tax-free. It was admitted by counsel for the wife that the free-of-tax order could not stand, and the Court of Appeal was asked, not to reinstate the registrar's order, but to increase the order made by the judge to £4 a week subject to tax. It was shown to the satisfaction of the court that WILLMER, J., in fixing the amount of £3 a week, had taken the potential earning capacity of the wife into account.

F. Donald McIntyre for the wife.

Latey, K.C., for the husband.

SOMERVELL, L.J.: This is an appeal from an order by WILLMER, J., who varied an order for maintenance made by Mr. Registrar HAWKES. The petitioner in the divorce proceedings was the wife, who obtained a decree based on her husband's adultery. The parties had been married some twenty years, and at the material time there were two children, one of whom was about four and a half years of age. The husband, a chartered civil engineer, was chief assistant bridge engineer to the Gloucestershire County Council. His gross salary was some £710 a year at the time when he swore his first affidavit, and it had risen to £735 a year when he swore the affidavit which was considered by WILLMER, J., on the appeal from the registrar. The registrar had made an order for maintenance of £4 a week free of tax. That expression is capable of more than one meaning, but we were told—and this is the construction I would expect to be put on it—that it meant such sum as after deduction of tax at the standard rate would leave £4 a week, representing approximately £375 a year. When the matter came before the judge it was conceded by counsel for the wife that the registrar's order could not stand. The judge reduced the amount to £156 a year—i.e., £3 a week—less tax. It is from that reduction that the wife appeals to this court.

What is asked for is, not the reinstatement of the registrar's order of £4 a week free of tax, but an order for maintenance at £4 a week subject to tax, instead of £3 a week subject to tax. In respect of the child there has been an order, which is not contested, for £1 a week. Leave to appeal was granted by this court on the ground that the judge had gone wrong in principle in that he had arrived at the figure of £156 by attributing to the wife a notional earning capacity—that is to say, he had added that notional capacity, in the same way as if it were actual earnings, to the husband's income to arrive at the joint income, and had then based his figure of maintenance on an appropriate proportion of the joint income so calculated. I am satisfied that WILLMER, J., did arrive at his figure by attributing a notional earning capacity to the wife. I am also satisfied that the figure the judge took into account was about £100.

The question is whether that is wrong in law on the facts of the case. I do not propose to consider whether or in what circumstances earning capacity ought to be brought into the calculation in the case of a wife who has not been required to earn any money during the matrimonial life, but, in my view, where during the matrimonial life the means of the husband were such that the wife was not required to go out and earn money, then, in determining the proper sum for maintenance, it would *prima facie* seem to be wrong that the husband should be able to say: "Now you must go out and work, and the only sum I can be ordered to pay is one based on the results of your going out to work, which you did not have to do when you were my wife and which

A you would not have had to do if I had not committed adultery and broken up the home"—as in the present case. That *prima facie* approach seems to me to be plainly right in a case such as this, where the marriage had lasted for some twenty years. The wife is a woman of forty-one years of age, who has no normal trade or calling, though, no doubt, she is capable of doing domestic work, and there is a child of some four and a half years of age for her to look after. Therefore, I think the appeal succeeds, and that the order should be for £4 a week less tax.

B BUCKNILL, L.J.: I agree with the judgment which has just been delivered. It seems to me that WILLMER, J., would not have disturbed the figure fixed by the registrar if it were merely a question of amount. I feel that he must have amended it because he felt that the registrar had not taken into
C consideration the earning capacity of the wife, and counsel for the husband has said that during the discussion before WILLMER, J., he submitted that the earning capacity of the wife could be put at £2 a week. Unfortunately, we have not got any record of the judgment, but I am satisfied that that was why WILLMER, J., altered the figure. The question whether the earning capacity
D of the wife should be taken into account, in my opinion, must always depend on the particular facts of the case. I would be sorry to lay down any general rule about it, but it seems to me that in a case such as this, where the facts are as stated in the judgment of SOMERVELL, L.J., it would be wrong to reduce the liability of the husband to maintain his wife by reckoning that the wife could, if she saw fit, go out with her child and earn some money by doing domestic work. The wife in this case is not trained to do any special work, and I do not know that she could do anything else. What she did for a short time was to work in the kitchen for a friend. I agree that the appeal should be allowed.

E DENNING, L.J.: I also agree. A very important matter in awarding maintenance is the conduct of the parties. In this case it has been established that the husband broke up the marriage after twenty-one years of married
F life, leaving the wife with two children, one of them very young. It was a particularly bad case because the husband committed adultery with a Swiss student help who came to the house. After the divorce the wife claimed maintenance, and the question is whether she ought to go out to work. I agree that no general rule can be laid down on the matter, but this wife is certainly
G under no legal duty to go out to work in order to reduce the maintenance that her husband should pay. It would be quite unreasonable to expect her to do so when she has to look after a young child. If a wife does earn, then her earnings must be taken into account; or if she is a young woman with no children, and obviously ought to go out to work in her own interest, but does not, then her potential earning capacity ought to be taken into account; or if she has worked regularly during the married life and might reasonably be expected to work after the divorce, her potential earnings ought to be taken into account. Except in cases such as those, however, it does not as a rule lie in the mouth of a wrongdoing husband to say that the wife ought to go out to work simply in order to relieve him from paying maintenance. I agree that the appeal must be allowed.

Appeal allowed with costs.

Solicitors: *Hepburns* (for the wife); *Gibson & Weldon* (for the husband).

[Reported by C. N. BEATTIE, ESQ., Barrister-at-Law.]

GOODLASS WALL AND LEAD INDUSTRIES, LTD. v.
ATKINSON (INSPECTOR OF TAXES).

[HOUSE OF LORDS (Lord Simonds, Lord Normand, Lord Morton of Henryton, Lord MacDermott and Lord Reid), May 10, 11, 15, June 23, 1950.]

Income Tax—Income from foreign possessions—New source in year of assessment—Shares in foreign company—Acquired prior to 1942-43—Income first received in 1942-43—Liability to tax in that year—New source of income “in any year of assessment”—Finance Act, 1926 (c. 22), s. 30, proviso (ii).

By s. 30 of the Finance Act, 1926: “All profits or income in respect of which any person is chargeable . . . under Case V of sched. D may respectively be assessed and charged in one sum: Provided that . . .

(ii) If in any year of assessment any person acquires a new source of any such profits or income or an addition to any source of any such profits or income, income tax in respect of the profits or income from that source or from the addition to that source shall be computed separately . . . and in the case of profits or income chargeable under . . . Case V of sched. D the provisions of proviso (b) to sub-s. (1) of the last preceding section of this Act shall apply.” By s. 29 (1), proviso (b): “. . . (i) income tax shall be computed, as respects the year of assessment in which the income first arises, on the full amount of the income arising within that year.”

Prior to 1937 the taxpayers acquired certain shares in a company incorporated in Argentina. For some years they had also owned shares in other foreign companies producing dividends and had been assessed to income tax under sched. D, Case V, in respect of the income from such other shares on the basis of the income received in the immediately preceding year without differentiating between the items making up their foreign possessions, in accordance with s. 30 of the Finance Act, 1926. In January, 1943, the taxpayers for the first time received a dividend on their shares in the Argentine company, in respect of which an additional assessment was made for the year 1942-43 in purported reliance on proviso (ii) to s. 30 of the Act of 1926. The taxpayers contended that the opening words of the proviso: “If in any year of assessment any person acquires a new source of any such profits or income,” referred to the year in which the source was acquired (*i.e.*, to a year before 1937), and that the subsequent words, “income tax in respect of the profits or income from that source . . . shall be computed separately,” referred to income of that year, and, as in the present case there was no income then, the proviso had no application.

HELD: on the true construction of proviso (ii) to s. 30 of the Act of 1926 the income tax thereby required to be computed separately was tax on profits or income of the year of assessment in which the new source of the income was acquired; in the present case the new source of income was not acquired in the year 1942-43; and, therefore, the proviso did not apply and the additional assessment must be discharged.

Decision of the Court of Appeal ([1948] 2 All E.R. 1095), reversed.

[FOR THE FINANCE ACT, 1926, s. 30, proviso (ii), see HALSBURY'S STATUTES, Second Edn., Vol. 12, p. 271.]

Case referred to:

- (1) *Brown v. National Provident Institution, Ogston v. Provident Mutual Life Assocn.*, [1921] 2 A.C. 222; 90 L.J.K.B. 1009; 125 L.T. 417; 8 Tax Cas. 57; 28 Digest 62, 316.

APPEAL by the taxpayers from a decision of the Court of Appeal (TUCKER, COHEN and ASQUITH, L.JJ.), dated Nov. 26, 1948, and reported [1948] 2 All

E.R. 1095, reversing a decision of SINGLETON, J., dated July 8, 1948, and reported *ibid.*, 653, on a Case stated by the Special Commissioners of Income Tax.

A Before 1937 the taxpayers acquired the whole of the issued ordinary shares in a foreign company. In January, 1943, the foreign company declared a dividend for the first time on its ordinary shares. The sterling equivalent of the amount of this dividend received by the taxpayers was £7,434, and an additional assessment in this sum was made on the taxpayers under sched. D, Case V. The Special Commissioners discharged the assessment and an appeal by the inspector of taxes was dismissed by SINGLETON, J. The Court of Appeal restored the assessment, holding that the taxpayers had acquired a new source of income within the meaning of proviso (ii) to s. 30 of the Finance Act, 1926, so that income tax was to be computed in respect of the year 1942-43 in accordance with s. 29 (1) proviso (b) (i) on the full amount of the income arising within that year. The facts and the relevant sections of the Finance Act, 1926, are set out in the opinions of LORD MORTON OF HENRYTON and LORD MACDERMOTT.

C *Donovan, K.C.*, and *Graham-Dixon* for the taxpayers.
The Solicitor-General (Sir Frank Soskice, K.C.), *Tucker, K.C.*, and *R. P. Hills* for the Crown.

The House took time for consideration.

June 23. The following opinions were read.

D LORD SIMONDS: My Lords, I have felt great difficulty in coming to a decision in this case, but as your Lordships are unanimous in thinking that the appeal should be allowed, I do not think that I should be justified in occupying the time of the House by an expression of my doubts. I propose, therefore, to concur in the conclusions to which you have come.

E LORD NORMAND: My Lords, the key to the problem in this difficult case is in the meaning of the words "in any year of assessment" in proviso (ii) of s. 30 of the Finance Act, 1926. These words must, if possible, bear the same meaning in proviso (ii) as in proviso (i), and both provisos must be construed in the light of the leading enactment of the section. The section requires all profits or income in respect of which any person is chargeable either under r. 1 of the Rules Applicable to Case III of sched. D or under Case IV of sched. D or under Case V of sched. D to be respectively assessed and charged in one sum. F Here we are concerned with Case V. I think that there is in the leading enactment an implied reference to the particular year of assessment, *viz.*, the year on which the person chargeable is being assessed on the income of that year. The measure of the income is (s. 29 (1)) the full amount of the profits or gains of the year preceding the year of assessment. Here the reference to the particular year in which the person chargeable is being assessed is explicit. So from the outset we are concerned with a year of assessment, meaning the year in which an assessment is being made on a person in respect of the income of that year measured by the income of the previous year.

G The provisos are exceptions to the rule that the income of the year preceding the year of assessment is to be the measure of the profits of the year of assessment. Proviso (i) deals with the case in which any person charged or chargeable H in respect of any such income (*viz.*: income chargeable under r. 1, Case III, or Case IV, or Case V of sched. D) ceases to possess any particular source of such income, and it provides that income tax in respect of the income from that source shall be computed separately and that the provisions of s. 31 shall apply as if the cesser of the possession of the source were the discontinuance of a trade. I pause there to point out that "the income tax" which is to be computed separately is apparently the income tax on the profits of the year in which the cesser of possession takes place. Section 31 (1) (a) provides that

when in any year of assessment a trade is permanently discontinued, a person charged or chargeable with tax in respect thereof shall be charged for that year on the amount of the profits or gains of the period beginning Apr. 6 in that year and ending on the date of discontinuance. Thus "in any year of assessment" can only mean *that* year in which the person is to be charged for that year, and in s. 30, proviso (i), the words "any year of assessment" must have the same meaning.

Before going on to proviso (ii) of s. 30 I will deal with an argument submitted by the Solicitor-General against this construction of the words "in any year of assessment" in s. 30, proviso (i). He said that in the year of assessment next after the year in which an investment was sold, the taxpayer would be taxed on the income of that investment under s. 29, unless the words "any year of assessment" were construed as the equivalent of "at any time." I do not agree with this submission. In the case supposed, the income from the investment sold must in the year in which it is sold be treated under the proviso as income from a separate source and the tax on it must be separately computed, and it is, therefore, not part of the global income in that year of the whole mass of Case V investments. In the next year the investment no longer exists as a source of income and there is no basis of chargeability: *Brown v. National Provident Institution, Ogston v. Provident Mutual Life Asscn.* (1). The taxpayer, therefore, has no need to bring the income from the sold investment within the scope of proviso (i) in any year after the year of sale, nor to extend the application of this proviso by construing "any year of assessment" so as to include any year but that year. If the same construction of "any year of assessment" is applied in proviso (ii) of s. 30, the year of acquisition of the new source is "the year of assessment" and it must also be the year in which the income tax in respect of the profits or income from that source is to be separately computed. The proviso is not concerned with any year in which a new source has been acquired unless it has yielded income in that year, nor is it concerned with any year after the year in which the new source was acquired. Income for the years after the year of acquisition will in all cases fall under the rule of the leading enactment of the section. The Crown's answer to this was put alternatively. If, it was said, "any year of assessment" must be construed as "any year in which an assessment is being made," the inspector must call for a return in every year of new sources acquired in the year and if they yield no income in that year he must compute the income tax at zero. This, I must confess, appears to me to be an imaginary procedure. There is no provision in the Income Tax Acts which authorises a demand for a return of new sources of income until they yield a profit, and the computation of the income tax on investments which have never yielded income is no better than a fiction. Failing that argument, the Crown contends that the words "in any year of assessment" mean no more than "at any time," but that results in assigning different meanings to technical words of income tax law in two parts of the same section, and it is, therefore, a construction which should, if possible, be avoided.

It is in the second half of proviso (ii), where the consequences of separating the income of the acquired source from the income of other Case V investments are expressed, that the appellants run into difficulties. The proviso appears in terms to apply with broad generality the whole provisions of proviso (b) of sub-s. (1) of s. 29. Proviso (b) is divided into four paragraphs and of these the first and fourth alone are capable of being applied on the appellants' construction of s. 30, proviso (ii). For that proviso *ex hypothesi* applies only if the new source is acquired and yields income in the same year, but paras. (ii) and (iii) of proviso (b) of s. 29 (1) (b) apply only if the income first arose in the year preceding the year of assessment. The appellants are, therefore, constrained to construe proviso (ii) of s. 30 as if it applied s. 29 (1), proviso (b), subject to the implied reservation "so far as applicable." This is not an

impossible construction, but it is by no means a convincing and satisfactory solution of the appellants' problem.

I have not so far referred to the definition of "year of assessment" in s. 237 of the Income Tax Act, 1918. Unless the context otherwise requires, "year of assessment" is there defined as meaning

"... with reference to any tax, the year for which such tax was granted by any Act granting duties of income tax."

The appellants maintain that the year for which tax was granted by any Act granting duties of income tax means the year of charge under each successive Finance Act in respect of income for that year. Accordingly, in proviso (ii) of s. 30 the words "year of assessment" mean the year in which income on the investment acquired in that year falls to be taxed under the Finance Act for that year. I think, with some hesitation, that the appellants' construction is right, and, if so, the definition confirms the meaning of the words which I have inferred from their context. There are difficulties which neither the appellants nor the Crown have succeeded in solving, but the greater difficulties seem to me to be in the way of the Crown's success. In any event, in a doubtful case the Crown must fail.

LORD MORTON OF HENRYTON [read by LORD REID]: My Lords, this appeal raises a question as to the true construction of proviso (ii) to s. 30 of the Finance Act, 1926. The construction contended for by the Crown, and upheld by the Court of Appeal, results in a charge to income tax being imposed on the appellants for the year 1942-43 in respect of certain income from a foreign investment arising in the same year. The construction contended for by the appellants, and upheld by the Special Commissioners and by SINGLETON, J., would result in the normal "preceding year" basis of assessment being applied, pursuant to the provisions of s. 29 (1) of the Finance Act, 1926, that is, the income in question would be taken into account for the purpose of making the assessment for the year 1943-44.

The facts are fully set out in the Case Stated and may be summarised as follows. The appellants "reside" and carry on business in the United Kingdom. They own all the issued ordinary shares, of a total nominal value of \$900,000, in Goodlass Wall y Cie, a company incorporated in the Argentine Republic, which I shall hereafter call "the Argentine company." These shares were issued to the appellants from time to time as follows: 1932, nominal value \$500,000; 1933, nominal value \$100,000; 1934, nominal value \$200,000; 1936, nominal value \$100,000. The appellants at all material times also held shares in other foreign companies, and received dividends thereon in the year ended Apr. 5, 1943, and in earlier years. Assessments to income tax were made on the appellants yearly in respect of these dividends, under Case V of sched. D to the Income Tax Act, 1918, the basis of the assessment in each year being the income received in the immediately preceding year. No dividend was received from the holding of shares in the Argentine company until the year 1942-43. In January, 1943, the Argentine company declared a dividend upon its ordinary shares, amounting in sterling to £7,434. The assessment on the appellants for the year 1942-43 under Case V of sched. D was made before this dividend was declared, but, on being informed of the declaration of this dividend, the Crown caused the additional assessment for 1942-43, which is the subject of this appeal, to be made in respect thereof. This was done in purported reliance on proviso (ii) to s. 30 of the Finance Act, 1926.

It is convenient at this point to set out s. 30 and s. 31 of the Act of 1926, together with the relevant portions of s. 29 of the same Act.

"29 (1). Such enactments in the Income Tax Acts as provide that income tax under sched. D shall in certain cases be computed on the full amount of the balance of the profits or gains, or on the full amount of the income, upon an average of three years, and so much of rr. 1 and 2 of the Rules

applicable to Case IV of sched. D as provides that income tax under that Case shall be computed on the full amount of the income which arises, or which has been or will be received, in the year of assessment, shall cease to have effect, and any income tax in respect of profits or gains or income chargeable under Case I, Case II, Case IV, or Case V of sched. D which would but for the foregoing provisions of this section have been computed as aforesaid shall be computed, subject to the provisions of this Part of this Act and subject as hereinafter provided, on the full amount of the profits or gains or income of the year preceding the year of assessment: A
Provided that—(a) Any person charged with income tax in respect of the profits or gains of any trade, profession or vocation which has been set up or commenced within the year preceding the year of assessment shall be entitled, on giving notice in writing to the surveyor within twelve months after the end of the year of assessment, to be charged to income B
tax on the amount of the profits or gains of the year of assessment; and (b) In the case of income tax chargeable under Case IV or Case V of sched. D—(i) income tax shall be computed, as respects the year of assessment in which the income first arises, on the full amount of the income arising within that year: (ii) where the income first arose on some day in the year preceding the year of assessment other than Apr. 6, income tax shall C
be computed on the income of the year of assessment: (iii) where the income first arose on Apr. 6 in the year preceding the year of assessment, or on some day in the year next before the year preceding the year of assessment other than Apr. 6, the person charged shall be entitled, on giving notice in writing to the surveyor within twelve months after the end of the year of assessment, to be charged on the amount of the income of that year, and if the tax charged has been paid, any tax overpaid shall be repaid: (iv) references in this proviso to income which arises or which arose shall, in cases where income tax is to be computed by reference D
to the amount of income received in Great Britain or Northern Ireland, be construed as references to income which is or was so received. 30. All profits or income in respect of which any person is chargeable either under E
r. 1 of the Rules applicable to Case III of sched. D, or under Case IV of sched. D or under Case V of sched. D may respectively be assessed and charged in one sum: Provided that—(i) If in any year of assessment any person charged or chargeable in respect of any such profits or income as aforesaid ceases to possess any particular source of any such profits or income or any part of any such source, income tax in respect of the profits F
or income from that source or that part shall be computed separately, and the provisions of the section in this Part of this Act which relates to the discontinuance of a trade, profession or vocation, shall, subject to the necessary modifications, apply in any such case as if the cesser of the possession of the source or part were the discontinuance of a trade: (ii) If G
in any year of assessment any person acquires a new source of any such profits or income or an addition to any source of any such profits or income, income tax in respect of the profits or income from that source or from the addition to that source shall be computed separately, and in the case of profits or income chargeable under r. 1 of the Rules applicable to Case III the provisions of para. (1) of r. 2 of those Rules shall apply, and in the case of profits or income chargeable under Case IV or Case V of sched. D H
the provisions of proviso (b) to sub-s. (1) of the last preceding section of this Act shall apply: (iii) Where any income in respect of which any person has previously been charged or chargeable under Case IV or Case V of sched. D becomes at any time chargeable to tax by deduction under the provisions of r. 7 of the Miscellaneous Rules applicable to sched. D, the provisions of para. (i) of this proviso shall apply as if that person had at the time aforesaid ceased to possess the security or possession from

which the income arises: (iv) Where income arising to any person from any security or possession in any place out of Great Britain and Northern Ireland ceases at any time to be chargeable to income tax by deduction under the provisions of r. 7 of the Miscellaneous Rules applicable to sched. D, the provisions of para. (ii) of this proviso shall apply as if that security or possession were a new source of income acquired by that person at that time. 31 (1) Where in any year of assessment a trade, profession or vocation is permanently discontinued, then, notwithstanding anything in this Part of this Act—(a) the person charged or chargeable with tax in respect thereof shall be charged for that year on the amount of the profits or gains of the period beginning on Apr. 6 in that year and ending on the date of the discontinuance, subject to any deduction or set-off to which he may be entitled under the section of this Part of this Act which provides for relief in respect of certain losses or under r. 13 of the Rules applicable to Cases I and II of sched. D, and, if he has been charged otherwise than in accordance with this provision, any tax overpaid shall be repaid, or an additional assessment may be made upon him, as the case may require; (b) if the profits or gains of the year ending on Apr. 5 in the year preceding the year of assessment in which the discontinuance occurs exceed the amount on which the person has been charged for that preceding year, or would have been charged if no such deduction or set-off as aforesaid had been allowed, an additional assessment may be made upon him, so that he shall be charged for that preceding year on the amount of the profits or gains of the said year ending on Apr. 5, subject to any such deduction or set-off as aforesaid to which he may be entitled. (2) In the case of the death of a person who, if he had not died, would, under the provisions of this section, have become chargeable to income tax for any year, the tax which would have been so chargeable shall be assessed and charged upon his executors or administrators, and shall be a debt due from and payable out of his estate.”

It is common ground between the parties that if proviso (ii) to s. 30 does not apply to the present case, the additional assessment in question must be discharged, and the dividend of £7,434 will appear for the first time in the assessment of income under Case V of sched. D for the year 1943-44, along with the other dividends received by the appellants from their foreign investments in the year 1942-43. It is also common ground between the parties, in your Lordships' House, that a taxpayer can “acquire a new source of income” within the meaning of proviso (ii) if he acquires shares from which income may arise at some future time. Arguments which may be inconsistent with this view were advanced in the courts below by the Crown, but are not now relied on.

The respective contentions of the parties in your Lordships' House may be summarised as follows. The appellants contend that the words “if in any year of assessment any person acquires a new source of any such profits or income” and the words “income tax in respect of the profits or income from that source . . . shall be computed separately” both relate to the same year of assessment. “The year for which income tax is being computed in the present case,” they say, “is the year 1942-43. We did not acquire any new source of income in that year, since the shares in the Argentine company had all been acquired by the year 1936. Thus, the event which brings proviso (ii) into play has not happened.” The Crown, on the other hand, contends that the proviso applies to any case in which a new source of income is acquired in any year of assessment, and income arises from that source in the year of acquisition or in any subsequent year. The Crown does not now rely on the words “or an addition to any source” in proviso (ii).

My Lords, if proviso (ii) had ended with the words “computed separately,” I should have had no hesitation in accepting the appellants' contention, which gives to the earlier part of the proviso the natural meaning of the words used.

It is necessary, however, to consider whether there is a context which should lead this House to accept the contention of the Crown. Counsel for the Crown contended that such a context could be found in the latter words of the proviso,

“ . . . and in the case of profits or income chargeable under r. 1 of the Rules applicable to Case III the provisions of para. (1) of r. 2 of those Rules shall apply, and in the case of profits or income chargeable under Case IV or Case V of sched. D the provisions of proviso (b) to sub-s. (1) of the last preceding section of this Act shall apply.”

They pointed out that, if the appellants' contention were correct, it would be impossible to apply to Case V income coming within proviso (ii) to s. 30 the whole of the provisions of proviso (b) to s. 29. “According to the appellants' contention,” they said, “proviso (ii) to s. 30 only comes into operation if a new source of income is acquired and *in the same year* income arises from that source. If this happens, it would be possible to put sub-cl. (i) of proviso (b) to s. 29 into operation, but the latter sub-clause of proviso (b) could never operate in respect of that income.” This is admitted by counsel for the appellants. Counsel for the Crown also pointed out that a similar difficulty would arise, under the same part of proviso (ii), in the case of income coming under Case III, since only the first portion of the provisions of para. (1) of r. 2 of the Rules applicable to Case III could be brought into operation. This is, however, in substance the same argument as that which I have already stated in regard to Case V income, and need not be further elaborated. While I appreciate that this argument on the part of the Crown is of some weight, the difficulty would be surmounted, at least to some extent, if the concluding words of proviso (ii) “shall apply” were construed as meaning “shall apply so far as applicable.”

I do not think that there is any other context which supports the contention of the Crown, but there is a context which, in my view, strongly supports the contention of the appellants. It is quite clear that in proviso (i) to s. 30 the words: “If in any year of assessment any person charged or chargeable in respect of any such profits or income as aforesaid ceases to possess any particular source of any such profits or income . . .” and the words “income tax in respect of the profits or income from that source . . . shall be computed separately” both relate to the same year. In other words, the income tax there referred to is the income tax for the year in which the taxpayer ceases to possess the particular source of income. I cannot believe that the very similar words in proviso (ii), which immediately follows proviso (i) in the same section, are to be construed in a different sense, and if they are to be construed in the same sense the income tax referred to in proviso (ii) must be the income tax for the year in which the taxpayer “acquires a new source.”

Giving due weight to the contexts relied on by the parties respectively, I see no sufficient reason why your Lordships should not give to the earlier part of proviso (ii) the meaning which it would naturally bear in the absence of any context, and I have come to the conclusion that the appellants' construction of proviso (ii) is correct. I am assisted in coming to this conclusion by a consideration of certain practical difficulties which arise in applying the Crown's construction to the facts of the present case. The Solicitor-General was invited by your Lordships, in the course of his argument, to explain how proviso (ii) would operate if his contention were correct. He asked the House to assume, for the sake of simplicity, that the appellants had acquired all their shares in the Argentine company in the year 1935-36, and continued as follows— I trust that I am correctly reproducing the substance of his explanation: “The inspector of taxes would ‘note’ that the appellants had acquired this new source of income in a year of assessment. That is enough to bring proviso (ii) to s. 30 into operation, and the inspector would note that, under the proviso, income tax in respect of the income from that source must be ‘computed separately.’ The income tax so computed would be nil in each year of assess-

A ment up to and including the year 1941-42. In the year 1942-43 income arose from this source for the first time and the inspector rightly made the assessment which is the subject of this appeal, applying proviso (b) to s. 29, as he is told to do by proviso (ii) to s. 30." I do not think that any better explanation could have been given, but I find this explanation unconvincing. Your Lordships were not referred to any statutory provision which requires a person or company, on acquiring a new investment which is producing no income, to inform the inspector of taxes of this acquisition, and it was never explained to my satisfaction how he would come to learn of it. Moreover, neither leading counsel for the Crown was able to refer your Lordships to any statute which laid down the procedure to be followed by the inspector of taxes, as outlined by the Solicitor-General. These practical considerations supply a further reason why I cannot accept the Crown's construction of proviso (ii) to s. 30. B I should add that counsel for the appellants relied very strongly on the definition of "year of assessment" which appears in s. 237 of the Income Tax Act, 1918, but I do not find this definition of any assistance in the present case.

C My Lords, I regret to find myself at variance with the view expressed by the Court of Appeal. I think I have sufficiently explained why I cannot accept the Crown's construction of proviso (ii) to s. 30, and, even if I gave more weight to the arguments in favour of that construction, I should still feel a very real doubt whether the proviso does or does not justify the assessment now in question. In these circumstances, it would be contrary to well established principles to uphold the assessment. I would allow the appeal and affirm the determination of the Special Commissioners that the assessment must be discharged. The Crown must pay the costs of the appellants here and below. D

E LORD MACDERMOTT [read by LORD NORMAND]: My Lords, the appellants having acquired, prior to 1937, certain shares in Goodlass Wall y Cie, a company incorporated in the Argentine Republic, received for the first time a dividend thereon, amounting to £7,434, during the fiscal year 1942-43. In the same year and also in the preceding year they had received dividends from other foreign companies and had been assessed to income tax on them under Case V of sched. D. On learning of the payment of £7,434 the Crown raised an additional assessment for 1942-43 in respect thereof. This was done on the view that proviso (ii) of s. 30 of the Finance Act, 1926, applied to this payment. The question now is whether this view was well founded in law. If so, the additional assessment should stand and the present appeal be dismissed. F If not, the appeal should be allowed and the additional assessment discharged, it being common ground that in that event the appellants' assessment for 1942-43 in respect of income from foreign possessions fell to be computed on the amount thereof arising in the year 1941-42 which, as already indicated, included no dividend from the Argentine company.

G Section 30 of the Act of 1926 consists of a single sentence (which I shall refer to as the main enactment) followed by four provisos. I need not quote the section in its entirety, but it will be convenient to set out the main enactment and the first two provisos. These, with the omission of certain references therein to the rules of Case III and to Case IV which do not, in my opinion, throw any light on the question to be decided, read as follows:

H "30. All profits or income in respect of which any person is chargeable . . . under Case V of sched. D may . . . be assessed and charged in one sum: Provided that—(i) If in any year of assessment any person charged or chargeable in respect of any such profits or income as aforesaid ceases to possess any particular source of any such profits or income or any part of any such source, income tax in respect of the profits or income from that source or that part shall be computed separately, and the provisions of the section in this Part of this Act which relates to the discontinuance of a trade, profession or vocation, shall, subject to the necessary modifica-

tions, apply in any such case as if the cesser of the possession of the source or part were the discontinuance of a trade: (ii) If in any year of assessment any person acquires a new source of any such profits or income or an addition to any source of any such profits or income, income tax in respect of the profits or income from that source or from the addition to that source shall be computed separately . . . and in the case of profits or income chargeable under . . . Case V of sched. D the provisions of proviso (b) to sub-s. (1) of the last preceding section of this Act shall apply."

Considered alone the main enactment but fortifies the appellants' contention that, by virtue of the change in the basis of assessment effected by s. 29 (1) of the Act of 1926, the tax for 1942-43 should be computed on the income of the preceding year from their foreign possessions considered as a single source. This was not disputed and the case for the Crown depended altogether on the applicability of the exception contained in the second proviso. Before considering the provisos, however, it may be observed that the terms of the main enactment relate to a year in respect of which the subject concerned is chargeable to tax. The meaning remains unaltered if, after the word "chargeable", there are inserted the words "in any year of assessment." The main enactment is, I think, clear enough without this addition, but it serves to emphasise the nature of the subject-matter which the provisos are intended to qualify.

Coming to proviso (ii) it will be well to refer at once to the opposing contentions regarding its construction and operation. As I understand them, their substance may be stated thus. For the appellants it was said that the opening words of the proviso, "If in any year of assessment," refer to the particular year for which tax is being computed, in this case the year 1942-43; that the additional source, the shares in the Argentine company, was not acquired in that year; and that, in consequence, the condition was not satisfied and the proviso could not be applied. For the Crown stress was laid on the word "any," and it was submitted that "in any year of assessment" was an expression wide enough to include any year previous to the year for which tax was being computed. The condition of the proviso, the argument proceeded, was, therefore, satisfied by the acquisition of the additional source prior to 1942-43, with the result that the proviso applied and in turn brought proviso (b) (i) of s. 29 (1) into operation so as to make the appellants chargeable in 1942-43 in respect of the income arising in that year from the additional source.

My Lords, the natural meaning of the words "in any year of assessment," when they are read in the light of their immediate context and with due regard to the terms of the main enactment, is, in my opinion, that contended for by the appellants. The structure of the text and the language used are such as to link these words naturally and grammatically, not only with the year of assessment to which the main enactment relates, but also with the year in respect of which the direction "shall be computed separately" is given. The interpretation favoured by the Crown, on the other hand, would give no real effect to the words "of assessment"; would read "acquires" as "acquires or has acquired"; and in certain cases, such as the present, would necessitate a computation based on events standing years apart. I doubt if the Income Tax Acts provide adequate machinery for a process of that kind, but, however that may be, I think the language of the proviso down to the word "separately" cannot, without straining, be said to contemplate the acquisition of a new source and its initial productivity as occurring in different years.

It remains to see whether the case for the Crown can be supported by the wider context on which it relied. Two points call for consideration in this connection. Both sides agreed that on any rational construction the crucial phrase, "If in any year of assessment," must have the same meaning in

proviso (ii) as in proviso (i) and both claimed that it had. For the Crown it was said that if in proviso (i) this phrase related, as the appellants submitted, to the year of separate computation thereby directed, the subject would in the following year suffer tax in respect of the lost source and the application of para. (b) of s. 31 (1) would produce a further anomaly. I am not satisfied that these results would follow, but I need not encumber this opinion with my reasons for that view, as I think the wording of proviso (i) is such as to preclude any real doubt as to what is meant by "any year of assessment" therein.

A It is the year in which a person is "charged or chargeable in respect of any such profits or income" and "ceases to possess any particular source of any such profits or income." I do not think any other reading is possible without disregarding the clear import of the language, and if that is so it seems no less clear that the year of separate computation is the same year. I am, therefore,

B of opinion that the point under discussion serves only to strengthen the interpretation of proviso (ii) advanced on behalf of the appellants.

The second point arises on the concluding words of proviso (ii) which say that "the provisions of proviso (b)" of s. 29 (1) shall apply. On the appellants' construction of "in any year of assessment," proviso (ii) only bears on the computation of a single year, the year which sees the new source acquired and

C yielding income after acquisition. In cases within proviso (ii) this, it was conceded, means that, in the course of the separate computation directed by that proviso, the only provision of proviso (b) of s. 29 (1) which can be applied is para. (i). That paragraph enacts that tax under Case IV or Case V is to be computed, as respects the year of assessment in which the income first arises, on the full amount of the income arising within that year. But this paragraph

D of proviso (b) is followed by two other substantive provisions of which, for present purposes, only para. (ii) need be mentioned. It enacts that where the income first arose in the year preceding the year of assessment, tax is to be computed on the income of the year of assessment. On the Crown's construction of proviso (ii) of s. 30 the process of separate computation is not limited to a single year, and, accordingly, if that is the sound construction, effect can

E be given not only to para. (i) of proviso (b) of s. 29 (1) but also to para. (ii) and, for a similar reason, to para. (iii) as well. This, it was said, was a strong indication that the Crown's was the correct interpretation, for what proviso (ii) applies is not "the appropriate provision" but "the provisions" of proviso (b). My Lords, I do not think it was in dispute that in cases falling within proviso (ii) of s. 30 the Crown would, in certain circumstances, lose tax if resort to proviso (b)

F of the preceding section were limited to para. (i) thereof. That, no doubt, lends point to the argument under discussion, but it does not conclude it. The problem is one of construction throughout, and the question, as I see it, comes to this—Do the implications of the application of the "provisions of proviso (b)" suffice to outweigh the considerations in favour of the appellants' interpretation which arise on the earlier parts of s. 30? In my opinion, they

G do not do so. I think the whole tenor of the relevant portions of the section, apart from the reference to proviso (b), manifests the meaning contended for by the appellants with a certainty which ought to prevail. The Crown's construction would not only involve a modification of what seems to me to be plainly conveyed by the important first part of proviso (ii); it would also, by giving the expression "in any year of assessment" a different sense in each

H of the first two provisos, lead to an inconsistency in the structure of the section at variance with its obvious design. In short, I think less disrespect is done to the natural signification of the language used by adding at the end of proviso (ii) some such phrase as "in so far as the same are capable of taking effect" than by introducing the changes necessary to let the proviso read as the Crown says it should. It may be that the failure to make provision for cases in which a new or additional source of income does not become fruitful until after the year of acquisition, constitutes a defect in the scheme of the taxing code, but

if a fair reading of the text reveals the defect it is not for the courts to repair the omission. For these reasons I think the additional assessment was bad. I would, therefore, allow the appeal.

LORD REID: My Lords, for some years before 1943 the appellant company had owned shares in an Argentine company which had never produced any income and had also owned shares in other foreign companies which had produced income. In January, 1943, the appellants for the first time received a dividend from its holding in the Argentine company. That dividend amounted to £7,434, and the appellants were assessed to income tax on that sum under sched. D, Case V, for the year 1942-43, the year during which the income had been received.

The general principles which now govern assessments under Case V are contained in s. 29 and s. 30 of the Finance Act, 1926. In the first place, s. 30 requires that, subject to the exceptions therein stated, all income in respect of which any person is chargeable under Case V must be assessed and charged in one sum. The section uses the word "may", but it is, I think, clear that its provisions are mandatory and not permissive. Then s. 29 requires, again subject to exceptions, that income tax in respect of income chargeable under Case V shall be computed on the income of the year preceding the year of assessment. The exceptions relating to Case V are set out in proviso (b) to s. 29. They apply to "the year of assessment in which the income first arises," the next following year, and, where the taxpayer so elects, the next year again. During these years the general rule is not to be followed, but tax is to be computed on the income arising during the year of assessment. As s. 30 directs that all income of a taxpayer chargeable under Case V is to be taken together and assessed in one sum, the year "in which the income first arises" must mean the first year in which any income chargeable under Case V arises, and if the matter stopped there subsequent changes in the sources from which Case V income was obtained would be immaterial and the acquisition of a new source would not bring the proviso into operation again. Income from a new source would simply be pooled from the beginning with the rest of the taxpayer's Case V income and the general rule of s. 29 would apply so that income tax on income from the new source would first become payable in the year following the year in which it was received. But that result is to some extent prevented by the second proviso to s. 30. To what extent it is prevented is the principal matter for decision in this case. This case turns on the interpretation of the second proviso, but that proviso cannot be taken by itself without regard to the meaning of the first proviso and I must, therefore, quote both. The relevant part of the section is in the following terms:

"All profits or income in respect of which any person is chargeable either under r. 1 of the Rules applicable to Case III of sched. D, or under Case IV of sched. D or under Case V of sched. D may respectively be assessed and charged in one sum: Provided that—(i) If in any year of assessment any person charged or chargeable in respect of any such profits or income as aforesaid ceases to possess any particular source of any such profits or income or any part of any such source, income tax in respect of the profits or income from that source or that part shall be computed separately, and the provisions of the section in this Part of this Act which relates to the discontinuance of a trade, profession or vocation, shall, subject to the necessary modifications, apply in any such case as if the cesser of the possession of the source or part were the discontinuance of a trade: (ii) If in any year of assessment any person acquires a new source of any such profits or income or an addition to any source of any such profits or income, income tax in respect of the profits or income from that source or from the addition to that source shall be computed separately, and in the case of profits or income chargeable under r. 1 of the Rules applicable

to Case III the provisions of para. (1) of r. 2 of those Rules shall apply, and in the case of profits or income chargeable under Case IV or Case V of sched. D the provisions of proviso (b) to sub-s. (1) of the last preceding section of this Act shall apply."

The crucial question in the case can, I think, be stated in this way. For what year or years does the second proviso direct that income tax in respect of income from a new or additional source shall be computed separately?

A But before coming to that question it is necessary to determine what is meant by a new source of income. The section applies to income chargeable under Case III, Case IV and Case V—for brevity I shall call such income Case III income, Case IV income and Case V income. The section treats these three classes of income separately. In considering whether certain Case V income is income from a new source or how the proviso applies to it, it is immaterial
B whether or not the taxpayer is in receipt of Case III or Case IV income. I may add while referring to Case III income that the second part of the second proviso directs different rules to be applied where Case III income is in question from those which apply in the other cases, but I am satisfied that there is no material difference between the two and, therefore, for the purposes of this case, I can consider the section as if it only applied to Case V income: no further light is
C thrown on it by discussing its application to Case III income. A "new source" of Case V income implies that the taxpayer already had a source of such income when he acquired the new source. If he did not, there is no need for the proviso as the case would fall directly under proviso (b) to s. 29 to which I have already referred. Originally there was a controversy in this case about what is meant by a "new source." It was contended for the Crown that a
D person does not acquire a new source of income merely by acquiring shares or other property which may later yield income, but that those shares or that other property only become a "new source" of income when they actually begin to yield income. That contention was unsuccessful and it is not now maintained. It is now admitted, and I think rightly admitted, that the appellants acquired a new source of income in acquiring the shares of the Argentine company in and before 1936 although no income arose from those shares until 1943.

E I can now return to what I have called the crucial question in the case. The proviso does not state expressly for what year or years income tax in respect of income from a new source is to be computed separately. The appellant contends that the direction to compute separately refers back to the initial words of the proviso so that the direction only refers to the year of assessment
F in which the new source was acquired. The Crown, on the other hand, contends that the direction refers forward to the subsequent part of the proviso so that separate computation must continue for a sufficient period to enable full effect to be given to the provisions of proviso (b) to s. 29 (1). If this contention is correct then separate computation must in every case continue for two years (or for three years if the taxpayer so elects) and separate computation will
G only begin when the new source begins to yield income.

I think it right to consider first what is the natural meaning of the language of the second proviso. Its framework can, perhaps, be more clearly shown if I contract what is not essential in this connection and express the proviso thus—If in any year of assessment a certain thing happens income tax in respect of certain income shall be computed separately and in the case of Case III
H income certain rules shall apply and in the case of Case IV or Case V income certain other rules shall apply. I think that the natural interpretation of such a provision is that the direction to compute separately refers solely to the year of assessment specified and that the part of the proviso which follows that direction and is introduced by the word "and" is intended to set out the manner in which the separate computation already directed is to be done. There appear to me to be two main objections to the Crown's interpretation. In the first place, it makes the words at the beginning "in any year of assess-

ment " meaningless: they might as well be "at any time" or even be omitted altogether, because according to the Crown it does not matter when the new source was acquired, the only thing that matters is when income from it first arose and that may be long after the year in which it was acquired. I would find this objection formidable in any case, but it becomes much more formidable when one looks at the definition of "year of assessment" in s. 237 of the Income Tax Act, 1918:

"In this Act, unless the context otherwise requires:— . . . 'Year of assessment' means, with reference to any tax, the year for which such tax was granted by any Act granting duties of income tax."

On the appellant's interpretation of the proviso this definition is exactly in point, but the Crown is forced to argue that the context does not permit its application. I find it difficult, if not impossible, so to hold because the phrase "year of assessment" is apparently used in this proviso with reference to a tax, the tax which the immediately succeeding part of the proviso directs to be computed separately. But I think that, by itself, this objection would not be fatal and I proceed to the next which arises out of the language of the latter part of the proviso. Somewhere a direction must be found as to the period during which there is to be separate computation: no one suggests that this is to go on indefinitely and I find it difficult to read into a provision in the form "and" certain rules shall apply a direction that the separate computation earlier mentioned shall continue for so long as is necessary to enable the whole of those rules to apply. That may have been the intention, but I do not find it easy to suppose that a person having that intention would express it in the way in which this proviso is expressed. The strength of the Crown's case is that where there is a direction that certain rules shall apply one would naturally expect that there would be at least some cases in which they could all apply, but admittedly on the appellants' interpretation paras. (ii) and (iii) of proviso (b) to s. 29 (1) and the corresponding provisions in the Rules applicable to Case III can never have any application to a case under this proviso. On the appellants' construction para. (i) of proviso (b) will apply if any income from the new source arises during the year of assessment in which the source was acquired, but not otherwise. This is not a satisfactory interpretation, but, in my judgment, it is not an impossible interpretation. I think that the direction to apply these rules can mean that they shall be applied, but only in so far as they can be applied during the year for which separate computation has already been directed.

There is a further argument from the provisions of proviso (i) to s. 30. What I have called the framework of this proviso is very similar to that of the second proviso. Both begin: "If in any year of assessment" something happens, both then direct separate computation of tax without expressly stating for what period, and both conclude "and" certain rules shall apply. If it could be shown that in the application of the first proviso cases can be found where the intention of the proviso would plainly be defeated if separate computation of tax is limited to the year of assessment specified, that would be a strong reason for holding that both must have been intended to have a wider application. If, on the other hand, the apparent purpose of the first proviso can be fulfilled without any separate computation in any year of assessment other than that specified, that would be an equally strong reason for adopting the appellants' interpretation of the second proviso. The first proviso deals with the case of a person holding several sources of Case V income (or of Case III or Case IV income) who in the course of a particular year of assessment ceases to possess one of them and it directs the application of certain provisions as if the cesser of possession of the source were the discontinuance of a trade. Is there any application of these provisions which is impossible if tax is only computed separately in the year of assessment specified in the proviso? The Crown argued that separate computation would also be

necessary in the year following and in certain cases in the preceding year. As regards the year following, which I shall call year 2, the argument was put in this way. Suppose a taxpayer to have ten sources of Case V income at the beginning of year 1 and to sell one, called A, during the year. Suppose further that A has yielded income in year 1 before its sale. As regards year 1 there is no difficulty: the statute directs separate computation of tax on the income from A in year 1. But when you come to year 2 it is said there is a difficulty. Tax in respect of year 2 is payable on the income in year 1 from all Case V sources taken together. In year 2 the taxpayer only holds nine sources and he is not intended to be taxed in that year on any income from source A which he ceased to possess during year 1. But, it is said, unless the proviso also applies in year 2 he will be taxed in that year on the income received from all Case V sources including A in year 1. I think that this argument is fallacious for this reason. The reason why the income from all ten sources is pooled is because s. 30 says so, but proviso (i) to that section makes an exception. It says that the income from source A in year 1 is to be taken out of the Case V pool of that year's income. So the Case V pool of year 1 income only includes the income from the other nine sources. When you come to compute tax for year 2 you are told to go to the Case V pool for year 1. But when you get there you do not find any income from A in it because during year 1 the proviso took it out. In other words the proviso only operates in year 1, but the result of that operation is reflected in year 2 because tax for year 2 is based on what happened in year 1. I take next the second argument, the argument with regard to the penultimate year. This argument is based on s. 31 (1) (b) of the Act of 1926. This section allows the Inland Revenue to make an additional assessment for that year if the actual income for that year from what I have called source A exceeds the amount on which the taxpayer was charged, *i.e.*, the actual income from source A in the year before the penultimate year. It is said that to operate this provision requires separate computation of the tax due in the penultimate year in respect of income from source A. I do not think so. There is no question of disturbing the original assessment or the original computation of tax for that year, and that computation would take into account the income from source A as included in what I have called the Case V pool. All that happens is that liability is adjusted by an additional assessment. I have, therefore, come to the conclusion that the Crown has failed to show that it is ever necessary in giving effect to proviso (i) to s. 30 to compute tax separately in respect of any year of assessment other than that in which the taxpayer ceases to possess the particular source, and if that be right the argument from proviso (i), far from helping the Crown, adds materially to the weight of the considerations favouring the appellants' interpretation.

The only other question which I need notice is whether there are any general considerations in favour of the Crown's contention. The result of the special methods of computation which apply at the beginning and end of a taxpayer's possession of a particular source of income is that very frequently the total sum on which he is assessed to tax for the whole years of his possession of the source differs materially from the total amount of income which he has received from it, and if it could be shown that one of the interpretations put forward in this case generally produced a more equitable result than the other that might be entitled to some weight. But that has not been shown, and probably could not be. Taking all the considerations with which I have dealt and giving due weight to them, I am left in no doubt that the appellants' interpretation of the proviso is that which ought to be accepted and I, therefore, agree that this appeal should be allowed.

Appeal allowed with costs.

Solicitors: *Linklaters & Paines* (for the taxpayers); *Solicitor of Inland Revenue* (for the Crown).

[Reported by J. D. PENNINGTON, ESQ., Barrister-at-Law.]

MOLE v. MOLE.

[COURT OF APPEAL (Bucknill, Somervell and Denning, L.J.J.), June 13, 14, 1950.]

Divorce—Evidence—Privilege—Letter by husband to probation officer—Probation officer consulted by wife, but not accepted as conciliator by husband.

On the hearing of a petition by a wife for divorce on the ground of the husband's alleged cruelty and desertion, the wife sought to adduce in evidence a letter which the husband had written to a probation officer in answer to a letter written to him by the probation officer after he (the probation officer) had been consulted by the wife with a view to effecting a reconciliation between the parties. The husband objected to the evidence being given on the ground that the letter was privileged, but it was argued that it should be admitted since the husband had not accepted the probation officer as a conciliator.

HELD: the letter was privileged and should not be admitted.

McTaggart v. McTaggart ([1948] 2 All E.R. 755), *applied*.

Bostock v. Bostock ([1950] 1 All E.R. 25), *doubted by* DENNING, L.J.

[AS TO COMMUNICATIONS "WITHOUT PREJUDICE," see HALSBURY, Hailsham Edn., Vol. 13, pp. 703-705, para. 774; and FOR CASES, see DIGEST, Vol. 22, pp. 375-378, Nos. 3836-3860.]

Cases referred to:

(1) *McTaggart v. McTaggart*, [1948] 2 All E.R. 754; [1949] P. 94; [1949] L.J.R. 82; 2nd Digest Supp.

(2) *Bostock v. Bostock*, [1950] 1 All E.R. 25; 114 J.P. 59.

APPEAL by a wife from an order of Mr. Commissioner BUSH JAMES, K.C., made on Jan. 27, 1950, whereby he refused to grant a decree *nisi* to the wife on the ground of the husband's alleged cruelty and desertion.

The parties were married on July 28, 1945, and lived together from December, 1945, when the husband came out of the army, until Mar. 30, 1946, when the wife left the husband on the ground of his alleged cruelty. In June, 1946, the wife consulted a probation officer with a view to effecting a reconciliation. The probation officer wrote a letter to the husband who replied on June 4, 1946. The commissioner ruled that the husband's reply to the probation officer was not privileged, but found that the husband had not been guilty of cruelty and that the wife had no just cause for leaving the husband. The Court of Appeal allowed the appeal and ordered a new trial on the ground that the commissioner had failed to direct his mind to the question whether the desertion by the wife had terminated by reason of a *bona fide* offer by her to return to the husband. The case is reported only on the point relating to the admissibility of the evidence of the letter written by the husband to the probation officer.

Seuffert for the wife.

The husband appeared in person.

BUCKNILL, L.J., after stating the facts, held that there was no ground for the wife's allegation of cruelty, but that, on the issue of desertion, the appeal should be allowed and a new trial ordered since the learned commissioner had failed to deal with the question whether the wife had made a *bona fide* offer to return to the husband. [HIS LORDSHIP then referred to the husband's letter to the probation officer, and continued:] At the trial, when the probation officer was called, the husband took the objection that this letter was privileged in accordance with the opinions given by two lords justices in *McTaggart v. McTaggart* (1), but the learned commissioner ruled that it was not privileged. He seems, however, to have dismissed the letter by saying that the husband wrote it in a pique and did not mean what he said. In my opinion, the letter was privileged and should not have been admitted. Counsel for the wife argued that the opinions expressed by the lords justices in *McTaggart v. McTaggart* (1)

only applied when both sides have accepted the probation officer as a conciliator between them. I do not think that that is what was intended in those opinions. DENNING, L.J., said ([1948] 2 All E.R. 755):

A “The rule as to ‘without prejudice’ communications applies with especial force to negotiations for reconciliation. It applies whenever the dispute has got to such dimensions that litigation is imminent. In all cases where the estrangement has reached the point where the parties consult a probation officer, litigation is imminent. It is clear that there is a dispute which may end either in the magistrates’ court or the divorce court. The probation officer has no privilege of his own from disclosure . . .”

B This dispute had got to the stage where litigation was imminent. The wife had seen a solicitor, the parties had been living apart for two years, and there was no reasonable prospect of their becoming re-united. It seems to me that if the husband, instead of writing this letter, had gone to see the probation officer and had told him verbally what he wrote in this letter it would be impossible to argue that that statement would not be privileged under the rule formulated in *McTaggart v. McTaggart* (1). I think the principles stated by COHEN and C DENNING, L.J.J., in *McTaggart’s* case (1) should be applied. It is essential, if a reconciliation is to be attempted, with the probation officer as intermediary, that statements made by either party, as soon as the probation officer is asked to act in that capacity, should be treated as privileged. Counsel for the wife suggested that if one applies that principle at such an early stage as in the present case, it tends to prejudice the working of another principle, *viz.*, that a spouse is no D longer in desertion if he or she has made a *bona fide* attempt to be taken back, and he argued that if such a *bona fide* attempt is made through a probation officer it ought to be taken into account. There is some force in that argument, but one must bear in mind that, in matrimonial disputes, the State is also an interested party and is more interested in reconciliation than in divorce, and if the rule as to privilege tends to promote the prospects of reconciliation, I think it ought E to be applied, although it may make it difficult for the spouse in some ways to prove a *bona fide* attempt to return home. That difficulty can always be got over by the deserting spouse writing a suitable and *bona fide* letter and sending it by registered post to the deserted one.

SOMERVELL, L.J.: I agree.

F DENNING, L.J.: I agree so fully with all that BUCKNILL, L.J., has said that I do not wish to add anything, except to say that I do not accept the correctness of *Bostock v. Bostock* (2). I take it that the principle of *McTaggart v. McTaggart* (1) applies not only to probation officers, but also to other persons such as clergy, doctors, or marriage guidance counsellors, to whom the parties resort with a view to reconciliation when there is a tacit understanding that the G conversations are without prejudice. I see no reason why the solicitors of the parties should be in any different position.

Appeal allowed; new trial ordered.

Solicitors: *Smiles & Co.* (for the wife).

[Reported by C. N. BEATTIE, ESQ., Barrister-at-Law.]

R. v. AVES.

[COURT OF CRIMINAL APPEAL (Lord Goddard, C.J., Humphreys and Parker, JJ.), June 19, 1950.]

Criminal Law—*Receiving*—*Recent possession of stolen property*—*Direction to be given to jury.*

On an appeal against a conviction of receiving stolen goods,

HELD: where the only evidence on such a charge is that the accused person was found in possession of property recently stolen, the jury should be directed that they may infer guilty knowledge (a) if the prisoner offers no explanation to account for his possession, or (b) if they are satisfied that the explanation he does offer is untrue, but, if the explanation offered is one which leaves the jury in doubt whether he knew that the property was stolen, they should be told that the case has not been proved, and, therefore, the verdict should be Not Guilty.

[AS TO POSSESSION OF GOODS RECENTLY STOLEN, see HALSBURY, Hailsham Edn., Vol. 9, pp. 555, 556, para. 944; and FOR CASES, see DIGEST, Vol. 15, pp. 972, 973, Nos. 10,861-10,879.]

Case referred to:

- (1) *R. v. Schama, R. v. Abramovitch*, (1914), 84 L.J.K.B. 396; 112 L.T. 480; 79 J.P. 184; 15 Digest 972, 10,865.

APPEAL against a conviction of receiving.

The appellant was convicted at London Sessions on an indictment charging him with receiving stolen property. The Court of Criminal Appeal now dismissed the appeal, and LORD GODDARD, C.J., indicated a proper form of summing-up to be adopted in receiving cases where the evidence is only that of recent possession.

C. I. Poole for the appellant.

S. A. Morton for the Crown.

LORD GODDARD, C.J., delivered the judgment of the court in which he stated the facts, said that one of the grounds on which the appeal was based was that the jury had not been properly directed in accordance with what had been laid down in *R. v. Schama and Abramovitch* (1), and continued: Where the only evidence is that an accused person is in possession of property recently stolen, a jury may infer guilty knowledge (a) if he offers no explanation to account for his possession, or (b) if the jury are satisfied that the explanation he does offer is untrue. If, however, the explanation offered is one which leaves the jury in doubt whether he knew the property was stolen, they should be told that the case has not been proved, and, therefore, the verdict should be Not Guilty.

I think I might add this as an addendum to the formula above stated. If there is evidence that the prisoner was in possession of property recently stolen and also other evidence which tends to show guilty knowledge, then the judge should direct the jury in the terms which I have mentioned on the question of recent possession, and should then go on to deal with the other evidence against the prisoner which may or may not be consistent with the explanation, if any, which he has given.

Appeal dismissed.

Solicitors: Registrar, Court of Criminal Appeal (for the appellant); Solicitor, Metropolitan Police (for the Crown).

[Reported by H. McL. MORRISON, Esq., Barrister-at-Law.]

CONWAY v. GEORGE WIMPEY & CO., LTD.

[KING'S BENCH DIVISION (Sellers, J.), June 8, 9, 12, 20, 1950.]

Negligence—Negligence of servant—Liability of master—Accident to unauthorised passenger in lorry—Extent of duty to take care.

A The defendants were a firm of contractors engaged on building work at an aerodrome, and they provided lorries for the purpose of conveying their employees to the place of their work on the site. In the cab of each lorry was a notice indicating that the driver was under strict orders to carry no passengers other than the defendants' employees during the course of and in connection with their employment, and that any other person travelling on the vehicle did so at his own risk. The driver of the lorry in question in the present case had also received oral instructions to that effect. In fact, it was not unusual for men not employed by the defendants to make use of the defendants' lorries as a means of transport, although it was not established that the defendants knew of the practice. The plaintiff, a labourer employed by P., Ltd., another firm of contractors engaged on work at the aerodrome, while on his way to work, hailed one of the defendants' lorries and was permitted by the driver to ride on it for some distance across the aerodrome. In dismounting the plaintiff was injured, and he claimed damages from the defendants for the driver's negligence.

B HELD: the driver of the lorry was acting outside the scope of his employment in carrying the plaintiff and had no authority to do so, and, therefore, the defendants were not liable for his negligence.

C [AS TO THE DUTY TO TAKE CARE, see HALSBURY, Hailsham Edn., Vol. 23, pp. 571, 572, para. 825; and FOR CASES, see DIGEST, Vol. 36, pp. 12-16, Nos. 33-60.]

Cases referred to:

- E (1) *Hay (or Bourhill) v. Young*, [1942] 2 All E.R. 396; [1943] A.C. 92; 111 L.J.P.C. 97; 167 L.T. 261; 2nd Digest Supp.
 (2) *Twine v. Bean's Express, Ltd.*, (1946), 175 L.T. 131; 2nd Digest Supp.
 (3) *Davis v. Swan Motor Co. (Swansea), Ltd.*, [1949] 1 All E.R. 620; [1949] 2 K.B. 291.
 (4) *Buckland v. Guildford Gas Light & Coke Co.*, [1948] 2 All E.R. 1086; [1949] 1 K.B. 410; 113 J.P. 44; 2nd Digest Supp.

ACTION.

F The plaintiff claimed that the defendants were liable for the negligence of a lorry driver employed by them, as a result of which he suffered physical injury. The jury having found that the driver was equally responsible with the plaintiff for the accident, the question of the defendants' liability was, by agreement between the parties, left to the judge. The facts appear in the judgment.

Seuffert for the plaintiff.*H. Edmunds* for the defendants.*Cur. adv. vult.*

H June 20. **SELLERS, J.**, delivered the following judgment. This case was tried by a jury, and by agreement between the parties it was left to me to decide, on the law and on the evidence and such inferences therefrom as I was free to make, whether the defendants were liable for any negligence the jury might find against the driver of the defendants' lorry concerned in the accident.

On May 1, 1948, the plaintiff was employed as a labourer by some contractors, named J. W. Page, Ltd., at Heath Row aerodrome. On his way to work, shortly before 8 a.m., he hailed a lorry belonging to the defendants and driven by their servant, which was crossing the aerodrome taking a number of the defendants'

servants to their work. The lorry stopped, and the plaintiff was given a lift for a short distance. After some communication with the driver, the plaintiff dismounted over the off-side of the lorry and somehow got his right leg under the off-side rear wheel, whereby the leg was so badly crushed that it had to be amputated a few inches below the knee. The circumstances in which the plaintiff dismounted were fully dealt with before the jury, who found both the plaintiff and the lorry driver equally responsible for the accident. The plaintiff's special damage, mainly for accrued loss of wages, had been agreed at £555. A The jury assessed the general damages at £1,000 and awarded the plaintiff half of that, £500 and all the special damage, £1,055 in all. Notwithstanding that the jury held the parties equally to blame, counsel for the defendants accepted that the jury were entitled to award damages as they did and he did not wish to argue that only half of the special damage could be recovered. In these circumstances, and as, in my view, the plaintiff cannot recover at all, that B interesting, and, perhaps, difficult, question does not arise for my determination.

In the course of the argument on the issue for my consideration, it was accepted by the plaintiff's counsel that the defendants' liability could only be based on a vicarious responsibility for the negligence of their servant, the driver of the lorry, but on occasions the argument seemed to go beyond this. The defendants were the main contractors for the building of the Heath Row C aerodrome where they employed many men. As the area is large and the men worked in a number of scattered places, the defendants customarily had a number of lorries available at appropriate times for the conveyance of their men. The vehicle in question was an open lorry, with sides and back, designed for the cartage of materials and with no provision for men to get on or off except by climbing over the back or sides as best they could. On the offside towards D the cab there was a tank under the level of the lorry floor, which could be used as a foot-rest or step and which the plaintiff was using at the time of the accident. In addition to the defendants, there were other contractors on the site, including the plaintiff's employers, who had only a small number of men working there. It was not unusual for men not employed by the defendants to get a lift across the aerodrome on the defendants' "men-carrying" lorries. The plaintiff knew of this practice, and I accept his statement that he thought he had as much E right as anyone else to ride in them. His view was that there was no question about it. He had not seen a notice or been told to the contrary. Other witnesses stated that these lorries were frequently used by men who were not servants of the defendants. The men working on the aerodrome had no marks F distinguishing those employed by the defendants from others, and I am not satisfied that the defendants' drivers in general knowingly carried men who were not the defendants' servants, or that the defendants' driver on this occasion took the plaintiff on the lorry knowing that he was not one of the defendants' men.

It was not suggested, and certainly it was not established, that the defendants G knew that men other than their own were using the lorries in this way. The argument was that the defendants ought to have known what was happening and that the plaintiff and others like him would use the lorries, and, therefore, they owed a duty to such persons as those who might reasonably be anticipated by them to be likely to be injured by the negligent driving of their servant: *Hay (or Bourhill) v. Young* (1). Such considerations are relevant in H considering the duty and obligations of the driver of the vehicle, but, in my view, they are not relevant in considering the responsibility of the defendants. The defendants were clearly under no duty to provide free rides for other contractors' servants or anyone else who happened to be crossing the aerodrome. Neither were the defendants under any duty to give them notice that the lorries were not for them. The defendants limited the scope of the driver's duty and authority in the present case by the following notice which was affixed in the cab and of which the driver was fully aware:

"The driver of this vehicle has strict orders to carry no passengers other than employees of G. Wimpey & Co., Ltd., during the course of and in connection with their employment. Any other person travelling on this vehicle does so at his own risk."

The driver had also received express oral instructions from the defendants' transport manager that he was to carry the defendants' men only.

A In these circumstances, I cannot find that the plaintiff has established against the defendants any right to be on the lorry or any authority in the driver to allow him to be there and to be driven thereon. The case, as I see it, is completely covered by the decision of the Court of Appeal in *Twine v. Bean's Express, Ltd.* (2), and the reasoning of LORD GREENE, M.R., therein from which I take two short extracts (175 L.T. 132):

B " . . . if the question is asked : Was the driver, Harrison, in giving a lift to the deceased man acting within the scope of his employment ? The answer is clearly 'No.' He was doing something that he had no right whatsoever to do, and *qua* the deceased man he was as much on a frolic of his own as if he had been driving somewhere on some amusement of his own quite unauthorised by his employers . . . He was in fact doing
C two things at once. He was driving his van from one place to another by a route that he was properly taking when he ran into the omnibus, and as he was driving the van he was acting within the scope of his employment. The other thing that he was doing simultaneously was something totally outside the scope of his employment, namely, giving a lift to a person who had no right whatsoever to be there. In my opinion, once
D the facts are understood the case is a perfectly simple one, and there is only one answer to it."

It was argued for the plaintiff that the written notice in the cab was a general notice which might well be applicable when the vehicle was travelling on the highways, but that the conditions in the aerodrome were quite different and called for specific instructions in respect of the special circumstances there,
E and reliance was placed on the fact that after this accident notice boards were put up by the defendants in certain convenient and conspicuous places on the aerodrome stating that the lorries were for the defendants' men only. I do not feel able to accept those contentions. They still leave the driver without authority at the material time to carry the plaintiff, and the plaintiff without authority or title to be on the lorry at the time of this accident which
F has had so unfortunate a result for him.

I was referred in the course of the argument on behalf of the plaintiff to *Davis v. Swan Motor Co. (Swansea), Ltd.* (3), and to *Buckland v. Guildford Gas Light and Coke Co.* (4), but these cases do not refer to vicarious liability of employers for the acts of their servants. They deal, in my view, with quite different issues. I give judgment for the defendants with costs.

G *Order accordingly.*

Solicitors: *J. H. Milner & Son* (for the plaintiff); *Stanley & Co.* (for the defendants).

[Reported by F. A. AMIES, ESQ., Barrister-at-Law.]

Re PRIMROSE (BUILDERS), LTD.

[CHANCERY DIVISION (Wynn-Parry, J.), May 25, 1950.]

Company—Winding-up—Preferential creditor—Advances for payment of wages—Advances by bank on current account on being satisfied that an amount equal to advance would shortly be paid in—Companies Act, 1948 (c. 38), s. 319 (4).

On Apr. 30, 1948, a company opened a current account with a bank and arranged to overdraw the account up to £175, the limit of the overdraft being subsequently raised to £3,500 and later to £5,500. No payment into the account was appropriated either by the company or by the bank to meet any particular payment out. In July, 1948, the company was informed by the bank that drawings must be restricted to wages only, in the absence of further credits, and the bank also requested the substantial reduction of the overdraft. In August, 1948, the bank indicated that an increase in the overdraft could not be permitted even for the payment of wages. During the relevant period of four months under the Companies Act, 1948, s. 319 (1), nine cheques were presented, the first two made out to "cash," and the rest to "wages," and on the presentation of each cheque the bank insisted on being satisfied, before honouring it, that payment in of about the same or of a greater amount would shortly be made. On May 9, 1949, the company was compulsorily wound-up and the bank claimed to be preferential creditors under the Companies Act, 1948, s. 319 (4), in respect of amounts advanced by them during the preceding four months for the purpose of paying wages.

HELD: the account had been conducted throughout as an ordinary current account; the payments which the bank required to be made into the account were in general reduction of the overdraft and were not to be regarded as having been appropriated to the refunding of the sums supplied by the bank in cashing the cheques drawn for wages; and, therefore, the bank were entitled to be treated as preferential creditors under s. 319 (4).

Rule in Clayton's Case (1816) (1 Mer. 572), applied.

[AS TO RIGHTS OF PERSON ADVANCING MONEY TO PAY CLERK OR SERVANT, see HALSBURY, 1949 Edn., Vol. 5, p. 752, para. 1224; and FOR CASES, see DIGEST, Vol. 10, pp. 944-946, Nos. 6466-6477.]

Cases referred to:

- (1) *National Provincial Bank, Ltd. v. Freedman and Rubens*, (1934), (unreported).
- (2) *Clayton's Case*, (1816), 1 Mer. 572; 35 E.R. 781; 3 Digest 179, 334.

ADJOURNED SUMMONS issued by the National Provincial Bank, Ltd., in the compulsory winding-up of Messrs. Primrose (Builders), Ltd., for an order that a decision of the liquidator rejecting the bank's claim to priority under the Companies Act, 1948, s. 319, be varied. The bank originally claimed to have priority in respect of advances in respect of wages amounting to £3,646 8s. 11d., but now claimed to have the liquidator's decision varied to the extent of £2,524 9s. 11d. only. The facts appear in the judgment.

P. J. Sykes for the National Provincial Bank, Ltd.

O. J. Shaw for the liquidator.

WYNN-PARRY, J.: The company was incorporated in December, 1947, and on May 9, 1949, it was ordered to be wound-up compulsorily. In due course the bank lodged a proof, claiming to rank as preferential creditors in respect of amounts advanced by them to the company for the purpose of paying wages and salaries and accrued holiday remuneration. The total amount of the advances specified in the proof is £3,646 8s. 11d. I should add that the

bank also lodged a proof claiming in respect of other moneys to rank as unsecured creditors. As regards the proof claiming to rank as preferential creditors, the liquidator rejected the claim *in toto* on various grounds, and the question which I have to determine is whether or not, and, if so, to what extent, he was justified in doing so.

By the Companies Act, 1948, s. 319 (1), it is provided:

- A “In a winding-up there shall be paid in priority to all other debts . . .
(b) all wages or salary . . . of any clerk or servant in respect of services rendered to the company during four months next before the relevant date . . .”

which, under s. 319 (8) (d) (i), in the case of a company which has been ordered to be wound-up compulsorily, is the date of the order, assuming, as was the case here, that no provisional liquidator had been appointed. By sub-s. (4) of that section it is provided:

- C “Where any payment has been made—(a) to any clerk, servant, workman or labourer in the employment of a company, on account of wages or salary; or (b) to any such clerk, servant, workman or labourer or, in the case of his death, to any other person in his right, on account of accrued holiday remuneration; out of money advanced by some person for that purpose, the person by whom the money was advanced shall in a winding-up have a right of priority in respect of the money so advanced and paid up to the amount by which the sum in respect of which the clerk, servant, workman or labourer, or other person in his right, would have been entitled to priority in the winding-up has been diminished by reason of the payment having been made.”

It is to be observed, in regard to that sub-section, that there is no obligation on the person seeking to rank as a preferential creditor to show that the money advanced for the purposes specified in paras. (a) and (b) of that sub-section was so advanced pursuant to any agreement or arrangement, nor, in my view, is it incumbent on such person to assert and prove that his aim in so advancing such money was with a view to becoming a preferential creditor. If he satisfies the conditions in the sub-section, the result, as a matter of law, will be that he achieves the priority given by the section.

- G The facts in this case are to be extracted from a volume of affidavit evidence, as supplemented by the cross-examination of two of the deponents—Mr. F Pollard, the manager of the branch of the bank at which the company kept its account, and Mr. Primrose, the chairman and managing director of the company. The account was opened on Apr. 30, 1948, the company being introduced by a Mr. Simmance, who was already a customer of the bank. The arrangement at the outset was that the company should be entitled to overdraw its account up to a limit of £175, the bank being induced to agree to that course on having a guarantee from Mr. Simmance, limited to £200. Subsequently, the authorised limit of the overdraft was raised, first, to £3,500, and, secondly, to £5,500, in each case, on the guarantee of Mr. Simmance, together with the lodging with the bank by him of security collateral to the respective guarantees. Throughout the whole period the account was conducted as a normal current account.

- H According to the evidence of Mr. Pollard, which I accept, no payments into this account were ever appropriated either by the company or by the bank to meet any particular payments out, nor was there any agreement between the company and the bank that there should be any such appropriation, and Mr. Pollard told me that, had such a thing been suggested, he would not have agreed to it. I am satisfied from his evidence that he kept a watch on the account and that over the latter part of the period he kept a very close watch on it. In July, 1948, Mr. Pollard told Mr. Primrose that the company's draw-

ings on the account must be restricted to wages only, in the absence of further credits. He agreed with him to allow the company to draw two cheques for £237 odd and £277 odd for wages, pending the receipt of the remittance which he said he was expecting. Later, on at least two occasions, Mr. Pollard, acting on the instructions of his head office, told Mr. Primrose that the overdraft must be substantially reduced within a reasonable period and also indicated that he did not intend to allow the overdraft to be increased even to pay wages. A

It appears to me that this desire of the bank that the overdraft should not be increased by payment of wages in the absence of further credits, and their desire that the overdraft should, within a reasonable time, be reduced, provides the whole key to the various subsequent conversations between Mr. Pollard and Mr. Primrose. There is a wealth of evidence which I do not propose to review in detail, but, in my judgment, it comes to this, that over the material period the course was followed that, first on Fridays, and latterly on Thursdays, which, according to the evidence, is the usual day in the building trade on which money for wages is drawn from the bank, cheques were presented by the company to the bank. Those cheques, for the last four months before the winding-up order, which is the period contemplated by s. 319 of the Act, were made out in the first two cases to "cash," and in the rest of the cases to "wages." In the case of every one of the material cheques—there are nine—except in the case of one for a sum of £55 drawn on Feb. 17, 1949, the details of the manner in which payment was required are written on the back of the cheque, and on every occasion Mr. Pollard or his assistant insisted on being satisfied, before agreeing to honour those cheques, that a payment or payments substantially equal to or exceeding the amount thereof would shortly be paid in. B C D

On behalf of the liquidator it is argued that the arrangement on each occasion was a special arrangement by which the bank agreed to make the particular advance—for on each occasion it was an advance—on the terms that that particular advance should be repaid within a short time through the expected credit being paid in. For the bank it is insisted that no such arrangement was ever made, and that the only object which Mr. Pollard had in being satisfied on each occasion that payments substantially equal to the particular wages cheque should be paid in was to ensure that in the result the overdraft should not be substantially increased. It is said against Mr. Pollard that certain language, which he used to Mr. Primrose and which admittedly was somewhat loose language, supports the liquidator's contention, because, as is said by Mr. Pollard himself, to take but one example, on Nov. 13, 1948, following on instructions received by him from his head office, he told Mr. Primrose that no increase in the borrowing would be allowed, and that wages would have to be provided for or any increase in the overdraft secured. He explains that by the words "provided for" he meant that the overdraft must not increase by the payment of the wages cheques, and that there must be sums paid in to the account to prevent such increase. On behalf of the liquidator it is said that that supports his contention that there was this special arrangement in each case, but, on the other hand, when such a conversation is related to the context, and when one remembers that it had been impressed on Mr. Primrose that, while the bank was willing, so far as it could, to honour cheques for wages, it was not willing that the overdraft should be increased, and, indeed, was anxious that it should be permanently reduced, the words used by Mr. Pollard have quite a different significance. E F G H

I have the guidance of what was said by CLAUSON, J., in the unreported case of *National Provincial Bank, Ltd. v. Freedman and Rubens* (1), which is a very similar case to the present, and unfortunately did not find its way into the reports. In that case, CLAUSON, J., said on an almost exactly similar contention:

"The truth of it is that danger always occurs when loose expressions used by the people whose business it is to carry on the details of business are regarded with more attention than the real settled methods of business which appear in the books kept by banks and other responsible persons."

As I have said, the account which the bank kept with the company, the pass sheets relating to which were regularly supplied to the company and which evoked no protest from them, disclosed a true current running account, and that circumstance is a strong pointer to the accuracy of Mr. Pollard's evidence in this regard.

The matter really comes down to this: Is the rule in *Clayton's Case* (2) to be applied to this account, or is there sufficient evidence before me to show that that rule, by agreement between the parties, was not to apply as regards these particular cheques drawn for "cash" or "wages"? Everything, in my view, points to the conclusion that the rule in *Clayton's Case* (2) does apply, and that there is not only no sufficient evidence, but, in my judgment, no evidence at all on which a court could come to the conclusion that that rule was to any extent, by agreement between the parties, not to apply in any particular instance.

Here, again, I am fortified in my conclusion by what was said by CLAUSON, J., earlier in his judgment in *National Provincial Bank, Ltd. v. Freedman and Rubens* (1) as follows:

"There is a suggestion that there were conversations of a somewhat loose character from which it can be inferred that there was an arrangement that the cheques paid in were to be used simply to provide the cash to pay the wages. What seems to me to be most important is the way in which the account was kept. The way the account was kept shows perfectly clearly that that was not the transaction at all. The transaction was that these cheques reduced the overdraft, and that is the meaning of the bank account as it appears. I have got it before me. The cheques reduced the overdraft. The bank manager, whatever loose language he may have used, was not going to let the overdraft be permanently increased, and accordingly it was necessary for him to take care that the wages cheque was not paid until these cheques had gone into the account. But those cheques did not provide the wages; those cheques reduced the overdraft, and the wages cheque was paid by money which was advanced by the bank for the purpose. And that is shown in the clearest terms in the form of the account."

The only possible distinction which can be drawn between that case and the present one is that, owing to the greater degree of accommodation which the bank was prepared to afford in this case, the wages cheques were honoured before the expected credits were received. So far from that affording a reason for not following the earlier case, it appears to me to make the present case *a fortiori*.

In those circumstances, in my judgment, the conditions of the Companies Act, 1948, s. 319 (4), are fulfilled by the bank, because it is agreed to the extent of the figure which I have mentioned, *viz.*, £2,524 9s. 11d., that the moneys advanced by the bank, in the circumstances to which I have referred, were applied in the payment of wages, and I find as a fact that those moneys were advanced by the bank for that purpose. To the extent of that sum, this application succeeds, and the decision of the liquidator must *pro tanto* be reversed.

Order accordingly. Costs to be paid out of the assets.

Solicitors: *Wilde, Sapte & Co.* (for the applicants); *J. E. Baring & Co.* (for the respondent).

[Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.]

JOHN M. BROWN, LTD. v. BESTWICK.

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Cohen and Singleton, L.JJ.), June 16, 1950.]

Rent Restriction—Statutory tenant—Retention of possession after end of contractual tenancy—Lease of shop and dwelling-house—Dwelling-house sub-let—Expiration of lease—Tenant not then occupying dwelling-house—Subsequent resumption of possession—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (c. 17), s. 15 (1). **A**

By a lease dated Dec. 9, 1935, premises described as a shop and dwelling-house were let to the tenant until Dec. 25, 1949. During the currency of the lease he ceased to occupy the upper part of the premises which constituted the dwelling-house and sub-let it, and at the expiration of the lease he occupied only the business part of the premises. On Feb. 7, 1950, the sub-tenant vacated the premises, and the tenant resumed possession and took up his residence there with his family. On Feb. 20, 1950, the landlords began proceedings to recover possession, and the tenant pleaded that he was a statutory tenant protected by the Increase of Rent and Mortgage interest (Restrictions) Act, 1920, s. 15 (1). **B**

HELD: on the expiration of the lease the tenant's contractual tenancy had come to an end and he had no statutory tenancy because at that time he was not in occupation of any part of the premises as a residence; on Dec. 25, 1949, therefore, he had ceased to have any interest in the premises for the purposes of the Rent Restrictions Acts, and his former interest was not revived by the fact that on Feb. 7, 1950, he obtained from his former sub-tenant possession of the residential part of the premises and took up his residence there; and, accordingly, the landlords were entitled to possession. **C**

Haskins v. Lewis ([1931] 2 K.B. 1), *applied*. **D**

[AS TO STATUTORY TENANTS, see HALSBURY, Hailsham Edn., Vol. 20, pp. 334, 355, paras. 400, 401; and FOR CASES, see DIGEST, Vol. 31, pp. 556-559, Nos. 7029-7064 and Digest Supp.] **E**

Cases referred to:

- (1) *Prout v. Hunter*, [1924] 2 K.B. 736; 93 L.J.K.B. 993; 132 L.T. 193; 31 Digest 557, 7040.
- (2) *Leslie & Co. v. Cumming*, [1926] 2 K.B. 417; 95 L.J.K.B. 1007; 135 L.T. 443; 31 Digest 557, 7041.
- (3) *Skinner v. Geary*, [1931] 2 K.B. 546; 100 L.J.K.B. 718; 145 L.T. 675; 95 J.P. 194; Digest Supp. **F**
- (4) *Haskins v. Lewis*, [1931] 2 K.B. 1; 100 L.J.K.B. 180; 144 L.T. 378; 95 J.P. 57; Digest Supp.
- (5) *Remon v. City of London Real Property Co.*, [1921] 1 K.B. 49; 89 L.J.K.B. 1105; 123 L.T. 617; 31 Digest 556, 7032.
- (6) *Hutchinson v. Jauncey*, [1950] 1 All E.R. 165; [1950] 1 K.B. 574. **G**

APPEAL by the landlords from a decision of His Honour JUDGE WILLES, sitting at Derby County Court, dated Mar. 22, 1950, dismissing an action for possession of a dwelling-house, part of which was used for business purposes, on the ground that the tenant was a statutory tenant at the date when the proceedings were commenced. The facts appear in the judgment of COHEN, L.J. **H**

L. A. Blundell for the landlords.

R. E. Megarry for the tenant.

SIR RAYMOND EVERSHERD, M.R.: I will ask COHEN, L.J., to deliver the first judgment.

COHEN, L.J.: This appeal raises a short point, but, like most short points under the Rent Restrictions Acts, it is not an easy one. The premises in question,

situate at 143, London Road, Derby, were demised to the tenant on Dec. 9, 1935, under a fourteen years' lease which expired on Dec. 25, 1949. In that lease the demised premises were described as a shop and dwelling-house. During the currency of the lease the tenant ceased to occupy the upper part of the house which constituted the dwelling-house and sub-let it to a Mrs. Robinson. When the lease expired on Dec. 25, 1949, the sub-tenant was still in possession and the tenant occupied nothing but the shop and two other rooms on the ground floor which were used for business purposes, so that, at that time, the tenant was not residing on the premises or using any portion of them as a dwelling-house. The landlords then gave notice to the tenant that they required him to give up possession of the shop and also to get possession of the upper part of the premises from the sub-tenant. On Jan. 9, 1950, the sub-tenant paid one week's rent to the landlords or their agents. The tenant complied with the second portion of the request made by the landlords and got the sub-tenant out of the premises. She gave notice to the landlords that she had vacated them, but she gave possession of the premises, not to the landlords, but to the tenant. On Feb. 7 the tenant resumed possession of the upper part and went to live there with his wife and daughter. On Feb. 20, 1950, the landlords began proceedings against the tenant to recover possession. The landlords contended that as at the date on which the lease expired the tenant was not in possession or occupying any part of the premises as a dwelling-house he never became a statutory tenant thereof and could not claim to remain there under the provisions of the Rent Restrictions Acts, 1920-1939. The tenant argued that the county court judge must look at the position as it was on the date at which the plaint was issued, and that, as at that date he, who had been the contractual tenant, was in occupation of the premises, he was entitled to remain there under s. 15 (1) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920. He relied on *Prout v. Hunter* (1) and *Leslie & Co. v. Cumming* (2) as supporting that proposition, and the county court judge very reluctantly acceded to that submission.

From that decision the landlords appeal. They contend that the purpose of the Act is, as appears from *Skinner v. Geary* (3) and other cases, to protect residential tenancies, and that for the tenant to retain possession within the meaning of s. 15 he must reside on the premises. I do not propose to refer to all the cases to which counsel for the landlords called our attention. I think it is sufficient if I mention *Haskins v. Lewis* (4) where premises consisted of a basement, ground floor, first floor, and second floor. The tenant originally carried on a tailor's business in the shop which was on the ground floor and resided in the house with his family. He ceased to carry on the tailor's business and his daughter carried on a drapery business on the ground floor while his son carried on a betting business on the first floor. The tenant later removed to another house and sub-let two rooms in the basement of the original premises to one sub-tenant and two rooms on the second floor to another sub-tenant, in each case as a residence. The landlord then served notice to quit on the tenant and began proceedings for possession. The tenant sought to rely on the protection given by the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, and the county court judge found as a fact that the ground floor and the first floor constituted business premises and that the tenant had sub-let the remainder of the premises and so parted with possession of them. The Court of Appeal decided by a majority, SCRUTTON, L.J., and ROMER, L.J., GREER, L.J., *dubitante* ([1931] 2 K.B. 2):

"... that an order could be made for the recovery by the landlord of possession of the whole of the premises, notwithstanding that the basement and second floor had been sub-let to two tenants as residences, those sub-tenants being protected by s. 5 (5) and s. 15 (3), of the Rent Restrictions Act, 1920 ..."

The *ratio decidendi* on which SCRUTTON and ROMER, L.J.J., proceeded is, I think,

most clearly stated in the passage from the judgment of ROMER, L.J., where he said ([1931] 2 K.B. 18):

"If it be right, as I think it is, to say that a tenant, who has given up possession of the whole of the premises, or who has sub-let the whole of the premises, is not entitled to the protection of the Act when his contractual tenancy comes to an end, it is equally true that where the contractual tenancy has come to an end and the tenant has given up possession of the residential portion of the premises and only remains in possession of part of the premises used solely for business purposes he is outside the protection afforded by the Act."

That passage *prima facie* covers in terms the facts of the present case. Counsel for the tenant pointed out, however, that the mind of the court was not there directed to what the position would have been if, as here, a tenant who had given up possession of the residential portion of the premises had recovered possession of them, no matter how, before proceedings were begun by the landlord to recover possession of the premises. In such a case, he said, the principle laid down by the Divisional Court in *Prout v. Hunter* (1) applies. He said there would be the utmost inconvenience if a different test were to be applied in deciding whether or not premises were within the Act, on the one hand, and, on the other hand, whether or not the tenant was a statutory tenant of those premises. It is clear, I think, from the cases that were cited that it has been held that, in determining whether or not a house is a dwelling-house to which the Act applies, regard must be had to the position at the moment of time when the plaint is issued, but it does not seem to me necessarily to follow from that that the same date must be looked at in deciding whether or not the tenant can properly claim to be a tenant of those premises either as contractual tenant or as statutory tenant. That conclusion would, I think, be inconsistent with the provisions of s. 15 (1) of the Act of 1920, which provides:

"A tenant who by virtue of the provisions of this Act retains possession of any dwelling-house to which this Act applies shall, so long as he retains possession, observe and be entitled to the benefit of all the terms and conditions of the original contract of tenancy . . ."

It seems to me an essential ingredient that the tenant should retain possession continuously of the dwelling-house. In saying that, I am not, of course, ignoring that in some cases he might retain possession although he was not in personal occupation. For instance, he might retain possession, if he were a sailor at sea, by the presence of his wife and furniture on the premises, or if he ceases to occupy the premises temporarily owing to ill health, as in one case cited by counsel for the tenant. Apart from such exceptional cases, however, where the intention to return is fully established, it seems to me that the tenant is not entitled to rely on the protection of s. 15 (1) unless he is continuously in residential occupation of the premises. I think, further, that that conclusion is reinforced, as counsel for the landlords submitted, by the provisions of sub-s. (3) of the section which provides:

"Where the interest of a tenant of a dwelling-house to which this Act applies is determined, either as the result of an order or judgment for possession or ejectment, or for any other reason, any sub-tenant to whom the premises or any part thereof have been lawfully sub-let shall, subject to the provisions of this Act, be deemed to become the tenant of the landlord on the same terms as he would have held from the tenant if the tenancy had continued."

On the facts of the present case the sub-tenant would clearly become the tenant of the landlords if the condition prescribed at the beginning of sub-s. (3) had been established and the interest of the tenant had been determined. That his contractual interest had determined is beyond argument, but counsel for the

tenant sought to induce us to hold that his interest as a statutory tenant had not determined. If the date of Dec. 26, 1949, is regarded, it is plain that he was in occupation of no residential part of the premises. He was in occupation only of the shop. It seems to me that we should be applying the Act for a purpose for which it was plainly not intended if we were to hold that the occupation of business premises which are not protected by the Act was sufficient to preserve an interest for the tenant in the premises and prevent sub-s. (3) operating. It seems to me that on Dec. 25, 1949, the tenant ceased to have any interest in the premises for the purposes of the Rent Acts. I do not think the interest can be revived by the fact that he obtained from his former sub-tenant—I say “former” because she had ceased to be his sub-tenant on Dec. 25, 1949—possession of the premises on Feb. 7, 1950.

Counsel for the tenant suggested that so to hold was inconsistent with the decision of this court in *Remon v. City of London Real Property Co.* (5). In that case the question at issue was different. The question was whether a tenant who had admittedly remained in possession of premises continuously from the time that his contractual tenancy had come to an end could rely on the Increase of Rent, &c., Act, 1920, which afforded him protection, but did not come into force until after the determination of his contractual tenancy. The Court of Appeal held that he could. BANKES, L.J., said ([1921] 1 K.B. 54):

“It is however clear that in all the Rent Restrictions Acts the expression ‘tenant’ has been used in a special, a peculiar sense, and as including a person who might be described as an ex-tenant, some one whose occupation had commenced as tenant and who had continued in occupation without any legal right to do so except possibly such as the Acts themselves conferred upon him.”

This court had to consider the effect of that case in *Hutchinson v. Jauncey* (6) where SIR RAYMOND EVERSHERD, M.R., said, in the course of his judgment, that *Remon v. City of London Real Property Co.* (5) showed that, in determining the question whether or not the tenant was entitled to possession, the court must have regard to the law as it was when the court was deciding the matter. It is manifest that, having regard to the various questions which arise under the Acts in relation to different subject-matters, different dates may be material. I do not think there is anything in *Remon’s* case (5) which affects the question which we are now determining. I would add, too, that that case seems to depend on the continued occupation of the premises by the tenant. In the present case there was no such continued occupation and I cannot see any answer to the point which counsel for the landlords made, that on Dec. 26, 1949, the tenant’s contractual tenancy had come to an end and there was no statutory tenancy since at that time he was not in occupation of any part of the premises as a residence. It seems to me that, if we were to come to a contrary conclusion we should be using Acts which were intended to protect residential premises for the purpose of protecting business tenancies which are outside the Act.

For these reasons I have come to the conclusion that we can accede to the request which the county court judge made at the end of his judgment, when he said he sincerely hoped that on appeal his decision might be found to be erroneous. I would allow the appeal.

SIR RAYMOND EVERSHERD, M.R.: I agree. The tenant has sought to establish a legal right under this somewhat complex legislation to the continued occupation of these premises on part of which he has for many years carried on his business. The question is whether, in the circumstances, he is entitled to remain? Counsel for the tenant said that he would be in much greater difficulty if during the interregnum between Christmas, 1949, and the re-entry into possession by the tenant in February, 1950, he had been in occupation of no part of the premises. He did not concede that in those circumstances he must

have failed, but he did agree that his case would have been more difficult. I think that on that hypothesis he would have failed for the simple reason that he could not then say that he was a tenant who had "retained possession" of a dwelling-house. Counsel for the tenant, as the foundation of his case, has argued that on the facts of the present case, the tenant did retain possession and continue to occupy that part of the premises which was used for business purposes, and, by so doing, when he came to occupy again the residential part, the latter occupation was, so to speak, fed by the continued occupation of the business part so as to enable the tenant to relate back his occupation of the whole premises after Feb. 7 to the original contractual tenancy, since there was originally a demise only of the one composite set of premises.

In my judgment, that distinction does not prevail. It seems to me that during what I have called the interregnum the tenant is unable to show that he was occupying anything as a dwelling-house, and, therefore, the necessary *nexus* was broken and the necessary condition for the bringing into existence of a statutory tenancy in the tenant was destroyed. I think, as COHEN, L.J., has stated, that the fact that, so far as I can see, the sub-tenant acquired a statutory tenancy of the residential part is a further and grave obstacle in the tenant's way, for his own alleged statutory tenancy *quoad* the residential part is, so to speak, separated from its contractual parent by a statutory tenancy in another, to which the tenant's statutory tenancy is not alleged to bear any kind of relation. It is true that in *Haskins v. Lewis* (4) the point we have to determine was not before the court. I agree, however, that the passage which COHEN, L.J., has cited from the judgment of ROMER, L.J., as a matter of principle covers the present case and I, therefore, follow it. As regards *Remon v. City of London Real Property Co.* (5) I can add nothing to what COHEN, L.J., has said by way of grounds for thinking that in this case it has no application. The essential condition of occupation of the dwelling-house as such was not satisfied during the period until February, 1950, and for the reasons already stated I think by that time the chain was broken. For these reasons I think that this appeal should be allowed.

SINGLETON, L.J.: I agree.

Appeal allowed with costs in both courts.

Solicitors: *Gregory, Rowcliffe & Co.*, agents for *Taylor, Simpson & Mosley*, Derby (for the landlords); *G. A. Hathway*, agent for *Flint, Bishop & Barnett*, Derby (for the tenant).

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

FOSTER v. ROBINSON.

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Cohen and Singleton, L.JJ.), June 19, 20, 21, 1950.]

Landlord and Tenant—Surrender of tenancy—Surrender by operation of law—Tenancy from year to year—Termination—Grant of licence to former tenant to occupy premises rent free.

Rent Restriction—Surrender of tenancy—Contractual tenancy from year to year—Agreement to terminate tenancy and grant of licence to former tenant—Validity.

The landlord, a farmer, was the owner of a cottage which had been occupied for many years by the defendant's father who worked for the landlord on the farm and paid a yearly rent of £6 10s. for the cottage. In May, 1946, the defendant's father, owing to age and infirmity, had ceased to

work, and it was then verbally agreed between him and the landlord that he need not pay any further rent but could continue to live in the cottage for the rest of his life rent free. Thereafter rent was neither demanded nor tendered. The defendant's father remained in the cottage until Jan. 15, 1950, when he died intestate. The defendant, the administratrix of her father's estate, had lived with him in the cottage for a number of years and resided there at the time of his death. The landlord informed the defendant of his intention to sell the cottage with vacant possession on Apr. 6, 1950, and he allowed her to reside there rent free until that date, but she refused to leave the cottage. In an action for possession by the landlord the county court judge found that under the agreement between the landlord and the defendant's father in May, 1946, which was made in good faith, the contractual tenancy had ceased to exist and the defendant's father became a licensee with permission to occupy the cottage rent free for the remainder of his life, and that, as the parties had acted for nearly four years in conformity with the agreement, the defendant was now estopped from asserting that the original tenancy still existed. Accordingly, an order of possession was made in favour of the landlord. On appeal by the defendant,

HELD: (i) the agreement between the defendant's father and the landlord in May, 1946, was effectual to produce a surrender of the tenancy by operation of law, and the defendant was estopped from asserting that the old tenancy still existed.

Metcalfe v. Boyce ([1927] 1 K.B. 758), *applied*.

(ii) in determining the question whether there was a surrender by operation of law of premises within the control of the Rent Restrictions Acts, the same principles must be applied as those which would be applicable in any other case; there was sufficient evidence on which the county court judge could find that the agreement of May, 1946, was a genuine transaction; and there was nothing in the Rent Acts which would prevent its having effect as a surrender of the tenancy.

Turner v. Watts (1928) (97 L.J.K.B. 403), *applied*.

[AS TO SURRENDER BY OPERATION OF LAW, see HALSBURY, Hailsham Edn., Vol. 20, pp. 269-274, paras. 302-307; and FOR CASES, see DIGEST, Vol. 31, pp. 511-525, Nos. 6585-6718.]

FOR THE RENT AND MORTGAGE INTEREST RESTRICTIONS (AMENDMENT) ACT, 1933, s. 3 (1), see HALSBURY'S STATUTES, Second Edn., Vol. 13, p. 1048.]

Cases referred to:

- (1) *Brown v. Draper*, [1944] 1 All E.R. 246; [1944] K.B. 309; 113 L.J.K.B. 196; 170 L.T. 144; 2nd Digest Supp.
- (2) *Lyon v. Reed*, (1844), 13 M. & W. 285; 13 L.J.Ex. 377; 3 L.T.O.S. 302; 153 E.R. 118; 31 Digest 512, 6596.
- (3) *Wallis v. Hands*, [1893] 2 Ch. 75; 62 L.J.Ch. 586; 68 L.T. 428; 31 Digest 135, 2696.
- (4) *Winter Garden Theatre (London), Ltd. v. Millenium Productions, Ltd.*, [1947] 2 All E.R. 331; [1948] A.C. 173; [1947] L.J.R. 1422; 177 L.T. 349; 2nd Digest Supp.
- (5) *Metcalfe v. Boyce*, [1927] 1 K.B. 758; 96 L.J.K.B. 376; 136 L.T. 606; 91 J.P. 55; Digest Supp.
- (6) *Oastler v. Henderson*, (1877), 2 Q.B.D. 575; 46 L.J.Q.B. 607; 37 L.T. 22; 31 Digest 523, 6701.
- (7) *Turner v. Watts*, (1927), 97 L.J.K.B. 92; *Affd.*, (1928), 97 L.J.K.B. 403; 138 L.T. 680; 92 J.P. 113; Digest Supp.

APPEAL by the defendant from a decision of His Honour JUDGE SHOVE at Scunthorpe and Brigg County Court, dated Apr. 5, 1950, granting possession of a cottage to the landlord.

The landlord, a farmer, was the owner of a cottage. Shortly after the 1914-1918 war the defendant's father was engaged to work for the landlord on his farm, and at the time of that engagement and in consequence of his employment the cottage was let to the defendant's father at a rent of £3 5s. a half year. Shortly before May, 1946, the defendant's father, owing to age and infirmity, gave up work, and in that month there was made between him and the landlord a verbal agreement whereby the existing tenancy was to cease, the landlord was not to charge rent any more, and the defendant's father was to be allowed to live in the cottage for the remainder of his life rent free. On Jan. 15, 1950, the defendant's father died. The defendant, a daughter of the deceased, had lived with him in the cottage for a number of years and was residing there at the date of his death. The landlord informed the defendant that it was his intention to sell the cottage, but that she could continue to reside there rent free until Apr. 6, 1950. On Feb. 18, 1950, letters of administration were granted to the defendant who refused to leave the cottage, claiming that at the date of his death her father was still a contractual tenant under the original tenancy and that that tenancy was now vested in her. The county court judge found that the agreement made between the landlord and the defendant's father in May, 1946, was a genuine transaction with the effect that the contractual tenancy ceased to exist and the defendant's father became a licensee with permission to remain in the cottage for the remainder of his life, and, as the parties had acted for nearly four years after May, 1946, in conformity with the agreement and as no rent had been tendered or demanded during that period, that the defendant was estopped from asserting that the original tenancy still existed and could not now deny that it had been validly determined. On appeal by the defendant it was contended on her behalf that the contractual tenancy of the cottage had not been determined either by agreement or by operation of law, and that the parties to the agreement made in May, 1946, could not, as between themselves, free the cottage from the protection of the Rent Restrictions Acts. The facts appear in the judgment of SIR RAYMOND EVERSHERD, M.R.

M. Hoare for the defendant.

Widgery for the landlord.

SIR RAYMOND EVERSHERD, M.R.: Although I have come to the conclusion that there is no ground for disturbing the decision of the county court judge, I would like to make it plain that I regard this as a case which, in the last resort, turns on a question of fact, and that there was evidence to support the essential finding of fact of the learned county court judge. I say that because I am not unmoved by some of the points made by counsel for the defendant to the effect that, if this decision is supported, those landlords who make a practice of studying decisions under the Rent Acts may seek to improve their position by making arrangements with their tenants which are based on this decision with a view to defeating the protection which the Acts intend to give to tenants.

The subject-matter of the action is property which until his death at the beginning of this year was in the occupation of Mr. Robinson, whose personal representative is the defendant. The main point which counsel for the defendant has argued is that the transaction relied on by the landlord amounted to a "contracting out of the Rent Act," and by that he meant doing something which seeks to circumvent the duty imposed by statute on the court. If that was the effect of the transaction, it might well be rendered ineffective on the ground stated. According to s. 3 (1) of the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933:

"No order or judgment for the recovery of possession of any dwelling-house to which the principal Acts apply or for the ejection of a tenant therefrom shall be made or given unless . . ."

On analysis, that part of the section amounts to this, that by no arrangement can the court be empowered (where the conditions are present, namely, where

there is a dwelling-house and a tenant thereof within the ambit of the Rent Acts) to make an order for possession save subject to the conditions laid down in the section. I should be the last to suggest that there should be any reservation made to that general principle, and, indeed, it would be quite outside the competence of the court in any event to do so, but the language which I have read from s. 3 (1) presupposes that there is a dwelling-house to which the Rent Acts apply, namely, a dwelling-house let to a tenant as such. The real question in this case may fairly be put thus: Was there at the relevant date a letting to a tenant of a dwelling-house within the scope of the Rent Acts?

Another general point I will refer to in order that I may dispose of it. In *Brown v. Draper* (1) LORD GREENE, M.R., delivering the judgment of the court, pointed out ([1944] 1 All E.R. 247) that in the case of a rent-controlled property there are only two ways in which a tenant whose contractual tenancy has come to an end can lose the protection of the Acts. One is by giving up possession, and the other is by having an order made against him by the court. As counsel for the landlord pointed out, that observation in terms related to the case of a tenant whose contractual tenancy had come to an end—in other words, to the case of a statutory tenant. In the present case the only question open in this court is whether the original contractual tenancy still subsisted. It is no part of the case with which we have to deal that at the date of his death Mr. Robinson was, not a contractual tenant, but a statutory tenant. I think, however, that it is equally fair to say that the observation of LORD GREENE is true generally, and that where there is a rent-controlled house there are only two ways in which the protection of the Acts can be lost. Either there must be an actual giving up of possession or its equivalent by the tenant, or there must be an order against the tenant which the court has power to make. Again, however, all that depends on the premise that there is a house let as a dwelling-house within the meaning of the Rent Acts and subject to the control of the Acts.

Mr. Robinson had worked for the landlord for a great many years, and his occupation of the cottage in question first took place after the first world war. The rent payable was £6 10s. per annum and at that rent Mr. Robinson continued to occupy the cottage until May, 1946. At some date before May, 1946, owing to his age and infirmity, Mr. Robinson ceased to work, and in May, 1946, the landlord called on Mr. Robinson and it was arranged that the existing tenancy would cease, that the landlord would charge no more rent, and that Mr. Robinson could live in the cottage for the rest of his life rent free. Mr. Robinson accepted those conditions. The learned judge has found as a fact that there was no question here of the landlord trying to get any unjust advantage. The judge accepted as true the landlord's description of the transaction and found as a fact that the agreement was a great deal more than a mere agreement for the reduction or a remission of rent, and that its express and primary condition was that the deceased's tenancy was to cease. All those matters were questions of fact. Mr. Robinson died at the beginning of 1950, and, therefore, the only oral evidence which could be given was that of the landlord, but the learned judge referred to one piece of corroboration. It appeared that for many years the rent was paid regularly half-yearly and receipts were given, but after this transaction there was a change of this practice. The last receipt was produced dated May 2, 1946, being a receipt signed by the landlord for £3 5s., and it is a fact that thereafter the old practice of tendering rent and getting a receipt stopped altogether. In other words, the payment of rent for these premises ceased and there was never any question of a demand for rent or of payment or tender of rent. So far as the transaction was to the advantage of the deceased the advantage was enjoyed.

The argument for the defendant is put on two grounds. First, it is said that the transaction which I have described was ineffective according to law to amount to a surrender, and, therefore, to a determination of the existing agreement. That is an argument independent altogether of the effect of the Rent Restrictions

legislation. Secondly, it is said that, even if, apart from the Rent Acts, it would have been so effective, the prohibitive effect of the Rent Acts to which I have alluded made it ineffective in this case.

First, it is important to notice that we are dealing here with a situation which, so far as the evidence is concerned, appears to have been contractual from the start. There is no evidence, for example, that there was ever any demise, any lease at any time of the premises. There is, indeed, no evidence that there was ever any written contract of tenancy. I think, however, that we must take it that the position immediately before this interview of May, 1946, was that Mr. Robinson was a yearly tenant or a tenant from year to year of the cottage in question. The only significance of what I have said is that I venture to think, when dealing with this aspect of the problem, that it makes it rather more easy to draw the inference that there was a surrender by operation of law if there is no existing estate or demise which might require a more formal or precise transaction. There is no question here of a surrender by express document effective for that purpose. If there is a surrender at all, it is a surrender by operation of law. A

That there may be such a surrender apart from any writing is clear, and that condition is expressly preserved by s. 52 (2) (c) of the Law of Property Act, 1925. What then amounts to a surrender by operation of law? We have been referred to many cases including that of *Lyon v. Reed* (2), and to the well-known judgment of PARKE, B., in that case. I think that for present purposes it is sufficient and accurate to refer to the passage in FOA'S GENERAL LAW OF LANDLORD AND TENANT, 7th ed., p. 617, 618, para. 987: C

"It has been laid down that in order to constitute a surrender by operation of law there must be, first, an act of purported surrender invalid *per se* by reason of non-compliance with statutory or other formalities, and secondly, some change of circumstances supervening on, or arising from, the purported surrender, which, by reason of the doctrine of estoppel or part performance, makes it inequitable and fraudulent for any of the parties to rely upon the invalidity of the purported surrender." D

The fact that the doctrine of estoppel really forms the foundation in such a case as this of the alleged surrender by operation of law is, I think, clearly discerned from the judgment of CHITTY, J., in *Wallis v. Hands* (3). E

The question in the present case is whether on the facts as found by the learned county court judge there are circumstances which prevent the tenant from asserting that the old relationship has been superseded by the new. Put in its simplest form, if there is a new arrangement which the tenant represents by his conduct that he is asserting, then he is estopped from denying that the landlord was capable of entering into that new arrangement, and, if the new arrangement could not be entered into if the old agreement subsisted, it follows that the tenant is equally prevented from denying that the old agreement has gone. There was some argument in the present case in regard to the proper conclusion as a matter of law to be drawn from the transaction if it is properly described in the language I have already referred to. It is divided into more than one section. First, the existing tenancy ceased. Then comes the second point: What took its place? The answer to that is: "I would charge him no more rent and he would live there for the rest of his days rent free." My own conclusion from that statement of the facts is that the old tenancy was extinguished by the creation instead of a licence for the former tenant, Mr. Robinson, to occupy these premises without any payment of rent for the rest of his days. Since the recent decision in *Winter Garden Theatre (London), Ltd. v. Millenium Productions, Ltd.* (4) I think that, although a licence of that kind may, apart from the terms of the contract, be revoked, it may now be taken that, if the landlord, having made that arrangement, sought to revoke it, he would be restrained by the court from so doing. Thus, the result is arrived at that Mr. Robinson was entitled as licensee F

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to occupy the cottage without charge for the rest of his days, and he did so. I prefer that analysis of the case. An alternative would be to say that he became tenant at will, likewise coupled with a promise that the tenancy at will would not be determined. If a tenancy was created it is said that it required a written instrument. If it did, I am not saying that the present case would not be one in which the acts following the transaction would supply part performance sufficient to make it equivalent to a written agreement, but it is unnecessary to express a final view about it because I think here there was a licence.

In my judgment, having regard to what occurred afterwards, there is no good ground for supposing that such an arrangement would not have the effect necessarily of producing a surrender by operation of law of the pre-existing tenancy. I think that some of the cases cited provide examples which strongly support that view. One is *Metcalf v. Boyce* (5), where a police constable, formerly a tenant, as the result of an arrangement, which was, apparently, parol only and did not disturb the continued occupation of the constable in fact, produced the result that the constable ceased to be a tenant and became a licensee. In *Oustler v. Henderson* (6) it was pointed out by BRETT, L.J., (2 Q.B.D. 579) that a mere agreement to effect some new transaction will not of itself suffice to produce a surrender by operation of law. Nothing that I have said in any way impinges on the validity of that observation. It is not here a question of mere agreement. There was here an agreement, plus superadded acts in pursuance of the agreement, which I think were sufficient to show that effect in the fullest sense was given to the agreement and that the new agreement made was inconsistent with the continuation of the old tenancy. I, therefore, consider that unless the matter is affected otherwise by the Rent Acts there is no good ground for saying that the present case, on the facts as found, would not suffice to produce a surrender by operation of law.

I now come to the provisions of the Rent Acts. In the case of an ordinary tenancy uncontrolled by the Rent Acts, if by notice to quit or by any other means the contractual tenancy is determined but the tenant stays on in possession, either he is a trespasser or he must be treated as staying on by the assent of the landlord, and, therefore, by reference to some new arrangement. In regard to the Rent Acts, the position is not quite the same. The mere determination of a contractual tenancy does not of itself mean that the tenant has become a trespasser, for without the existence of some new supervening arrangement he might, and *prima facie* would, remain by virtue of his statutory right to do so under the Rent Acts, *i.e.*, as a statutory tenant. That fact is one which must always be borne in mind in cases of this kind by the judge who has to determine whether all the facts in the case amount to a surrender by operation of law. In considering that matter he must bear in mind the proper inference to be drawn from the fact that it is a rent-controlled house. I will not pursue that further for, as I have already said, there is no question here of Mr. Robinson having been a statutory tenant at the date of his death, but I have mentioned the matter because it is relevant to the question which the judge had to determine: What is the proper inference of fact to be drawn in the particular case?

Counsel for the defendant has boldly asserted that where there is a rent-controlled house and a rent-controlled tenancy there is no means whereby, whatever the parties might intend, they can get themselves out of that situation.

The strongest case which was put was that of a lease under seal, say for seven years, at a rent which brought the tenancy within the Rent Acts. Two years before its termination the parties enter into a new deed which starts by reciting the surrender of the first lease and then grants a new demise to the tenant for ninety-nine years, determinable on the tenant's earlier death, at a peppercorn rent. Counsel says that that is quite ineffective. I find it very difficult to suppose that such a transaction is prohibited and rendered wholly ineffective by the Rent Acts, but, of course, that is not the present case. Another instance of the sort

of transaction which might occur was put by SINGLETON, L.J., early in the argument. A landlord may say to a tenant: "You are getting on in years. Which of these two things would you prefer. I am grateful to you for all you have done and I am willing that this present tenancy should be ended and that you should remain on as my licensee, and I will undertake that in no circumstances whatever will I seek to disturb your occupancy for the rest of your life and you need not pay rent. That will give me the advantage, if I survive you, that after your death I shall be able to get vacant possession, but I shall not be able, by relying on any of the provisions of the Rent Acts or otherwise, to disturb your occupancy during your life. Alternatively, stay on as you are. I may try and get rid of you if I can find alternative accommodation, and, of course, the right that you will enjoy will persist in favour of your daughter or whoever otherwise under the Act may be entitled to it after your death. Which do you prefer?" Let us suppose the tenant says: "I prefer the former, so that I can spend my life here and die here and I need not pay any more rent."

If all that were given effect to by a carefully drawn agreement, it seems to me very difficult to suppose that the court would have to say: "We cannot pay the slightest regard to it—though it may be that the landlord can claim ten years' arrears of rent." Indeed, such a view would appear to be inconsistent with the conclusion of this court in *Turner v. Watts* (7) where the bargain was that the tenant should buy the premises, and the contract, therefore, provided that the tenancy should cease. He was thereafter to be a tenant at will paying interest on the unpaid purchase money. The proposed sale went off altogether, but it was held that by the transaction, which was *bona fide* entered into, the tenancy had gone, and that, therefore, there was nothing capable of protection under the Acts. The example of SINGLETON, L.J., if effected by a carefully drawn document, could not, in my view, be distinguished in principle from *Turner v. Watts* (7). I am content to accept what is said in MEGARRY ON THE RENT ACTS, 5th ed., p. 10:

"... there is nothing to prevent the parties from so arranging matters that there is nothing to which the Acts can apply, provided the transaction in question is a genuine transaction and not a mere sham ..."

The mere fact that there is a written document, a document under seal, cannot, it seems to me, affect the essential validity of the transaction. The difference in the two types of case is a matter of evidence rather than of substance. If here the facts which the learned judge has found are the equivalent of what could be stated in a written document, why should there be any distinction? I confess that if I had been trying this case I am by no means sure that I would have reached quite the same conclusion as did the judge. That is not suggesting that I would in any way have impugned the good faith of the landlord, but I am not sure that I would have found the transaction proved. There is nothing said about any of the other terms of the arrangement or of the terms of the original tenancy. I might, therefore, not have found the facts as the judge found them, but I might well have been wrong. I am very anxious to avoid any suggestion that a decision in the landlord's favour would open the door to all kinds of devices whereby a landlord could go to a sick tenant and get him to agree to some arrangement which was really to the advantage of the landlord and the grave disadvantage of the tenant. I think the county courts may be relied on to protect tenants from that kind of thing, but this is a county court appeal and it is impossible to say that there is no evidence on which the county court judge could find that this was a genuine transaction and was effective.

Having so found, I can see no ground in principle why the transaction should not have the result the parties intended it should have. I think it amounts to this, that the determination of the former tenancy was equivalent to delivery up of possession under that tenancy and then a resumption of possession under a new transaction immediately afterwards. I think, to use the language of

COCKBURN, C.J., in *Oastler v. Henderson* (6) (2 Q.B.D. 578) there was a virtual taking of possession. If the key had been handed over and then been handed back the next minute that would have symbolised the delivery up and the grant of possession and I cannot think that it vitally matters that that performance was not gone through. That is the effect of a surrender by operation of law in such a case as the present and the learned judge has so found, and, there being evidence to support that finding, we would not be justified in differing from his conclusion as to fact, and, if not, it seems to me the conclusions which I have stated necessarily follow. The whole question is: Was the old contractual tenancy determined? Was it determined as the result of surrender by operation of law? The learned county court judge found that it was, and I think that that is a finding supported by the evidence without any misdirection in law and that this appeal should be dismissed.

COHEN, L.J.: I agree with the conclusion which my Lord has reached and with his reasons therefor. Counsel for the defendant invited us to say that different principles had to be applied in determining the question whether or not there had been a surrender by operation of law where the premises were such as, if let, would come within the control of the Rent Restrictions Acts from those which would be applied in other cases. Counsel for the landlord denied that there was any distinction at all, and I think he was right. It seems to me that in determining whether or not there was a contractual tenancy in existence the same principles must be applied in deciding the question whether there has been a surrender by operation of law to premises which are within the control of the the Rent Acts as those which would be applicable in any other case. That is not to say that the fact that the premises are within the control imposed by the Act is immaterial. It is, I think, a very material factor for the county court judge to take into account in investigating the transaction alleged to have given rise to the surrender by operation of law and deciding whether it was a genuine transaction in exact accordance with that which it purported to be, or was, as was said in one case and in the passage in Mr. MEGARRY'S book to which my Lord referred, a mere sham. But if the county court judge comes to the conclusion that the transaction was genuine, and that the result of that genuine transaction was to effect a surrender by operation of law, I see no reason, and I know of no provision in the Rent Restrictions Acts, which prevents him giving effect to that conclusion. In the present case the learned county court judge has obviously carefully considered both the value to be attached to the evidence of the landlord, having regard to the fact that Mr. Robinson was dead, and the question of the intention of the parties and the effect of the transaction. He has found it was a genuine transaction, and on his finding it seems to me that the inevitable consequence is that there was a surrender by operation of law, and, therefore, that there was, at the material time, no contractual tenancy in existence which could in any circumstances have entitled the defendant to protection under the Rent Restrictions Acts. For these reasons, I agree that the appeal should be dismissed.

SINGLETON, L.J.: I am of the same opinion. I look on the matter in this way: (i) the defendant, as administratrix of her father's estate, has only the rights which her father had as occupier; (ii) the learned county court judge has found that from May, 1946, until his death the father was a licensee, paying no rent, but being entitled to remain in the cottage for the rest of his life; (iii) this is not a case of contracting out. If this correctly states the position, we are not concerned with the Rent Acts, for s. 3 (1) of the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, only limits the power of the court in the case of a house to which the Acts apply. They do not apply to one which is the subject-matter of a licence. They apply to a house or a part of a house let as a separate dwelling at a rent within the purview of the Acts: see s. 2 (2) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920.

If the learned county court judge is right, the house was not let after May, 1946. The real substance of the matter lies in this. The landlord, who had farmed a farm on which Mr. Robinson was employed, allowed him to have the house at a weekly rent of 2s. 6d. Another farmer occupying the farm employed Mr. Robinson subsequently, but after a period Mr. Robinson had to give up work. The learned county court judge found that by May, 1946, the deceased, owing to age or infirmity, had given up work, and in that month there was made between him and the landlord an arrangement which is the crucial point in the case. That arrangement was that the tenancy which had existed for some years should cease, Mr. Robinson should remain in the house for the rest of his days, and the landlord should charge him no rent. The learned county court judge came to the conclusion that that was a licence and no more.

Speaking for myself, if, on seeing the landlord, I had formed the impression of him which the learned judge formed, I should have no doubt as to the arrangement made, for support is to be found for it in two or three respects. First, in support of the arrangement or agreement which the landlord set up there is the fact that thereafter for the remaining three-and-a-half years of Mr. Robinson's life no rent was proffered and no rent was demanded. After the death of Mr. Robinson the landlord wrote to the defendant this letter: `

"Dear Maud, No doubt Harry would tell you what I'm doing re your cottage and Wilkinsons—I have decided to sell them both some time in March, and you can stay on rent free as before until Apr. 6, as I shall sell your cottage with vacant possession on Apr. 6, 1950. Spilman & Glasier, auctioneers, are acting for me. Hoping you are keeping well. Yours sincerely, W. H. Foster."

That letter, telling the defendant what he proposed to do, shows an arrangement of the kind to which the landlord spoke. The defendant herself in the course of her evidence was asked questions. She said: "I only know of arrangement by what father told me." If the evidence of the landlord himself was accepted by the learned judge, he was well justified in finding the agreement he did find.

We were urged to say that to uphold this judgment would be to open wide the door so as to enable people to defeat or to get round the provisions of the Rent Restrictions Acts. I do not take that view. I regard this as a case in which the landlord acted perfectly properly and in the interests of the tenant. Not a word can be said against him. Although judges in county courts who have these matters before them obviously must be careful before they find an agreement of this kind, I do not think this court ought to hesitate to uphold this judgment in favour of a landlord who was acting, as I think, in the best interests of the occupier of the house. It is for the county court judge to find the facts, and he has done so in a most careful judgment. He came to the conclusion that from May, 1946, the occupier was not a tenant at all. I agree with that finding. The position of the father was altered by agreement between the parties; there was a complete change. The father became a licensee, at least he could not be heard to say that he was anything more than that. At his death he had had the advantage of the agreement and had paid no rent for three and a half years, and his daughter, the defendant, cannot be in a better position. I agree that the appeal should be dismissed.

Appeal dismissed with costs.

Solicitors: *Sharpe, Pritchard & Co.*, agents for *William Bains*, Brigg (for the defendant); *Waterhouse & Co.*, agents for *Sowler & Gibson*, Brigg (for the landlord).

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

COLEBORN AND SONS, LTD. v. BLOND.

[COURT OF APPEAL (Bucknill and Denning, L.J.J., and Roxburgh, J.), May 22, June 21, 1950.]

Purchase Tax—Chargeable process—Conversion of army wireless type vehicle into shooting brake—Finance Act, 1946 (c. 64), s. 16 (1), (3).

A The defendant was the owner of a vehicle which had originally been constructed as a wireless type army vehicle, having two seats in the driver's compartment for the driver and the officer in charge of the vehicle, and two seats in the truck portion for the use of men working the field wireless apparatus intended to be carried therein. The plaintiffs, on the defendant's orders, did work on the vehicle so as to convert it into a shooting brake, having eight seats, a pair of back doors instead of the tail board which the vehicle originally had, a permanent roof and a new floor. The Commissioners of Excise demanded purchase tax from the plaintiffs, amounting to £186 8s. 4d., which the plaintiffs paid. The plaintiffs demanded reimbursement by the defendant of the amount so paid, but the defendant contended that purchase tax was not chargeable.

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D HELD: the shooting brake was a different article from the vehicle before conversion, and, therefore, the work done by the plaintiffs was a "process of manufacture" within the meaning of the Finance Act, 1946, s. 16 (1) and (3), by which was made a vehicle constructed solely or mainly for the carriage of passengers; such a vehicle was "chargeable goods" within the Finance (No. 2) Act, 1940, s. 19 (1) and sched. VII, and of a class specified in sched. IV to the Act of 1946; and, therefore, the process applied was a "chargeable process" attracting liability to purchase tax under s. 17 of the Act of 1946.

Guildford Corpn. v. Brown ([1915] 1 K.B. 256), *applied*.

[FOR THE FINANCE ACT, 1946, s. 16, see HALSBURY'S STATUTES, Vol. 39, p. 745.]

E Cases referred to:

- (1) *Gamble v. Jordan*, [1913] 3 K.B. 149; 82 L.J.K.B. 743; 108 L.T. 1022; 77 J.P. 269; 38 Digest 221, 539.
- (2) *Guildford Corpn. v. Brown*, [1915] 1 K.B. 256; 84 L.J.K.B. 289; 112 L.T. 415; 79 J.P. 143; 38 Digest 222, 540.
- (3) *French v. Champkin*, [1920] 1 K.B. 76; 89 L.J.K.B. 131; 122 L.T. 95; 83 J.P. 258; 39 Digest 241, 168.

F APPEAL by the plaintiffs from an order of CASSELS, J., made on Feb. 9, 1950, dismissing the plaintiffs' claim for reimbursement of purchase tax paid by them in respect of work done by them to the defendant's order in converting an army wireless type vehicle into a shooting brake. CASSELS, J., held that the work did not constitute a chargeable process attracting purchase tax. G The facts appear in the judgment of BUCKNILL, L.J., and are summarised in the headnote.

J. P. Ashworth and Youds for the plaintiffs.

J. R. D. Crichton for the defendant.

Cur. adv. vult.

H June 21. The following judgments were read.

BUCKNILL, L.J.: This is an appeal by the plaintiffs from a judgment in favour of the defendant given by CASSELS, J. The claim was for £186 8s. 4d. paid by the plaintiffs by way of purchase tax to the Commissioners of Excise in the following circumstances. In June, 1947, the plaintiffs, under a contract with the defendant, supplied and built a shooting brake body on to a former War Department motor vehicle. The Commissioners of Excise then demanded payment of £186 8s. 4d. purchase tax on the vehicle by virtue

of the Finance (No. 2) Act, 1940, and the Purchase Tax (Charges) (No. 1) Order, 1947. The plaintiffs paid the sum and claimed to be reimbursed that amount by the defendant. The defendant denied that purchase tax was chargeable as claimed, and the issue in the case was whether that was so or not. CASSELS, J., decided that the tax was not chargeable, and it is from that decision that the plaintiffs appeal.

Before referring to the material facts I will set out the relevant sections and orders. The Finance (No. 2) Act, 1940, s. 18 (1), enacted that:

"A tax, to be called purchase tax, shall be charged, subject to and in accordance with the provisions of this Part of this Act, on the wholesale value of all chargeable goods bought under chargeable purchases."

Section 19 (1) provides:

"Chargeable goods are goods falling within any of the classes specified in the first or second column of sched. VII to this Act and not falling within any of the classes specified in the third column of that schedule."

No. 23 of the items of chargeable goods set out in sched. VII is:

"Road vehicles and cycles . . . being vehicles . . . constructed or adapted solely or mainly for the carriage of passengers, except as specified in the third column."

The third column enumerates as goods mentioned in the first column but not chargeable, "Tramcars, trolley vehicles, omnibuses and charabanes. Ambulances, invalid carriages and perambulators." The Finance Act, 1946, s. 16, enacted:

"(1) For the purposes of any enactment relating to purchase tax, a person shall be deemed to apply a chargeable process if he applies any process of manufacture which results in chargeable goods of any of the classes specified in sched. IV to this Act; whether or not the goods to which the process was applied were, before the process was applied, goods of the same class or any other class specified in that schedule . . . (3) In this section, the expression 'process of manufacture' means a process applied so as to make goods or in the course of the making of goods."

Schedule IV to the Act enumerated the relevant classes of goods to which chargeable processes could be applied, and one class was "road vehicles and cycles (whether mechanically propelled or not)." Section 17 provides for the charging of purchase tax on goods resulting from the application of any chargeable process, and makes the person who applies the process accountable for the tax.

The relevant facts of the case were that the defendant, having bought the vehicle in question in December, 1946, took it to the plaintiffs with a view to converting it into a shooting brake. The vehicle had been originally constructed as a "Humber four-wheel drive pick-up vehicle wireless type." That was admitted by counsel before us, and it was also admitted that the learned trial judge was in error when, in his judgment, he said (I quote his own words):

"The vehicle originally was a Humber wireless and personnel type. I am anxious to state those names and that description with some little care and precision, for the reason that I do not think there was a type of this vehicle properly described as a wireless type and another type of this vehicle properly described as a personnel type. It was a wireless and personnel type itself."

The difference between the two types is material, in my opinion. In each type there were two seats in the driver's compartment, one for the driver and one for the officer in charge of the vehicle. In the wireless type, the truck portion contained a field wireless apparatus and two seats for the use of the

men working the apparatus. In the personnel type there was no wireless apparatus and there were three seats in the truck instead of two, the third seat occupying the space which in the wireless type housed the wireless apparatus. It appears from the evidence of a Mr. Berry, who had practical experience in the use of this kind of vehicle by the army during the war and was accepted by the judge as a reliable witness, that the vehicle was issued to officers, and its main task was to convey the officer when reconnoitring, or observing, if the guns were in action, and that the wireless was mainly used for receiving and issuing fire orders to those firing guns. The wireless apparatus was detachable from the vehicle, and if that was done the vehicle could be used as a passenger carrying vehicle, and was used for the purpose of visiting ordnance dumps and drawing rations, etc. The truck portion had no entrance door, but a tail board which was hinged at its bottom edge.

When the defendant took the vehicle to the plaintiffs for the purpose of producing a shooting brake, it was then described as being an open truck body behind a cab. The seats had been taken out and there was no canopy or roof, but the wheels, engine, bonnet and scuttle were the same as when the vehicle was originally constructed. I do not think it is necessary to describe in detail the work done by the plaintiffs to the vehicle in building on the chassis a new wooden body. When complete it contained eight seats, a pair of back doors, a permanent roof and a new floor. The learned judge's comment on the result of the work was that the plaintiffs had done it up and made it look so different from what it originally was that its own mother would scarcely have recognised it. The plaintiffs supplied all the material which was used in the construction of the body. The work was finally completed in September, 1947.

The crucial question in the case seems to me to be whether the work done by the plaintiffs was a process of manufacture which made, or was in the course of making, a vehicle constructed solely or mainly for the carriage of passengers. If it was such a vehicle when it was originally constructed, then the work done by the plaintiffs in converting it into a shooting brake was, so to speak, merely a change of dress, but not a change of character. There is no direct authority on the point, which seems to depend for its decision on the inference to be drawn from the admitted facts. In my opinion, the mere fact that a vehicle in the course of the work for which it was designed habitually carries a man or men does not *ipso facto* make it a vehicle constructed solely or mainly for the carriage of passengers. Every vehicle, unless controlled by wireless, must have a driver, and is, in a sense, constructed for the carriage of a passenger, but the Act says "constructed . . . solely or mainly for the carriage of passengers," and, therefore, if the accommodation for carrying passengers were only incidental to the use of the vehicle for other purposes it would be exempt. Thus, the crew of an armoured car or the driver and attendants in an ambulance are all, in one sense, passengers, but the main purpose which causes their presence in the vehicle is not their transportation from place to place. The cause of their presence in the vehicle is that they may use it for the special purposes for which it was constructed.

In my opinion, the error which the judge made in failing to distinguish between the wireless type and the personnel type of this particular species of car indicates a failure to distinguish between the two different purposes for which each type was used. Moreover, I think that the concluding words of the Finance Act, 1946, s. 16 (1), indicate that, even if the vehicle was originally constructed to carry passengers, yet, if the work done by the plaintiffs was to manufacture a thing which was different from what it was before the work was done—in other words, if the work was such as to involve an alteration in the article so fundamental as to produce a different article—the purchase tax would be chargeable on the article so produced. In my opinion, if one applies these tests, then the shooting brake was a different article from the article before the work was done.

The cases to which we were referred do not seem to throw much light on the problem. They rather indicate the difficulty of coming to a right decision in this case. On the meaning of the words "making goods" there is *Gamble v. Jordan* (1). A man was charged with the offence of using, for the purpose of making an article of bedding, flock manufactured from rags. The person charged had taken rag flock from an old mattress for the purpose of re-stuffing the same mattress with the same flock. The magistrate held that the re-stuffing of a mattress was the making of an article of bedding, and convicted the man, but on appeal the conviction was set aside. BANKES, J., in his judgment, said ([1913] 3 K.B. 153) that, in his opinion, no distinction ought to be drawn between the word "manufacture" and the word "make." He thought that the true meaning of making or manufacturing an article was "bringing into being" that article. On the other hand, in *Guildford Corpn. v. Brown* (2) a man charged with an offence under the same Act as in *Gamble v. Jordan* (1) had taken flock manufactured from rags from two old mattresses and put the same flock without any addition to or subtraction from it into new covers. On appeal, the Divisional Court held that it was "manufacturing" a mattress if one took flock out of an old cover and put it into a new one.

As LUSH, J., remarked ([1915] 1 K.B. 259):

"... there is a great difference between re-making an old article and making a new one. It is clear on the facts of this case that the respondent made a new article..."

The reasoning of LUSH, J., seems applicable to the case before us. It is true that the new vehicle had as some of its component parts parts of the old vehicle, but that does not prevent the work being described as making a new article, if the new vehicle is sufficiently different from the old vehicle.

In *French v. Champkin* (3), the question for decision was whether a certain carriage was a vehicle constructed or adapted for use, and used solely, for the conveyance of any goods in the course of trade within the meaning of the Customs and Inland Revenue Act, 1888, s. 4 (3). The EARL OF READING, C.J., in the course of his judgment, said ([1920] 1 K.B. 79):

"The justices seem to have treated the word 'adapted' as if it were synonymous with 'suitable' or 'apt,' whereas it must be construed as meaning altered so as to make the vehicle apt for the conveyance of goods. The words are intended to cover the case of a vehicle which was not constructed solely for the purpose of conveying goods in the course of trade, but after its construction has been made apt for that purpose. If the vehicle has not been originally constructed for the conveyance of goods it is still entitled to exemption if by some alteration it has been made suitable for the purpose mentioned."

It is not suggested in the present case that the vehicle had been adapted for the carriage of passengers before it became the property of the defendant, and the fact that it could be used for the conveyance of passengers did not make it a vehicle constructed solely or mainly for the carriage of passengers, if that was not its primary purpose. In my judgment, therefore, the vehicle was not originally constructed or adapted solely or mainly for the carriage of passengers. Alternatively, even if it was so constructed, the work done by the plaintiffs was of such a nature as to bring into being an article different from that which it had been before that work was done. I, therefore, think that this appeal should be allowed.

DENNING, L.J.: In order that a process of manufacture should attract purchase tax, it must be "applied so as to make goods or in the course of the making of goods." There must, therefore, be a making of goods which is, I think, different from the repair, alteration, or improvement of goods. If the thing remains in substance the same thing, even though repaired, altered or improved,

purchase tax is not payable, but, if the work has made it into a different thing altogether, then purchase tax is payable. The line between these two is very difficult to draw, because it is so much a question of degree. Speaking generally, I should have thought that if you replace an old engine by a new one, or an old body by a new body, you are not making a different vehicle. You are altering and improving an old one, and purchase tax is not payable. But a point may be reached where you are not really altering or improving an old car, but are making use of it, or the various parts of it, to make a different car altogether. That point has, I think, been reached here. This old army wireless-type vehicle was, so to speak, the raw material out of which the shooting brake was made. This is a case where a new thing was made out of two parts—one part being the old chassis and the other part being the new body—and the two parts when assembled together make a different thing from either of them separately. In my opinion, therefore, purchase tax was payable on it.

ROXBURGH, J.: I agree.

Appeal dismissed with costs.

Solicitors: *Bower, Cotton & Bower* (for the plaintiffs); *Cartwright, Cunningham & Co.*, agents for *Donnison, Edwards & Cornish*, Liverpool (for the defendant).

[*Reported by C. N. BEATTIE, ESQ., Barrister-at-Law.*]

BOGUSLAWSKI AND ANOTHER v. GDYNIA AMERYKA LINIE.

[COURT OF APPEAL (Bucknill, Cohen and Denning, L.JJ.), May 3, 4, 5, 8, 9, 10, 11, 12, 15, 16, June 15, 1950.]

International Law—Recognition of foreign government—Retroactive effect — Payment of compensation to officers and men of Polish merchant navy on their leaving their ships—Offer made in London on July 5, 1945, by Minister of old Polish government, on behalf of Polish shipping company—Recognition by British government of new Polish government from midnight on July 5/6, 1945—Offer accepted and acted on, in England, after recognition of new Polish government.

In 1940 the government of the Polish State, which had escaped from Poland when that country was occupied by Germany, established itself in London and was recognised by the British government as the government of Poland. It controlled the Polish merchant navy, which now had its home ports in England. On June 28, 1945, the Polish Provisional Government of National Unity was established in Poland, and on June 29 it wrote to the British government asking for recognition. On the same day, in view of the possibility that the British government would withdraw its recognition of the old Polish government, the old government made a decree, giving effect to resolutions of its Council of Ministers (a) to determine the employment of its civil servants and pay them a gratuity of three months' salary, and (b) to pay a similar gratuity to the office staffs of its shipping companies on determination of their employment, the gratuity in this case to be paid out of the moneys of the enterprises concerned. On July 2, 1945, representatives of the Polish Captains' and Officers' Union and the Polish Seamen's Union asked the association representing the Polish shipping companies for a similar compensation to be paid to their members in the event of the new Polish government taking over the Polish navy. On July 3 the Minister of Industry, Commerce and Shipping of the old Polish government, acting on behalf of the shipping companies, informed

the representatives of the unions that he was proposing that seamen who left their ships on account of the change of government should be treated in the same way as the office staffs of the shipping companies, and, in the presence of the representatives of the unions, he dictated a telegram to the head of the Polish shipping department, stating *inter alia* that, on the authority of the government and in consequence of claims put forward by the unions of officers and seamen, who were unwilling to return to waters controlled by the Soviet Union, he asked the Minister of War Transport that all Polish ships be first directed to United Kingdom ports so as to give the officers and seamen the possibility of disembarking in ports considered as home ports, and he declared that, in the event of their leaving their ships owing to the political situation, captains, officers and men should be entitled to compensation on equal footing with government officials and shipping companies' staff. On July 5 a telegram in those terms was sent by the Minister, through the curator of the defendant shipping company (one of the Polish shipping companies), to the master of the Morska Wola, a motor vessel belonging to the defendant company, which was then lying in the Manchester Ship Canal. The telegram, which ended with a request that it should be brought to the notice of the crew, was read to the officers on the same day and to the seamen on the following day. At midnight on July 5/6, the British government recognised the new Polish government. The certificate of the Secretary of State for Foreign Affairs which proved this fact stated: "Up to and including midnight of July 5/6, 1945, His Majesty's government in the United Kingdom recognised the Polish government having its headquarters in London as being the government of Poland, and as from midnight of July 5/6, 1945, His Majesty's government in the United Kingdom recognised the Polish Provisional Government of National Unity as the government of Poland, and as from that date ceased to recognise the former Polish government having its headquarters in London as being the government of Poland." Acting on the telegram of July 5, the first plaintiff, an officer in the Polish merchant navy, who had been serving in the Morska Wola at all material times, left her on July 11, and the second plaintiff, a seaman in the Polish merchant navy, who joined the ship on July 4, left her on July 7. In an action by the plaintiffs against the defendant company for payment of the compensation alleged to be due to them, the defendant company denied liability and contended *inter alia* that the recognition of the new Polish government by the British government on midnight of July 5/6, 1945, operated retroactively to June 28, 1945, with the result that the British government would not recognise as valid the acts of the old Polish government done after that date.

HELD: (i) the statement in the Secretary of State's certificate that the British government recognised the old Polish government until midnight on July 5/6, 1945, and the new Polish government thereafter had the same effect as if the Secretary of State had said that the new Polish government was recognised as from midnight on July 5/6 as the legitimate successor of the old Polish government, and, therefore, all acts done in England by the old Polish government before midnight on July 5/6 were valid and binding on the new Polish government unless and until the new government rescinded or repudiated them, an event which had not occurred in regard to any act relevant to the present case.

(ii) assuming that the recognition by the British government of the new Polish government had retroactive effect, the principle that there could not be more than one government of a foreign State recognised at the same time, truly stated, was that there could not be two governments recognised in respect of the same territory at the same time, and, therefore, a recognition of the validity of acts done by the old Polish government

between June 28, 1945, and midnight on July 5/6, 1945, outside the area which was under the *de facto* control of the new Polish government did not infringe that principle.

(iii) the agreement of July 3, 1945, was a valid agreement between the Minister, acting on behalf of the shipping companies, on the one side, and the officers' and seamen's unions, on the other side, that the Minister would dispatch a telegram in the terms of the draft dictated in the presence of the representatives of the union; the Minister fulfilled his obligation thereunder when he dispatched the telegram of July 5; and, therefore, the plaintiffs were not entitled under this agreement to the compensation claimed.

(iv) the telegram of July 5, 1945, constituted an offer, made by the Minister on behalf of the defendant company, which could be accepted until it was withdrawn; as it was not withdrawn, either by the company or by the new government, there was a binding contract between the company and the plaintiffs when the plaintiffs accepted the offer by their conduct in leaving the ship; it was immaterial (a) that the offer was not communicated to the second plaintiff until after July 5, and (b) that neither of the plaintiffs acted on the offer until after that date; and, therefore, the plaintiffs were entitled to the compensation specified in the telegram.

[AS TO RECOGNITION OF FOREIGN STATES, see HALSBURY, Hailsham Edn., Vol. 13, pp. 619, 620, para. 691, and *ibid.*, Vol. 26, p. 254, para. 568; and FOR CASES, see DIGEST, Vol. 22, pp. 148-150, Nos. 1262-1273.]

Cases referred to:

- (1) *Aksionairnoye Obschestvo A. M. Luther v. Sagor (James) & Co.*, [1921] 3 K.B. 532; 90 L.J.K.B. 1202; 125 L.T. 705; 11 Digest 309, 17.
- (2) *Lazard Brothers & Co. v. Midland Bank, Ltd.*, [1933] A.C. 289; 102 L.J.K.B. 191; 148 L.T. 242; Digest Supp.
- (3) *Haile Selassie v. Cable and Wireless, Ltd.* (No. 2), [1938] 3 All E.R. 677; [1939] Ch. 182; 108 L.J.Ch. 190; 160 L.T. 120; Digest Supp.
- (4) *Banco de Bilbao v. Sancha*, [1938] 2 All E.R. 253; [1938] 2 K.B. 176; 107 L.J.K.B. 681; 159 L.T. 369; Digest Supp.
- (5) *Guaranty Trust Co. v. United States*, (1938), 304 U.S. 126.
- (6) *Re Amand*, [1941] 2 K.B. 239; 110 L.J.K.B. 524; *subsequent proceedings*, *on appeal*, *sub nom.*, *Amand v. Secretary of State for Home Affairs*, [1942] 2 All E.R. 381; *sub nom.*, *Amand v. Home Secretary and Minister of Defence of Royal Netherlands Government*, [1943] A.C. 147; *sub nom.*, *R. v. Secretary of State for Home Affairs and Minister of Defence of the Royal Netherlands Government, Ex p. Amand*, 111 L.J.K.B. 657; 167 L.T. 177; 2nd Digest Supp.
- (7) *Lorentzen v. Lydden & Co., Ltd.*, [1942] 2 K.B. 202; 111 L.J.K.B. 327; 167 L.T. 365; 2nd Digest Supp.
- (8) *The Arantzazu Mendi*, [1939] 1 All E.R. 719; [1939] A.C. 256; 160 L.T. 513; *sub nom.*, *Spain Republic Government v. Arantzazu Mendi*, 108 L.J.P. 55; Digest Supp.

APPEAL by the defendant company (a Polish shipping company) from an order of FINNEMORE, J., dated July 21, 1949, whereby he awarded sums of £176 5s. and £123 to the plaintiffs respectively, as compensation equal to three months' pay due to them from the defendant company.

The first plaintiff was an officer and the second plaintiff was a seaman in the Polish merchant navy, and they were serving on July 5, 1945, in a ship belonging to the defendant company. Until midnight on July 5/6, 1945, the Polish merchant navy was under the control of the Polish government which had its headquarters in London and the navy's home ports were in England. As from midnight on July 5/6, 1945, the British government ceased to recognise the Polish government having its headquarters in London, and recognised the Polish Provisional Govern-

ment of National Unity, which had been set up in Poland on June 28, 1945, as the government of Poland. On account of the political situation, the first plaintiff left his ship, which was then lying at the Manchester end of the Ship Canal, on July 11, 1945, and the second plaintiff left it on July 7, 1945. In an action brought by them against the defendant company for payment of compensation alleged to be due to them on their leaving the ship, they based their claims on (i) an agreement alleged to have been made on July 3, 1945, between the Minister of Industry, Commerce and Shipping of the Polish government in London, acting on behalf of the defendant company, on the one side, and the representatives of the Polish officers' and seamen's unions, acting on behalf of all their members, on the other side, and, alternatively, on (ii) an offer contained in a telegram, sent by the Minister on behalf of the defendant company on July 5, 1945, and accepted by the plaintiffs by their conduct in acting on it. The defendant company denied liability under Polish law and further contended that the recognition by the British government of the new Polish government operated retroactively to June 28, 1945, and, therefore, acts done by the old Polish government after that date would not be recognised by the British government as valid. FINNEMORE, J., found that the agreements were valid under Polish law, and rejected the contention of the defendant company in regard to the retroactive effect of the recognition by the British government of the new Polish government, on the grounds (a) that the Polish merchant navy was not in the area over which the new government had control, and (b) that, as the certificate of the Foreign Secretary, which proved the fact of the recognition of the new government, expressly stated that the British government recognised the old government until midnight on July 5/6, 1945, acts done by the old government while it was still recognised must be valid, and, accordingly, the learned judge gave judgment for the plaintiffs. The facts appear in the judgment of COHEN, L.J.

Pritt, K.C., Scott Henderson, K.C., and A. J. Hodgson for the defendant company.

Thorpe, K.C., and Niall MacDermot for the plaintiffs.

Cur. adv. vult.

June 15. The following judgments were read.

COHEN, L.J.: This is an appeal from a judgment of FINNEMORE, J., given on July 21, 1949, by which he awarded to the plaintiffs respectively £176 5s. and £123, with interest in each case at eight per cent. from Feb. 8, 1946, to the date of judgment, and costs. I will state later the basis on which those sums were claimed.

Before recounting the events which gave rise to the claim, it might be convenient to list the *dramatis personae*. The plaintiff Boguslawski was an officer in the Polish merchant navy. At the material times he was serving, as second engineer, in S.S. Morska Wola, owned by the defendants. He was a member of the Polish Captains' and Officers' Union (hereinafter referred to as "the officers' union"). Mr. Dabkowski was at the material time chairman and acting secretary of that union in London. The plaintiff Krupka was a seaman in the Polish merchant navy and claims to have been serving at all material times in the same ship as his co-plaintiff. He was a member of the Polish Seamen's Union (hereinafter referred to as "the seamen's union") of which Mr. Fligel was at all material times the chairman. The defendants were a Polish limited company, 98½ per cent. of the share capital of which was owned by the Polish State. The defendants were at all material times managing the ships of two other Polish companies. Mr. Plinius was a member of the board of management of the defendants, and was on Sept. 2, 1942, appointed curator of the defendants under Polish war-time legislation. The old Polish government was the government of the Polish State which, after Poland had been overrun by Germany, left Warsaw and established itself first at Angers and then, in 1940, in London. I shall refer

to it hereafter as the old Polish government. Mr. Kwapinski was the Minister of Industry, Commerce and Shipping in the old Polish government. The new Polish government was the Polish Provisional Government of National Unity, which, on June 29, 1945, wrote to His Majesty's government, claiming that it had been established on June 28, 1945, pursuant to the decision of the Crimea conference, and asking for recognition by His Majesty's government. I shall refer to it hereafter as the new Polish government.

The events in the drama cover a very short period. On June 25, 1945, the Council of Ministers of the old Polish government passed a resolution to determine the employment of civil servants and to pay them on such determination a gratuity of not less than three months' salary. On the same date the council resolved to pay to employees of Polish shipping enterprises a gratuity on an equal footing to that payable to State employees, with the proviso that the gratuity was to be paid out of the moneys of the enterprises concerned. On June 28, 1945, on which date, as I have said, the new Polish government claims to have been established, the President of the old Polish government made a decree giving statutory effect to the resolution as regards civil servants. The resolution as regards employees of shipping enterprises was inserted in Part 2 of that decree, but it was not contended that this inclusion had any statutory effect or of itself gave any legal right to the plaintiffs in this action. Before that decree had been published, Mr. Kwapinski had, on June 26, 1945, sent for Mr. Plinius and told him of the resolution passed by the Council of Ministers as regards shipping enterprises, but Mr. Plinius had said that it could not be in the interests of the defendants to immobilize their ships and he must refuse to implement the resolution so far as officers and seamen were concerned. His attitude was confirmed at a meeting held on June 27 at which were present Mr. Plinius and the curators of the other two shipping lines which were being managed by the defendants. At this meeting it was decided to adopt the Minister's suggestion as regards employees ashore, but not as regards officers and crews of ships.

On July 2, 1945, letters were written by the officers' union and the seamen's union to Mr. Kwapinski and to the association which represented all the Polish shipping lines, asking for pay for a number of things, including three months' compensation for their members in the event of the taking over of the Polish merchant navy by the new Polish government, in the same way as was being done regarding employees ashore. On July 3, 1945, Mr. Kwapinski had an interview with representatives of both unions. Mr. Fligel and a colleague of his represented the seamen's union. The learned judge states what happened at this interview as follows:

"Mr. Kwapinski said that he would agree that out of the moneys of the defendant company or the other shipping companies the sailors who in fact left their ships because of this change of government should be treated the same, or substantially the same, and should be entitled to the three months' gratuity which was being given to the other people. Mr. Kwapinski told the trade union representatives that the government was paying three months' gratuity to civil servants, that the shipping lines were going to do the same to their office staffs, and that he was proposing that seamen should be treated the same way. He then, in their presence, dictated a telegram to the head of his shipping department."

The effect of that telegram is summarised by the learned judge in the following passages of his judgment:

"That telegram . . . referred to what was happening about the political situation, and said that the Ministers had decided to discharge all officials of the government and pay them compensation, and then it said: 'At the same time, on the authority of the government I made a declaration to the Minister of War Transport, on behalf of the Polish crews, requesting that

no ships of the Polish merchant navy be directed to waters under the Soviet control.' That was another point they were anxious about. Then it said: 'The trade organisations of officers and seamen are of the view that until free, unfettered and democratic elections are held they are unable to return to homeland as well as to take ships to waters controlled by the Soviet Union. I also asked that in this case all Polish ships be first directed to the United Kingdom ports so as to give the officers and seamen the possibility to disembark in ports considered as home ports.' Then comes the part that we are considering in this case: 'I also declared that in the event their leaving the ships owing to the above-mentioned causes the captain, officers and seamen are entitled to compensation on equal footing with government officials and shipping companies staff . . . captains of the ships are requested to bring the above to the notice of the crews'."

It is on what transpired at this interview that the plaintiffs rely as constituting the agreement on which they primarily sue. On the same day Mr. Plinius had an interview with Mr. Kwapinski, at the latter's request. Mr. Plinius says that Mr. Kwapinski said that the board of management of the defendants must reverse the decision they had taken on June 27, 1945, not to offer compensation to officers and seamen who might leave their ships by reason of the impending change of government. Mr. Plinius refused and left the Minister. Another interview, however, took place on the next day (July 4) at which Mr. Plinius was shown a telegram which was, so far as material, in the same terms as that which had been dictated by Mr. Kwapinski at his interview with the union officials. Mr. Plinius at first refused to send it, but ultimately, on its being pointed out to him that it was being sent by the Minister and that he was merely being used as a post office, he agreed to send it and did so on July 5, 1945. In its final form, as dispatched to the master of the *Morska Wola*, it read as follows:

"Priority. Captain *Morska Wola* c/o Lamports Manchester. For Miezkowski. In connection with the political situation now prevailing and in view of the announcement of Anglo-Saxon governments on possibility of withdrawing recognition from the Polish government the Council of Ministers at meeting on June 29 decided to discharge all officials of the government administration and to pay those discharged compensation on the day of publication of the decree. At same time on authority of the government I made a declaration to Minister of War Transport on behalf of Polish crews requesting that no ships of Polish merchant navy be directed to waters under the Soviet control. I have done so as a consequence of claims put forward by the interested organisations. The trade organisations of officers and seamen are of the view that until free unfettered and democratic elections are held they are unable to return to homeland or take ships to waters controlled by the Soviet Union. I also asked that in this case all Polish ships be first directed to United Kingdom ports so as to give officers and seamen the possibility to disembark in ports considered as home ports. I also declared that in event their leaving ships owing to above-mentioned causes captains officers and seamen should be entitled to receive suitable compensation. Captains of ships are requested to bring the above to notice of crews. Jan Kwapinski, Minister."

It is common ground between the parties that "suitable" in this telegram meant "three months," and the plaintiff Krupka deposed that the captain of the ship told them so. The telegram was received by the master of the *Morska Wola* on the same day and was in due course read to the officers and crew. The plaintiff Boguslawski, who had been serving in the ship since before July 5 heard it on July 5, but it only reached the plaintiff Krupka (who joined the ship on July 4) on July 6. The plaintiff Boguslawski left it on July 11. Mr. Kwapinski wrote a letter to Mr. Plinius and to the curators of the other two lines managed

A by the defendants, purporting to act under powers conferred by the legislation which provided for the appointment of curators, and pursuant to the resolution of the Council of Ministers passed on June 25, 1945. By it he directed the curators to pay gratuities to officers and seamen who left their ships on the same scale as that paid to the shore employees of the respective companies. That letter bore date July 5, 1945, but did not reach any of the curators before July 7, and did not reach Mr. Plinius until July 10. It appears improbable, therefore, that the letter was dispatched before July 6. In the meantime, as at midnight on July 5/6, His Majesty's government had recognised the new Polish government. Paragraph 1 of the certificate of the Secretary of State for Foreign Affairs which proves this fact is in the following terms:

B "1. Up to and including midnight of July 5/6, 1945, His Majesty's government in the United Kingdom recognised the Polish government having its headquarters in London as being the government of Poland, and as from midnight of July 5/6, 1945, His Majesty's government in the United Kingdom recognised the Polish Provisional Government of National Unity as the government of Poland, and as from that date ceased to recognise the former Polish government having its headquarters in London as being the government of Poland."

C I have now stated all the material facts other than the relevant Polish law which is, of course, in our courts a question of fact. I shall deal with the question of Polish law when I come to consider the points thereon taken by counsel for the defendants.

D The plaintiffs commenced the present action on Feb. 8, 1946. By their statement of claim they based their right to relief on an agreement, alleged to have been made at the interview on July 3, 1945, between Mr. Kwapinski, acting on behalf of all Polish shipping companies, on the one side, and the representatives of the two unions, acting on behalf of all their members, on the other, whereby it was provided that, in the event of such members leaving their ships, they should be entitled to receive compensation on an equal footing with all government employees of the State and the staff of Polish shipping companies. They alleged in the alternative that the plaintiffs, by leaving their ships on the faith of the telegram signed by Mr. Kwapinski (dispatched by Mr. Plinius and communicated to them by their captain), had accepted the offer contained in that telegram, which offer, the plaintiffs said, had been made by Mr. Kwapinski on behalf of the defendants. They made other alternative allegations including, as we understand the pleadings, an allegation that the defendants by Mr. Kwapinski had contracted a unilateral obligation to the plaintiffs which was binding on the defendants after communication to the plaintiffs without the necessity for any acceptance. The defendants denied liability under Polish law, alleged that the representatives of the union had no authority to make the oral agreement set up by the plaintiffs, and pleaded, in the further alternative, that the transaction alleged was a contract of donation and invalid for want of notarial act. They further alleged that the effect of the recognition of the new Polish government by His Majesty's government at midnight on July 5/6 was retroactively to make the old Polish government incompetent after June 28 to carry out any legislative, administrative or other function on behalf of the Polish State.

H FINNEMORE, J., found for the plaintiffs. He rejected the argument based on the effect in English law of the recognition of the new Polish government, on the ground that the new Polish government had not prior to midnight on July 5/6 any control over Polish ships and Polish seamen because they were all far removed from the area over which the new Polish government was at that time exercising *de facto* control. He also relied on the fact that the certificate of the Secretary of State specified the exact hour at which recognition was accorded to the new Polish government and impliedly withdrawn from the old Polish government, and said:

"I should have thought, and I so hold—there being no authority on this that I know at all—that, where the government of this country in terms certifies that it recognises one government up to midnight on July 5 and another government thereafter, the acts done by that government recognised up to midnight in this country while it was still recognised as the government must be valid. Otherwise this certificate would seem to mean little or nothing. And I think, if that is so, there can be no retroactive effect back, for example, to June 28, as is pleaded in this case."

That difficulty being out of the way, the learned judge held that the plaintiffs were entitled to succeed. He summarised the objections taken by the defendants to the plaintiffs' claim as follows: (i) that the Minister had no power to make this contract; (ii) that, if he did make it, it was a collective agreement and under Polish law should have been in writing; (iii) that the trade union officials had no right or authority to enter on behalf of their members into whatever it was they did enter into; (iv) that, if it was merely a unilateral obligation, it was unenforceable as against the company; (v) that, if it was argued (as, of course, it is) that the men ratified the action of the trade union officials by leaving their ships, they had no power to ratify such an arrangement; (vi) that, at the most, this arrangement of July 3 was what in Polish law is called a "donation" and that a donation must be in a special form, what is called "notarial form," and that, plainly, this arrangement was not in that proper form. He found in the plaintiffs' favour that (i) the Minister had power under cl. 19 of an Act passed on Mar. 30, 1939, to make on behalf of the defendants the contract alleged; (ii) it was not a collective agreement within art. 445 of the Polish Code of Obligations, because something given to workmen on one occasion only could not be a collective agreement, at any rate where it did not affect future entrants into the trade or profession; (iii) the union officials had power to make the alleged agreement on behalf of the plaintiffs or, at any rate, if they had no such authority, they purported to do so, and the plaintiffs by leaving their ship ratified the contract; (iv) quite apart from the question of contract, Mr. Kwapinski had entered into a unilateral obligation on behalf of the defendants to pay the compensation claimed and that obligation, being communicated to or accepted or ratified by the union representatives, or, alternatively, the plaintiffs, became a bilateral enforceable obligation; (v) if the contract relied on would otherwise have been a contract of donation within art. 354 of the Code of Obligations and, therefore, valid only if made in notarial form, it was taken out of that article because it was made under a moral duty and was, therefore, within art. 355 (3).

From that decision the defendants appeal and base their appeal on the same points which they took in the court below. Two further points emerged before us. The defendants contended that (i) interest not being claimed as a matter of contract, the right to it is governed by the law governing procedure (in this case, English law) and, accordingly, interest should only have been allowed at the rate of four per cent.; (ii) having regard to the evidence of Dr. Bloch, the expert witness for the plaintiffs, the plaintiff Krupka, having only joined his ship on July 4, is not within the ambit of the contract alleged to have been made on July 3. I can dispose shortly of these two points. Counsel for the plaintiffs very properly admitted that the learned judge had allowed interest at eight per cent. on the basis of Polish law being applicable. He further admitted that this was an error, non-contractual interest awarded by way of damages being governed by the *lex fori* and not by the proper law of the contract. He also admitted—as he was bound to do, in view of the unanimous opinion of the legal experts—that under Polish law the contract alleged to have been made on July 3 enured only for the benefit of officers and seamen then serving on board ship and this excluded Mr. Krupka. He reserved, of course, Mr. Krupka's rights based on the telegram dispatched on July 5.

Counsel for the defendants put in the forefront of his argument the point that in English law recognition by His Majesty's government of a foreign government,

de jure or *de facto*, has retroactive effect. Before I consider the validity of this point, I must premise that, although, as the certificate itself points out in para. 3 thereof, the question whether and to what extent recognition of a foreign government is retrospective is a matter of law for decision by this court, the facts as to the extent of recognition of the old and the new governments are decisively settled by the certificate of the Secretary of State. I have already read para. 1, which is the material part of that certificate for this purpose. It seems to me, as it did to the learned judge, that, where the Secretary of State certifies that His Majesty's government recognises one government up to midnight on a specified day and another government thereafter, the position is the same as if a Secretary of State were to certify, for example, that His Majesty's government recognised the government of one absolute monarch up to the moment of his death and the government of his son and heir thereafter. There would then be no question of retroactive effect—one government would be and could be recognised as the successor of the other. So here it seems to me that the Secretary of State is, in effect, saying that the new Polish government is recognised as from midnight on July 5/6 as the legitimate successor of the old Polish government. In these circumstances it seems to me that the acts of the old Polish government prior to midnight on July 5/6 are valid and binding on the new Polish government, at any rate unless and until the new Polish government rescinds or repudiates them, an event which, it is common ground between the parties, has not occurred so far as any act relevant to the present case is concerned.

Having reached this conclusion, it is not strictly necessary for me to consider what the position would be if the recognition by His Majesty's government of the new Polish government were to have some retroactive effect. As, however, the matter was fully argued, I ought to say that, even on this basis, I would doubt whether counsel for the defendants was entitled to succeed. He argued that recognition not only validated all acts of the new Polish government done during what he conveniently called the twilight period (*i.e.*, the period between the date on which that government attained power and the date of recognition by His Majesty's government), but also invalidated all acts, whether executive or legislative, done during the twilight period by the old Polish government. He admitted that there was no reported case that went this length, but he said that the principle laid down by this court in *Aksionairnoye Obschestvo A. M. Luther v. James Sagor & Co.* (1), and approved by the House of Lords in *Lazard Brothers & Co. v. Midland Bank, Ltd.* (2), was sufficiently far-reaching to entitle him to succeed. That principle is concisely stated by LORD WRIGHT in the latter case, where the question at issue was whether or not the Industrial Bank, a Russian company, was an existing company or had been duly dissolved under Russian law. LORD WRIGHT said ([1933] A.C. 297):

“The Industrial Bank was a corporation established by an Act of the Tsar; but the governing authority in Russia, as recognised in the English courts, is now and has been since October, 1917, the Soviet State. Soviet law is accordingly the governing law from the same date in virtue of the recognition *de facto* in 1921 and *de jure* in 1924 by this country of the Soviet State as the sovereign power in Russia. The effect of such recognition is retroactive and dates back to the original establishment of Soviet rule which was in the 1917 October Revolution, as was held by the Court of Appeal in *Aksionairnoye Obschestvo A. M. Luther v. James Sagor & Co.* (1).”

In *Luther's* case (1), however, the question at issue was the validity of acts done by the foreign government in territory indisputably under its *de facto* control, and I think that the ambit of the decision was correctly stated by BENNETT, J., in *Haile Selassie v. Cable & Wireless, Ltd.* (No. 2) (3), where he said ([1938] 3 All E.R. 684) that *Aksionairnoye Obschestvo A. M. Luther v. James Sagor & Co.* (1) had reference:

"... exclusively to the acts of a *de facto* government and a *de jure* government, both recognised as such by His Majesty's government and both claiming to have jurisdiction in the same area with reference to persons and property in that area."

Counsel for the defendants suggested that *Banco de Bilbao v. Sancha* (4) lent some support to his argument. In that case the question at issue was which of two sets of persons, each claiming to be the board of directors of a company incorporated in Spain, and having its corporate home at Bilbao, was to be treated as the legitimate board of directors. The court held that that question depended on the construction of the company's articles, that this question must be governed by the law from time to time prevailing at the place where the corporate home was set up, and that must be the law of the government recognised as the *de facto* government of the area which included the corporate home. It is true that the matter before the court was the question who were entitled to be managers of the English branch of the company, but the *ratio decidendi* was as I have stated. I do not think, therefore, that it carries the matter any further than it was carried in *Luther v. James Sagar & Co.* (1).

In the present case I am concerned, not with the validity of acts done in Poland by a Polish government, but with acts done in England by the old Polish government which are alleged to have given rise to a contract between the defendants and persons all of whom were outside Poland. Counsel for the defendants, as I have said, claimed that the retroactive principle still applied, but he found himself obliged to admit that there must be a limit to its application. Thus, he conceded that, if during the twilight period an Englishman paid in England a debt due to the Polish State to the proper officer of the old Polish government and got a discharge from him, an action in the English courts at the instance of the new Polish government to recover that debt must inevitably fail. He said, however, that the present case was not analogous (*a*) because the plaintiffs were Polish nationals, and (*b*) because the questions at issue were not in regard to the validity of a completed transaction, but whether an executory contract, or, on one view, an offer which had not yet resulted in a contract, remained in force after the recognition of the new Polish government. I do not think that either of these suggested distinctions affect the matter. The English sovereign affords his protection, not only to British subjects, but to foreigners for the time being in England. Counsel for the defendants admitted that no distinction could be made between British subjects and alien friends in England, but he said that we were dealing here with Polish subjects in Polish ships and, therefore, notionally on Polish territory. It seems to me, however, that the nationality of the plaintiffs and the ships is irrelevant, since the alleged contract of July 3, if made, was made in England, or, if the matter rests on the telegram, then the offer was made from England and, having regard to its nature, acceptance by leaving the ship could only take place outside Poland. I would add that there is clear evidence that the old Polish government was purporting up to midnight on July 5/6 to exercise control over the Polish merchant navy and no evidence that in the twilight period the new Polish government asserted any such control.

The second distinction presents more difficulty, but I derive great assistance from the judgment of STONE, J., in the Supreme Court of the United States of America, in *Guaranty Trust Co. v. United States* (5). In that case the question at issue was whether a debt admitted to have been at one time due from Guaranty Trust Co. to the provisional government of Russia (hereinafter referred to as "the Karensky government") was statute-barred at the date of issue of the writ. The answer to this question depended on whether a notice, given by Guaranty Trust Co. to the representative of the Karensky government that, for reasons stated, the company repudiated all liability for the alleged debt, was effective to set the statute running against the Soviet government and in favour

of Guaranty Trust Co. The Supreme Court held that it was effective. STONE, J., delivering the judgment of the court, said (304 U.S. 140):

A "The government argues that recognition of the Soviet government, an
action which for many purposes validated here that government's previous
acts within its own territory . . . operates to set at naught all the legal
consequences of the prior recognition by the United States of the provisional
government and its representatives, as though such recognition had never
B been accorded. This is tantamount to saying that the judgments in suits
maintained here by the diplomatic representatives of the provisional govern-
ment, valid when rendered, became invalid upon recognition of the Soviet
government. The argument thus ignores the distinction between the effect
of our recognition of a foreign government with respect to its acts within its
C own territory prior to recognition, and the effect upon previous transactions
consummated here between its predecessor and our own nationals. The one
operates only to validate to a limited extent acts of a *de facto* government
which by virtue of the recognition, has become a government *de jure*. But it
does not follow that recognition renders of no effect transactions here with a
prior recognised government in conformity to the declared policy of our own
D government. The very purpose of the recognition by our government is that
our nationals may be conclusively advised with what government they may
safely carry on business transactions and who its representatives are. If
those transactions, valid when entered into, were to be disregarded after the
later recognition of a successor government, recognition would be but an idle
ceremony, yielding none of the advantages of established diplomatic relations
in enabling business transactions to proceed, and affording no protection
to our own nationals in carrying them on. So far as we are advised no
court has sanctioned such a doctrine."

E That decision is not, of course, binding on us, but I respectfully agree with every
word that the learned judge said. I may add that, as FINNEMORE, J., pointed
out, in the present case a contrary conclusion would be particularly unfortunate,
since the certificate of the Secretary of State says not only that as from midnight
on July 5/6 His Majesty's government recognised the new Polish government,
but also that up to midnight His Majesty's government recognised the old
Polish government.

F Counsel for the defendants points out that in *Guaranty Trust Co. v. United
States* (5) the court was dealing with a completed transaction. I cannot, however,
think that a different principle applies where the contract is executory. In
either case the other party to the transaction has acquired a vested right.
A *fortiori* must this be the case where, as here, if there is a contract, that contract
was made by the government not on its own behalf, but as agent for a third
party, the defendants. A more difficult question is in regard to the position where
G the action of the old government has at the date of recognition constituted not
a contract but an offer which might, or might not, be accepted and thus lead to
a contract. On the whole, I incline to think that counsel for the plaintiffs gave
the right answer to this problem when he said that, assuming for this purpose
that Mr. Kwapinski had authority to make the offer on behalf of the defendants,
the offer, when made, became the offer of the defendants. Until accepted it
could, no doubt, be withdrawn either by the defendants themselves or by the
H new Polish government on their behalf if the war-time legislation remained in
force. Until withdrawn, it could be accepted, and, in the present case, was
accepted by the plaintiffs by their leaving their ship pursuant to the terms of
the offer.

Counsel for the defendants objected that this conclusion involved the infraction
of a well-established principle of international law which formed part of the
municipal law of this country. That principle is that there cannot be more than
one government of a foreign State recognised at the same time. I accept the

principle, but I do not agree that a decision in favour of the plaintiffs will infringe it. The principle truly stated is that there cannot be two governments recognised in respect of the same territory at the same time, but a recognition of the validity of the acts done by the old government during the twilight period outside the area under the *de facto* control of the new government does not, in my opinion, involve the recognition of two governments at the same time in respect of the same area. Comity seems to us to be satisfied by a recognition of the validity of the acts done by the new Polish government during the twilight period in territory under its *de facto* control, and convenience requires that the validity of acts done in England by the old Polish government during the same period should not be questioned. I would add in passing that no conflict is involved in the present case, since the new Polish government has done nothing to invalidate the acts of the old Polish government which we are considering. For these reasons, I agree with the conclusion of FINNEMORE, J., that the defence based on English law fails.

I turn, therefore, to the questions of Polish law which determine whether the plaintiffs acquired rights which enable them to succeed in this action. On these points, while I differ from the learned judge in the court below on certain particulars, I find myself in complete agreement with his method of approach to the problem and with the result at which he arrived. He was faced on most points with a conflict of views between the experts. In reaching his conclusion he was, I think, entitled, as he did, to bear in mind that, while the *bona fides* of all the experts was unquestioned, Dr. Bloch was a recognised expert on the branch of law with which the court was concerned, whereas Dr. Szer and Professor Piotrowski, though they had some experience in that field, did not specialise in it. Moreover, there being that conflict and there being apparently no decision of a Polish court directly in point, the judge was entitled to apply his own mind to the translations of the relevant sections of the Code with which he had been supplied in order to determine which of the conflicting views of the experts was correct. I think he did so, and I agree with him that on most points this method of approach leads to the acceptance of Dr. Bloch's views.

With these preliminary observations, I turn to the six points of Polish law on which counsel for the defendants relied. First, as to the authority of Mr. Kwapinski to bind the defendants. It was common ground that this authority, if it existed, was to be found in the Act of Mar. 30, 1939, concerning the communications in the defence service of the State. Article 1 provided that, in the meaning of the Act, "communications" are considered all areas and functions connected with the transport of persons, goods and information. Article 2 specifically included sea transport. Article 13 (1) was in the following terms:

"In cases of outbreak of war or the issuing of mobilisation and cases where the defence interests of State as laid down by a resolution of the Council of Ministers will require, all means of communications become subordinate to the defence interests of the State."

Articles 17, 18 and 19 enabled the appropriate Minister on the occurrence of any of the events mentioned in art. 13 to assume the supreme management of various means of transport. Article 19, which is the relevant article for the purposes of this case, reads as follows:

"In conditions enumerated in art. 13 (1) shipping companies, whether owned by the local government authority or owned privately, shall be placed under the supreme management of the Minister of Industry and Commerce. The board of directors of such companies shall become executive organs of the Minister of Industry and Commerce."

Article 21 confers certain powers on the military authorities as distinct from the Ministers which, it was suggested, might have some bearing on the question we have to decide, but I am unable to derive any assistance from it.

Dr. Bloch took the view that art. 19 enabled the Minister to do anything he thought fit on behalf of and in the name of the companies, including the making of contracts on their behalf. That is the conclusion I should have reached from the language of the translation before us, but counsel for the defendants says, as did his experts at the trial, that this construction ignores the concluding words of art. 19, "The board of directors shall become executive organs of the Minister." He argued that (i) the board of directors were, under the statutes of the company, the executive organ of the company and remained so despite the Act of 1939; therefore (ii) the Minister's only power, if he desired the company to enter into a contract, was to direct Mr. Plinius (who was a member of the board of management and the curator in whom, under the war-time legislation, certain powers in relation to the company were vested) to enter into the desired contract in the company's name. It was suggested that, if Mr. Plinius was recalcitrant, the Minister's only remedy was to dismiss him and appoint another curator. This construction seems to me inconsistent with the language of the Act of 1939 and to defeat its purpose as a measure intended to be available in time of war. Counsel for the defendants also argued that, if the Minister had the power, he was not purporting to exercise it. That, said counsel, was clear from the fact that in his letter, dated July 5 and addressed to Mr. Plinius, he cited as his authority, not the Act of 1939, but art. 5 of the Act of Feb. 26, 1940 (the decree as to curatorship). I do not regard this as conclusive. The material question, in our opinion, is whether or not the Minister intended to enter into a contract on behalf of the defendants. If he did, and if in fact he had the power, the fact that he cited the wrong Act is, I think, immaterial. I agree with the learned judge in thinking that the effect of art. 19 of the Act of 1939 was to give to the Minister the widest powers in relation to the company, which he could exercise himself or delegate to the board of management if he chose to do so.

The next question is in regard to the authority of Mr. Dabkowski and Mr. Fligel to contract on behalf of the plaintiffs. This was challenged on two grounds. It was said (i) that the union had no power to make the alleged contract, and (ii) that, if the union had the power, there was no evidence to show that it could be exercised by Mr. Dabkowski and Mr. Fligel. The second point was not very strenuously argued, and I shall content myself with expressing my complete agreement with the observations of FINNEMORE, J., to the effect that the evidence quite satisfied him that these gentlemen were fully authorised to act. The first point must depend on the statutes of the unions. Among the objects of the officers' union was:

"2. to conclude agreements between the captains, navigating, engineer and radio officers of the Polish merchant navy on one side and the employers on the other side, also to regulate the relations among the members of the association."

The rules of the seamen's union state that one of its objects is to conclude agreements in respect of conditions of work and wages. I respectfully agree with the learned judge in the court below in thinking that, on any view of the arrangement made on July 3, it was plainly within cl. 2 of the statutes of the officers' union and was an agreement in respect of conditions of work and wages within the meaning of the statutes of the seamen's union. This conclusion accords with the evidence of Dr. Bloch. Counsel for the defendants, however, says that the authority given by the statutes was limited to making agreements which are collective agreements within art. 455 of the Polish Code of Obligations. I shall have to consider that section more closely when I come to consider whether the arrangement made on July 3 was a collective agreement within it. Suffice it for the moment to say that it is impossible to give this limited meaning to the word "agreements" in the statutes of the seamen's union, since they were adopted before art. 455 became law, and I see no reason to give a more limited meaning to the same word in the statutes of the officers' union.

The next question is: What did the Minister arrange (I use a neutral word) with the representatives of the unions on July 3? Counsel for the defendants, in his reply, suggested that he made no contract, but merely announced his intention of performing an executive act. That point does not seem to have been taken in the court below, nor do any questions seem to have been directed to the expert witnesses on that basis. In these circumstances, and having regard to the evidence of Mr. Kwapinski, Mr. Dabkowski and Mr. Fligel, we are not prepared to dissent from the judge's finding that a contractual agreement was reached on July 3. But what was that agreement? That is a question of fact and the evidence of the Polish lawyers is only admissible in so far as they can call the court's attention to provisions of the Polish Code or to decisions of Polish courts laying down principles of construction which are applicable to the facts of this case. The only relevant principles to which our attention was called were, I think, those which are to be found in arts. 107 and 108 of the Code of Obligations, which read as follows:

"Article 107. Declaration of will shall be interpreted in such a manner as it is required under the circumstances in which they were made by the principle of good faith and fair dealing. Article 108. In contracts one should examine mutual intention of the parties and the object of the contract rather than adhere to the literal meaning of the words."

With these articles in mind, I shall turn first to the only contemporaneous document, the note made by Mr. Dabkowski shortly after the interview, but would mention in passing that, on July 2 Mr. Dabkowski had written to the Minister asking him to issue orders to the Polish Shipowners' Association that the shipping companies should, among other things, pay captains and officers three months' compensation in the event of the eventual taking over of the Polish merchant navy by the new Polish government. That was one of the matters discussed on July 3, and Mr. Dabkowski's contemporaneous memorandum contains the following extracts on the subject:

"3. The compensation due to officers and men of Polish merchant navy in view of payment of compensation to the administrative staff of shipping companies, ships' crews should be paid compensation on equal footing. The representatives of both unions request that the Minister as supreme manager of shipping companies should make a binding declaration in this matter . . . As the payment of compensation will burden shipping companies with considerable expense and as they desire to have in this matter the view of the whole cabinet, the Minister obtained an appropriate resolution on June 25, 1945, which was published in the *Journal of Laws* on the day of this meeting. Further, the Minister declared that in exercise of supreme management of Polish merchant navy he gives to officers and men who will stop working aboard ships in consequence of the political changes the right to compensation on equal footing with administrative employees of the Polish merchant navy and civil servants."

Mr. Dabkowski confirmed that this document was a correct record of what happened at the interview, and so did Mr. Fligel. [HIS LORDSHIP then set out the most important parts of Mr. Kwapinski's evidence on the point, and continued:] In my opinion, the proper inference to draw from this evidence is that the parties had a contractual intent, but that the agreement was an agreement between the Minister, on the one side, and the unions, on the other, and not between the Minister and the unions contracting on behalf of their individual members. I do not read the agreement quite in the sense that the learned judge appears to have done in the passages of his judgment which we have already cited. I think the agreement was an agreement by the Minister that, acting on behalf of the shipping companies in the exercise of his powers under art. 19 of the Act of 1939, he would dispatch a telegram in the terms or to the effect of the draft he dictated in the presence of Mr. Dabkowski and Mr. Fligel.

The next question is whether that agreement was an agreement within art. 455 of the Code, which required a collective agreement to be in writing and made it void unless in writing. I do not think I need read the sections of the Code since the experts were all of opinion that, if an agreement was made which was a collective agreement in the sense that it was intended to apply to all the members of the union, or to a class of the members, but was intended to operate on one occasion only, it was not a collective agreement effected by art. 455 and need not be in writing. An illustration put to the witness was an agreement between the Employers' Federation and the unions that the members of the unions should have a day's holiday on the occasion of a particular football match. We see no distinction between such an agreement and an agreement, such as was made on July 3, to dispatch a particular telegram on a particular occasion.

A In our opinion, therefore, the agreement of July 3 was not a collective agreement within art. 455.

On the construction I have placed on the agreement of July 3, it will not enable the plaintiffs to succeed in this action, since the Minister fulfilled his obligation thereunder when he dispatched the telegram of July 5. This construction is not that adopted by the learned judge and it has the inevitable consequence that

C no question of ratification of that contract by the plaintiffs can arise. The plaintiffs can only succeed if they establish that the telegram constituted either (a) a unilateral obligation binding on the defendants as soon as communicated to the party or parties intended to benefit, or (b) an offer which was accepted by them. In the view that I have formed of the telegram, I need not go into the question of unilateral obligation for the following reasons. (i) I do not read

D the telegram as evidencing any intent to undertake any such obligation. I think it was intended as an offer which the officers and seamen could accept by leaving their ship. (ii) I agree with the learned judge that, if there was ever a unilateral obligation, it became bilateral when the plaintiffs walked off their ship.

The next question with which I have to deal is whether the offer contained

E in the telegram was accepted and thus a contract became binding between the parties. It was argued by counsel for the defendants that, as the acceptance did not take place until after the recognition of the new Polish government, no contract resulted. I have already given our reasons for rejecting this argument. Counsel for the defendants also said that the defendants could not be bound by the agreement, since the telegram was sent by the Minister and did not

F contain any statement that the compensation was to be paid by the defendants. I am unable to accept this argument. Article 107 of the Code which I have already read is, I think, in point. The intention of the Minister and of the union representatives that the payment was to be made by the companies is clearly established by their evidence. Bearing in mind that the plaintiffs knew when they accepted the offer that the new Polish government had been recognised,

G I think it is a fair inference that it was with the shipping companies that the plaintiffs were intending to contract. There remains the question whether this contract constituted a contract of donation within art. 354 of the Polish Code of Obligations and was, therefore, void for want of a notarial act. I agree with the learned judge in the court below that this question must be answered in the negative. Article 355 provides that:

H " ... the provisions concerning donations shall not apply to ... (3) increment of property which had been either promised or provided for, satisfied either a moral duty, or propriety of behaviour or custom."

I agree with the learned judge that, assuming the promised compensation constitutes an increment of property, it can fairly be said to have been given in satisfaction of a moral duty or propriety of behaviour. I respectfully adopt the words of his judgment where he says:

" Obviously there is no moral duty to say to the men: ' If you go off the ship without giving proper notice at a time when we want you badly to stop there, we are going to give you three months' compensation.' That would be absurd: there would be no moral duty at all. But, if the employer, recognising, as in this case, certain extraneous facts which, in his opinion, reasonably would lead people to give up their employment in any event, says, as he might well do: ' I am sorry about the position which has brought about the result that you will not be able to sail the ships, but, in view of what you have done and so that you will not be in great hardship, I am going to give you three months' gratuity,' I think that would be satisfying, on the part of the owner, a moral duty and would be expressing what might be called propriety of behaviour."

As I have already said, counsel for the defendants sought to distinguish the position of Mr. Krupka from that of Mr. Boguslawski on the ground that (a) he did not join the ship until July 4, (b) the telegram was not communicated to him until July 6, (c) he did not leave the ship until July 7. On the view that I have formed of the case, these distinctions do not amount to a real difference. The first point is disposed of by the fact that, in my view, the plaintiffs succeed, not on the alleged contract of July 3, but on the contract arising from the offer in the telegram of July 5 and its subsequent acceptance by the plaintiffs. The second two points are immaterial in view of my conclusion, based on the terms of the certificate of the Secretary of State, that all acts done in England by the old Polish government prior to midnight on July 5/6 are binding on the new Polish government, at any rate unless and until the new Polish government takes some step to cancel or repudiate them, an event which in this case did not occur. Had I taken a different view of the effect of the certificate of the Secretary of State, a difficult question might have arisen as regards Mr. Krupka in view of the fact that the offer was not communicated to him until after the recognition of the new Polish government, and that, under art. 30 of the Polish Code of Obligations, the expression of the will which is intended to be communicated to another person is deemed to be made when it reaches the said person in such a manner that he can acquaint himself with its context. But this point was not considered by the learned judge and does not seem to have been put to the experts on Polish law, and I think it better, therefore, to express no opinion on it. For these reasons, I think that the plaintiffs are entitled to retain their judgment with the variation only in the rate of interest allowed from eight per cent. to four per cent.

DENNING, L.J.: At the beginning of July, 1945, the officers and crews of the Polish merchant navy were in a quandary. The ships in which they were serving were not only Polish ships flying the Polish flag, but they were also, for all practical purposes, owned and controlled by the Polish government. That government, for instance, owned 98½ per cent. of the shares of the Gdynia Ameryka Linie. All through the war the British government had recognised the Polish government which had its headquarters in London as being the government of Poland, but the end of that government was in sight. The British government, in pursuance of an international agreement made at Yalta in the Crimea, had announced that it would soon recognise the new Polish government which had been set up in Warsaw and that it would no longer recognise the old London government. Many of the men thought that this foreboded ill. They foresaw that the new government in Warsaw would come under the control of the Soviet Union and they feared to go back to a Poland which was under Soviet control. They looked for a lead to their unions and they got it. The union leaders had discussions with the Polish Minister in London, Mr. Kwapinski, and, as a result of these discussions, the Minister sent a telegram to the captains of all the ships. It said, in effect, that any officer or man who left his ship in consequence of the political situation should receive suitable compensation. The telegram

was sent out at noon on July 5. It soon reached the Polish motor vessel *Morska Wola*, which was lying tied up at the Manchester end of the Ship Canal. The captain was away in London. He had probably gone to take part in the discussions. In his absence the chief officer called a meeting of the officers and read the telegram to them. He told them that "suitable compensation" meant that compensation equal to the amount of three months' wages would be paid to all officers and men who left the ship. The officers discussed the position, but no decision was made that day as to what they should do. They went on with their work in the ship.

Before anything else happened, at midnight of July 5/6, 1945, the British government ceased to recognise the Polish government in London as being the government of Poland and recognised the new government in Warsaw as the government of Poland. The important question is: How did that affect the legal position? Did the telegram sent by the London Minister have any continuing effect after midnight? Could the men safely act on it afterwards? They did, in fact, continue to act on it. On July 6 the chief officer of the *Morska Wola* read the telegram in the seamen's mess, and told them that the compensation would be three months' pay for those who left the ship. The seamen discussed the position, but made no decision until the captain came back from London the next day and confirmed what the chief officer had told them. Soon afterwards the men left the ship. The carpenter, Stanislaw Krupka, decided to leave at once and did so on July 7, although he had only joined the ship on July 4. The second engineer, Jan Boguslawski, did not leave until July 11. He gave his reasons quite simply:

"I left the ship because everybody did, and I was promised that I would get three months' wages, and because the ship probably was going to waters under Soviet Union control and I didn't want to go there."

Jan Boguslawski and Stanislaw Krupka now bring this action in the High Court of Justice in England, claiming three months' wages. They do not bring the action against the Polish government. They could not, of course, do that, because a foreign government cannot be impleaded in our courts. They bring it against the shipowners, the Gdynia Ameryka Linie. They say that, when the Minister sent the telegram, he sent it as supreme manager of the shipping company, and thereby bound the shipping company to pay the men three months' wages if they left the ship, and, as they left it, they are entitled by contract to that sum. The outstanding fact in the case is that it was after July 6, 1945, that the men acted on the telegram. It is vital, therefore, to decide whether the telegram had any continuing effect after Mr. Kwapinski ceased to be Minister. Assuming that the men are right in saying that Mr. Kwapinski sent the telegram as supreme manager of the shipping company, nevertheless he was only supreme manager *ex officio* because he was Minister of Industry and Commerce. If his actions as Minister had no continuing effect after midnight on July 5/6, 1945, nor did his actions as supreme manager. So the question is whether his actions as Minister had any continuing effect.

On this question there is no relevant precedent to guide us, and the matter has to be considered on principle. At the outset it is necessary, I think, to consider what was the legal effect of our recognition of the Polish government, which had its headquarters in London from 1940 until 1945. Poland itself had been overrun by the Germans and was occupied by them, but the members of the government had escaped, and so had men and ships. There was, for the time being, no territory for the government to govern, but there were the men and the ships, and there was no reason why the government in exile should not exercise governmental functions in regard to them, provided that it had at its disposal the remedies which every government needs to enforce its decrees. No such remedies could have been exercised in England except by the permission of our government. No other government can exercise acts of sovereignty here

except with our consent. That was freely given. The exiled governments established and exercised their functions here with the consent, and, indeed, on the invitation, of our government. They made, for instance, decrees imposing compulsory military service on the men and decrees requisitioning the ships. They had not the means to enforce the decrees, but the means were supplied by us. Thus, when a Dutch national deserted from the Dutch army, he was arrested by the metropolitan police, and, on an application for *habeas corpus*, our courts refused to release him: see *Re Amand* (6). When the Norwegian government made a decree requisitioning choses in action, the English courts gave effect to it: see *Lorentzen v. Lydden & Co., Ltd.* (7). I do not know that our courts would ever embark on an inquiry whether those decrees were constitutionally valid according to the pre-war constitution of the country concerned. If the exiled government was to exercise the functions of government, it must have the power to make decrees, and, if the old machinery could not be operated in exile, the exiled government must be able to adapt the machinery so far as necessary for it to exercise its functions here, otherwise our recognition of it might be rendered valueless to them and to us.

This all shows that the recognition by us of the Polish government in London was a very special recognition. We took that government, so to speak, under our wing, and allowed it to exercise here extraordinary powers over its men and ships, and these powers were recognised and enforced by our courts. The time came later—viz., at midnight on July 5/6, 1945—when we ceased to recognise that government, but I cannot believe that the de-recognition, if I may so describe it, had any retroactive effect in respect of acts done here. It could not render invalid acts which we had previously sanctioned as valid, nor could it take away rights and obligations which had accrued only because we had permitted them to accrue.

This brings me to the next question which is: What was the legal effect of our recognition of the Polish Provisional Government of National Unity, which was formed in Warsaw on June 28, 1945? We recognised it as the government of Poland as from midnight on July 5/6, 1945. To what extent did our recognition operate retroactively, to June 28, 1945? In the ordinary way, of course, our courts do give retroactive effect to the recognition of a government, in that we recognise the acts of that government within its proper sphere to have been lawful, not merely from the time of recognition, but antecedently from the time that it was an effective government. Thus, if it has already made decrees transferring to itself goods and chattels within its territory and sold those goods to British buyers, our courts will recognise the transfer as valid: see *Aksionairnoye Obschestvo A. M. Luther v. James Sagor & Co.* (1). If it has already passed legislation dissolving companies incorporated within its territory, our courts will hold the companies to be non-existent, as well here as there: see *Lazard Brothers & Co. v. Midland Bank, Ltd.* (2). The reason for this retroactivity is that, just as we recognise as lawful the decrees of the government which are made subsequent to our recognition of that government, so also we must recognise as lawful the decrees made prior to our recognition of the government, unless, indeed, we are to say that the government must re-enact those prior decrees before they can have any validity in our eyes. That would be a work of supererogation and humiliation to which that government might reasonably object, and it would be inconsistent with the sovereignty which is involved in recognition. The retroactive effect must, however, be confined to acts of the government within its proper sphere, i.e., acts with regard to persons and property in the territory over which it exercised effective control: see *Banco de Bilbao v. Sancha* (4); or acts with regard to ships which are registered there and whose masters attorn to them: see *The Arantzazu Mendi* (8). Just as the new government only gains its right to recognition by its effective control, so also the extent of the retroactivity is limited to the area of its effective control.

The relevant period in this case is from June 28, 1945, to midnight of July 5/6,

1945. During that week the Polish Provisional Government of National Unity had control only over the territory of Poland itself. It had no control over the men and ships who were subject to the Polish government in London. During that time no master of any of those ships attorned to the new Polish government. It follows, therefore, that our recognition of the new Polish government had no retroactive effect whatever, so far as those men and ships were concerned. The result of all this discussion is, therefore, that, in the eyes of our courts, until midnight of July 5/6, 1945, the Polish government in London had full right and title to exercise governmental functions in respect of the men and ships of Poland who, or which, were here or had their home ports here, and, as from that same midnight, they ceased to have any such right or title, and the same became vested in the new Polish government in Warsaw. There was, in short, at midnight a transfer by operation of law of all governmental functions and property from one government to the other. So far as our courts are concerned, it was nothing more than a case of an old government going out of office and a new government taking over. At such a time feelings may run high. The old government may be fearful of what the new government may do. The new government may cast suspicious eyes on what the old has done. But none of these things concerns these courts. In the eye of the law it was simply a case of one government succeeding to another by operation of law. On such a succession it is obviously desirable that there should be continuity in the administration of the affairs of State, and the law will make every presumption in favour of it. Decrees which were passed by the old government will remain effective, except in so far as the new government decides to repeal them. Rights and obligations which have become vested under the old government will remain intact unless the new government passes a decree divesting them, if it can lawfully do so. Orders which have been issued by the old executive may have lawfully been obeyed, unless the new executive countermands them. Curators who have been appointed by the old government will remain curators, unless and until the new government dismisses them. So, also, it seems to me that offers made by the old government may lawfully be accepted during the time of the new government, unless they have meanwhile been revoked. There may be a difficulty in enforcing the ensuing contracts, because the new government cannot be impleaded in our courts. But the principle of continuity is of paramount importance. It requires that the new government should stand in the shoes of the old government in all respects, except in respect of acts of members of the old government which were *ultra vires* or acts which were done by them, not in good faith as trustees for the State, but for an alien and improper purpose.

Applying this principle to the telegram of Mr. Kwapinski of July 5, 1945, I am of opinion that the declaration continued to be effective under the new government unless it was *ultra vires* or made in bad faith. But was it either of these? First, was it *ultra vires*? The intention of Mr. Kwapinski was that the compensation should be paid out of the funds of the shipping companies, and the declaration must be read as being made by him on behalf of those companies. They were, in effect, undisclosed principals. But had Mr. Kwapinski, as Minister, any power to bind the shipping companies by a declaration to that effect? It is quite clear that he, as Minister, was also supreme manager of the shipping companies, but it was said that his only power as supreme manager was to give directions to the curator, Mr. Plinius, and that, if Mr. Plinius refused to obey, as he did, the supreme manager could not do the act himself. I do not agree. It would, no doubt, be very exceptional for the curator to refuse, but, if he did, then, in Polish law, the supreme manager could do the act himself on behalf of the companies, and I think that, in English law, in like circumstances the result would be the same. The declaration was, therefore, within his powers. Secondly, did Mr. Kwapinski make the declaration in good faith, or did he do it for an alien and improper purpose? It was argued before us that it was most detrimental to the shipping companies for the men to leave the ships and thus immobilise them;

that a payment of three months' wages if they left would have the effect of inducing them to leave and was, therefore, unjustifiable; and it was to be inferred that the purpose of the declaration was to embarrass the new government on its taking over the ships. If that was the purpose of the declaration, I do not think it would be valid. I am quite satisfied, however, that that was not Mr. Kwapinski's purpose. His concern was, not to embarrass the new government, but to act fairly by the men. He thought that, on a change of management, the men should be entitled to leave the ships if they wished, and he knew that, having regard to the political situation, many of them would leave in any event, gratuity or no gratuity. In the smaller affairs of life, old servants often prefer to leave when there is a change of master, and the new master should not take it against them if they do. So here Mr. Kwapinski thought that, if the seamen chose to leave, it should not be taken against them, and that, on leaving, they ought to receive a gratuity just as much as the civil servants. These sailors had served throughout the war, they had not only saved the Polish merchant navy, but had greatly extended it, and the new government was taking over the benefits of their work. If the men elected not to stay on under the new management, that was no reason why they should not receive a gratuity for the services they had rendered in the past. Those who chose to stay on would have the advantage of further employment, and might get a gratuity later on, if the new Minister chose to declare it. In these circumstances, it is quite impossible to say that Mr. Kwapinski was acting in bad faith or for an alien or improper purpose.

Applying, therefore, the principles which I have stated, it follows that, so far as the telegram is concerned, the new government stand in the shoes of the old government. The situation after midnight on July 5/6, 1945, was in this respect the same as before it. The telegram continued to have effect. It was, indeed, just as effective as if it had been issued by the new Minister or confirmed by him. The new Minister never revoked the declaration before the men left the ships. When they did leave, they became entitled to a gratuity from the shipping companies on whose behalf the declaration was made. I do not find it necessary to embark on a discussion of the Polish law about trade unions, collective agreements, and unilateral obligations, because, on the view I take, it is a simple matter of offer and acceptance—an offer in the telegram made on behalf of an undisclosed principal, which was accepted by the conduct of the men in leaving the ships. As far as I can see, whether you apply English law or Polish law, the result is the same. The men are entitled to the money. I agree, therefore, that the appeal should be dismissed.

BUCKNILL, L.J.: I also agree that the appeal should be dismissed. I cannot usefully add anything to the judgments which have been delivered by COHEN, L.J., and DENNING, L.J.

Appeal dismissed with costs.

Solicitors: *Constant & Constant* (for the defendant company); *Hilder, Thompson & Dunn* (for the plaintiffs).

[*Reported by C. N. BEATTIE, Esq., Barrister-at-Law.*]

PRINCE v. PRINCE.

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Tucker and Bucknill, L.JJ.), May 1, 2, June 26, 1950.]

Divorce—Appeal—Jurisdiction—Divisional Court—“No error of the court at the hearing alleged”—New evidence obtained after trial—Unsuccessful party entitled to appeal to Court of Appeal—Matrimonial Causes Rules, 1947 (S.R. & O., 1947, No. 523/L 9), r. 36.

A husband, whose petition for divorce on the ground of the wife's adultery was dismissed because the adultery was not proved, discovered new evidence after the trial tending to show that his wife had committed adultery, and he applied under the Matrimonial Causes Rules, 1947, r. 36, to the Divisional Court of the Probate Division for a re-hearing. The application was dismissed on the ground that the rule gave the Divisional Court no jurisdiction to entertain the application. On appeal,

HELD: rule 36 of the Matrimonial Causes Rules, 1947, was intended, or ought to be treated as having been intended, to give or preserve to a Divisional Court the right to order a new trial or a re-hearing in cases in which the parties would not in the ordinary course be entitled to go to the Court of Appeal; by the provision in the rule that an application for the re-hearing of a cause where “no error of the court at the hearing is alleged,” shall be made to a Divisional Court of the Probate Division, it was intended to exclude all cases in which an aggrieved party might seek, upon application according to the ordinary general procedure of the Court of Appeal, to challenge as erroneous the conclusion of the judge at the trial or hearing in the court below; in the present case the husband could have appealed to the Court of Appeal from the decision dismissing his petition on the ground that it was against the weight of evidence and he could also have applied for leave to call new evidence before the Court of Appeal; and, therefore, the decision of the Divisional Court was right.

[EDITORIAL NOTE. A rule in the terms of r. 36 of the Matrimonial Causes Rules, 1947, first appeared as r. 46 of the Matrimonial Causes Rules, 1924. Later, it appeared as r. 36 of the Matrimonial Causes Rules, 1937, and r. 36 of the Matrimonial Causes Rules, 1944. The cases referred to in the present case which were decided after 1924 were decided on one or other of the above rules.]

AS TO APPLICATIONS FOR RE-HEARING, see HALSBURY, Hailsham Edn., Vol. 10, p. 779, para. 1233; and FOR CASES, see DIGEST, Vol. 27, p. 490, Nos. 5220-5233, and Digest Supp.]

Cases referred to:

- (1) *Smith v. Smith*, [1897] P. 293; 66 L.J.P. 151; 77 L.T. 206; 27 Digest 490, 5221.
- (2) *Garnett v. Garnett and Calderon*, (1919), 35 T.L.R. 521; 27 Digest 490, 5224.
- (3) *Manners v. Manners and Fortescue*, [1936] 1 All E.R. 41; [1936] P. 117; 105 L.J.P. 26; 154 L.T. 271; Digest Supp.
- (4) *Winter v. Winter*, [1942] 2 All E.R. 390; [1942] P. 151; 111 L.J.P. 95; 167 L.T. 258; 2nd Digest Supp.
- (5) *Petty v. Petty*, [1943] 2 All E.R. 511; [1943] P. 101; 112 L.J.P. 97; 169 L.T. 224; 2nd Digest Supp.
- (6) *Everitt v. Everitt*, [1948] 2 All E.R. 545; 2nd Digest Supp.
- (7) *Peek v. Peek*, [1947] 2 All E.R. 578; [1948] P. 46; [1948] L.J.R. 833; *affmd.*, [1948] 2 All E.R. 297; 2nd Digest Supp.
- (8) *Howarth v. Howarth*, (1884), 9 P.D. 218; 51 L.T. 872; 27 Digest 492, 5250.

APPEAL by the husband from a decision of the Divisional Court of the Probate Division, dated Oct. 14, 1949, dismissing his application for a re-hearing of the

suit in which his prayer for divorce on the ground of the wife's adultery with the co-respondent was dismissed.

The husband based his application on the ground that new evidence had been found since the hearing of his petition. The Divisional Court held that it had no jurisdiction to entertain the application under r. 36 of the Matrimonial Causes Rules, 1947. The facts appear in the judgment of the court.

Crispin and Stuckey for the husband.

R. H. Forrest and J. J. Clark for the wife.

Cur. adv. vult.

June 26. **SIR RAYMOND EVERSHERD, M.R.**, read the following judgment of the court. This is an appeal from a judgment of the Divisional Court (LORD MERRIMAN, P. and ORMEROD, J.), whereby the court held that it had no jurisdiction to grant an application under the Matrimonial Causes Rules, 1947, r. 36, for the re-hearing of the suit of *Prince v. Prince and Campbell*. In that suit JUDGE FRASER HARRISON, sitting as commissioner at Liverpool, granted a decree of divorce to the respondent wife on the ground of her husband's cruelty, and dismissed his prayer for a divorce on the ground of her adultery with the co-respondent and her cruelty.

Rule 36 states:

"(1) An application for re-hearing of a cause heard by a judge alone where no error of the court at the hearing is alleged shall be made to a Divisional Court of the Probate Division. The application shall be by notice of motion, stating the grounds on which it is based, filed in the Divorce Registry and served upon the opposite parties within six weeks after judgment. The notice shall be a fourteen days' notice and may be amended at any time by leave of the judge. (2) Any other application for re-hearing shall be made by way of appeal to the Court of Appeal."

This rule was made by LORD JOWITT, L.C., under the provisions of s. 1 of the Administration of Justice (Emergency Provisions) Act, 1939, and s. 99 of the Supreme Court of Judicature (Consolidation) Act, 1925. It follows the wording of a similar rule which was first made in 1924 to which we refer later.

The crucial point on which the application for a re-hearing turned related to the husband's charges of adultery against the wife. In his petition the husband, in addition to a general charge of adultery by the wife with the co-respondent, Colin Campbell, alleged adultery (a) from Nov. 10 to Nov. 19, 1947, at 102, Kirkstone Road, Litherland, the matrimonial home, and (b) on an occasion in January, 1948, at the same place. As regards (b) no evidence was given. The wife and the co-respondent filed answers denying the adultery, and gave evidence denying the charges. The evidence on the charge of adultery consisted partly of alleged confessions by the wife and partly of evidence of the presence of a man at night or in the early morning in the matrimonial home during the husband's absence from Nov. 10 to Nov. 19, 1947.

The important evidence as to the adultery related, therefore, to November, 1947, and there was also an incident in September, 1947. As regards the occasion in September, the husband's father proved that he visited his son's house in the evening. He saw a light in the bedroom, rang the bell and also knocked for about ten minutes. Eventually, the wife opened the door and told him that her husband was away. The father saw two or three stubs of cigarettes in the hearth. One was still smouldering and it had lipstick on it. The wife, in her evidence, said that she did not smoke cigarettes, and explained the cigarette ends by saying: "When he came to the house I was feeding the baby. I had just gone to bed and my friend had been from over the road. She smokes cigarettes and is a heavy smoker. Her name is Mrs. Jones. She is in London now though." The other incident was in November, 1947, when the husband was in hospital. He said that so far as he knew no one was living in his house at

A that time except his wife and their children. Two neighbours were called who said that they saw a man leaving the husband's house in the early morning and going into the house in the evening, and either positively identified him as the co-respondent or asserted that he was not the husband. By way of rebuttal of this evidence, the wife said that a workman had been working at the house early in the morning and that while her husband was in hospital she went on several evenings to the British Legion with her father. At the end of the case the wife was re-called at the request of the commissioner, who put these questions to her:

B "Q—When you went to the British Legion with your father who looked after the children? A—It was Mrs. Jones, but she is in London now. Q—Was that the Mrs. Jones who smokes? A—Yes. Q—And Mrs. Jones was the woman who always looked after the children? A—Yes. Q—Was she a great friend of yours? A—Yes.

C Cross-examined for the husband: Q—Have you brought Mrs. Jones here? A—She is in London. I haven't had any correspondence with her. Q—It was never suggested before that Mrs. Jones was in the house that week, was it? A—It was never asked."

D In his judgment the commissioner said that he had to decide whether adultery was committed from Nov. 10 to 19 at 102, Kirkstone Road, and that he thought the witnesses were wrong when they said that they saw the co-respondent entering or leaving the house. As regards the cigarette ends incident, the commissioner said: "I am satisfied that these cigarette ends were left there by Mrs. Jones who was looking after the children." The commissioner, therefore, clearly placed reliance on the evidence of the wife that her friend, Mrs. Jones, was in the house shortly before the husband's father called, and that she was also in the house in the evenings when the wife went to the British Legion. It was argued before us that this presence of Mrs. Jones in the house was inconsistent with the suggestion that the co-respondent was visiting the house at night while the husband was in hospital.

E After the judgment the solicitors for the husband succeeded in finding Mrs. Jones in London, and the husband then filed his application for a re-hearing on the following two grounds:

F "(a) That further evidence, to wit, the evidence of Gertrude Jones and Vera Smith and Martha Hulme and Maureen Bell and Henry Charles Prince, being evidence which is material to the issues between the parties to the above suit, has come to the knowledge of the above petitioner since the hearing of the above suit. (b) That had such further evidence been heard by the court, or if such further evidence were to be heard by the court on a re-hearing of this suit, it is submitted that the court would conclude that the above respondent and the above co-respondent could not be relied upon as witnesses of fact."

H In support of these allegations an affidavit by the husband was produced to the Divisional Court in which he referred to certain statements which, he said, had been made by Gertrude Jones and three other persons. The vital part of the statement of Gertrude Jones was that she lived at 90, Kirkstone Road, Litherland, from March to May, 1947. She was a friend of Mrs. Prince during that time, and once or twice, while she minded the two children, Mr. and Mrs. Prince went out to the cinema. She said that she left Litherland on May 26, 1947, and had not been there since, and that she was not in Litherland either in September or November, 1947.

Two questions were raised at the hearing of this appeal. One was whether this case came within r. 36. The second was whether, assuming it was such a case, the facts alleged in the copy statements attached to the husband's affidavit were

such as would justify a re-hearing. In view of our decision on the first point, as hereinafter set out, we consider it unnecessary to express any opinion with regard to the second, which involves considerations peculiarly within the discretion of the court in which the jurisdiction is vested.

We, accordingly, turn to the important question raised in the Divisional Court and before us, as to the limit of the jurisdiction conferred by r. 36. The importance of the rule, apart from its obvious usefulness in preventing a miscarriage of justice in a matrimonial cause, is that the matters over which it confers jurisdiction are, or may be, withdrawn from the jurisdiction of the Court of Appeal. Thus, in *Smith v. Smith* (1) an application was made to the Court of Appeal to order a re-hearing of a divorce cause heard by GORELL BARNES, J., without a jury. The application was regarded as covered by r. 62 of the Divorce and Matrimonial Causes Rules, 1865, as amended in 1885, which was in the following terms:

"An application for a new trial of the issues of fact tried by a jury or for the re-hearing of a cause, shall hereafter be made to a Divisional Court of the Probate, Divorce and Admiralty Division."

The Court of Appeal held that it had no jurisdiction to make the order. LINDLEY, L.J., said [1897] P. 294:

"I think it clear, on looking at the Act and the rule that this application ought to be made to a Divisional Court of the Probate, Divorce, and Admiralty Division, and that we have no jurisdiction to entertain it."

The Act referred to by LINDLEY, L.J., was presumably the Supreme Court of Judicature Act, 1890, s. 1, which enacted:

"From and after the commencement of this Act every motion for a new trial, or to set aside a verdict, finding, or judgment, in any cause or matter in the High Court in which there has been a trial thereof, or of any issue therein with a jury shall be heard and determined by the Court of Appeal and not by a Divisional Court of the High Court . . ."

Smith v. Smith (1) had been tried by a judge alone and the application to the Court of Appeal was for a re-hearing. LINDLEY, L.J., appears, therefore, to have treated it as within the terms of r. 62 of the Divorce and Matrimonial Causes Rules, 1865, and not taken out of that rule by s. 1 of the Act of 1890. In 1892, in order, apparently, to bring the procedure in non-jury cases into line with cases where there had been trials with a jury, the Rules Committee constituted under the provisions of s. 19 of the Judicature Act, 1881, had made R.S.C., Ord. 39, r. 1, which reads as follows:

"... every application for a new trial or to set aside a verdict, finding, or judgment where there has been a trial with or without a jury shall be made to the Court of Appeal."

That rule does not appear to have been referred to at the hearing of *Smith v. Smith* (1) in the Court of Appeal, or, if referred to, it was, apparently, treated as subject to the divorce rule, r. 62, above-mentioned.

The question whether an application for a re-hearing of a divorce cause tried by a judge without a jury must be made to a Divisional Court of the Probate, Divorce and Admiralty Division or to the Court of Appeal was again raised in the Divisional Court (LORD STERNDAL, P., and HILL, J.), in 1919 in *Garnett v. Garnett and Calderon* (2). Counsel for the applicant husband in the cause, which was contested and tried by HORRIDGE, J., without a jury, asked that the judgment should be reversed, mainly on the ground that the judge had misdirected himself as to the evidence, but also on the ground that vital new evidence was available. The court allowed the application on the ground that the

judge had misdirected himself as regards the evidence. LORD STERNDALE, P., also said that the sooner the practice as to such appeals was altered the better. Counsel then referred to the decision in *Smith v. Smith* (1) and suggested that LORD STERNDALE, P., had power to make a fresh rule which would bring the practice as regards appeals into line with appeals from other Divisions, and the PRESIDENT said he might consider it when he had finished Prize work. Again, R.S.C., Ord. 39, r. 1, was not referred to. Five months later LORD STERNDALE was made Master of the Rolls, and no fresh rule was made until 1924.

In 1924, r. 46 of the Matrimonial Causes Rules was made. It was in substantially the same terms as r. 36 of the present rules. It introduced the words "where no error of the court at the hearing is alleged." It is clear from *Garnett v. Garnett and Calderon* (2) that the Divisional Court made the order for a re-hearing in that case because of an alleged misdirection by the trial judge, and one may fairly assume that the new rule was made so as to exclude such cases from the jurisdiction of the Divisional Court and so that (as in cases from other Divisions of the High Court) the Court of Appeal should have exclusive jurisdiction over them by way of appeal either to order a re-hearing or to reverse the decision or make such other order as might appear to be just. In other words, in so far as the general rule contained in R.S.C., Ord. 39, r. 1, had been treated as inapplicable or in conflict with r. 62 of the Rules in Divorce and Matrimonial Causes, 1865, the general rule was intended to apply thenceforth in all cases save for the limited exception provided by the new r. 46.

The scope of r. 46 was considered by the Divisional Court (apparently for the first time) in *Manners v. Manners and Fortescue* (3). In that case the respondent applied to the Divisional Court that the decree against her be set aside and the case re-heard on the ground that she had not been served with the petition. LORD MERRIMAN, P., in his judgment, said that there was no precedent to guide the court as to what was meant by the words "where no error of the court at the hearing is alleged." He said that he thought it would be most inadvisable to attempt to lay down any exhaustive definition of what those words meant, but it was quite plain that the wife was entitled to be heard, and there must be a re-hearing of the case. LANGTON, J., in his judgment, said that in the nature of things the cases which could fall within the rule must be comparatively few, but the rule must contemplate something more than the bare cases under Ord. 36, r. 33, in which judgment has been given by default. He continued ([1936] 1 All E.R. 46):

"I am not sure that it is not the proper way to regard this case to say that it concerns a suit which is not properly constituted in that there has been a failure in an indispensable step of the procedure. One then turns to inquire: But is it the fault of anyone concerned in the administration of justice here that that indispensable step was not complied with? Clearly it could not be the fault of the court, for everyone must be agreed upon reading [the] evidence that the court had ample evidence upon which to act and could, as both counsel agree, not have acted in any other way; nor could I see that any inquiries of the court could have in any way dealt with this subject so as to ensure that that indispensable step, the service of the petition, was complied with."

LANGTON, J., also dealt with the question whether it was proper that the judge who heard the case should also sit as a member of the Divisional Court on the application for a re-hearing, and in that connection he said (*ibid.*, 47):

"... I think it is both right and desirable that he should, if possible, be a member of the court which considered the question of re-hearing. It is to be observed that in no sense is any action of his impugned, no error by the nature of things can be imputed to him, and his recollection, a little hazy, perhaps, but nevertheless probably refreshed as the matter goes on, is of inestimable assistance in dealing with this very limited class of case."

If the view of LANGTON, J., as expressed here, is correct, it seems to us that the scope of the rule could hardly include a contested case in which the judge, on an issue of vital importance, has elected to believe one witness and has rejected the evidence of another, and the application for a re-hearing is based on the hypothesis that the judge was in error in so doing, and will, when he hears the fresh evidence, realise that he was in error. We here use the word "error" as meaning or including the making of an incorrect inference as to the truth from the conflicting evidence before him.

The next reported case on the application of the rule is *Winter v. Winter* (4). In that case the husband asked for a re-hearing of the wife's petition on the ground that the decree which she had obtained by reason of his alleged desertion was against the justice of the case in that it was untrue that he had ever deserted her, and that he now wished to put the real facts before the court. The wife's petition had been duly served on the husband, who had deliberately decided to do nothing to oppose it and had not entered an appearance, so that the petition was undefended and the wife obtained her decree. The Divisional Court ordered a re-hearing, although, as LANGTON, J., said, the application, so far as the husband personally was concerned, had no vestige of merit. The order for re-hearing was made on the specific ground that in matrimonial matters there was always something more to be considered than the mere individual merits of the parties and it was the duty of the court to consider the interests of the State as well as the private interests in such cases. LANGTON, J., also pointed out that there was no possibility of an appeal to the Court of Appeal by the husband. Inasmuch as he had not entered an appearance it seems doubtful whether he would have had any *locus standi* on appeal.

Up to this point the Divisional Court had not considered any application for a re-hearing of a cause in which there had been a conflict of evidence on vital matters and in which the loser was seeking to obtain a re-hearing on the ground that fresh evidence was available which would put an entirely different complexion on the case. In such a case, if the Divisional Court has exclusive jurisdiction to order a re-hearing, such power obviously trenches on the general jurisdiction of the Court of Appeal to make a similar order. The question whether the Divisional Court had jurisdiction to order a re-hearing in a case in which there would be an obvious right of appeal was first raised in *Petty v. Petty* (5), a case heard by LORD MERRIMAN, P., and HENN COLLINS, J. The application was by the wife for the re-hearing of a contested case in which the wife asked for a divorce on the ground of her husband's cruelty and desertion and the husband denied those charges and charged the wife with desertion. Both parties gave evidence and called witnesses, and the judge dismissed the wife's prayer and gave the husband a decree because he preferred the husband's evidence to that of the wife. The basis of the wife's application for a re-hearing was that since the hearing she had obtained statements from several witnesses whose evidence would persuade the court that the truth lay with the wife and not with the husband. Also it was said that the preparation of the wife's case had been interfered with by enemy action. LORD MERRIMAN, P., in his judgment, said ([1943] 2 All E.R. 513):

"We feel, and we have said this very emphatically on these earlier occasions, that the peculiar jurisdiction vested in this court by r. 36 . . . should only be exercised in cases in which it is plain that this court is intended to have the jurisdiction to the exclusion of the Court of Appeal . . ."

After reviewing the history of the jurisdiction now embodied in the rule LORD MERRIMAN, P., said that, in his view, it was impossible to attach to the word "error" in the rule any interpretation or limitation based solely on any part of the earlier history of the court. He continued (*ibid.*, 513):

"... it is much more likely that the words were deliberately chosen as

being supposedly apt to impose a limitation upon our special jurisdiction to order a re-hearing, notwithstanding the vesting in the Court of Appeal of the general right to deal with such applications from this Division."

LORD MERRIMAN, P., when presiding in the Court of Appeal in the recent case of *Everitt v. Everitt* (6), again emphasised this limitation of the jurisdiction of the Divisional Court under r. 36. He said ([1948] 2 All E.R. 548):

"In dealing with cases under r. 36 the Divisional Court has always been careful to avoid any semblance of trespassing on the exclusive jurisdiction of the Court of Appeal . . . although, if the Divisional Court is satisfied that a case comes within the rule it is bound, as I pointed out in *Peek v. Peek* (7), to deal with it because no other court can do so: see also *Smith v. Smith* (1), decided in the Court of Appeal under r. 62 of the Matrimonial Causes Rules, 1865, as amended in 1885."

In *Petty v. Petty* (5), LORD MERRIMAN, P., after referring to *Manners v. Manners* (3) and *Winter v. Winter* (4), said ([1943] 2 All E.R. 514):

"Those two cases, which, so far as I know, are the only two cases in which a decision of this court on this point has been reported, are, as I think, clearly on the right side of the line; but equally, it seems to be impossible to assert that a case in which a judge having seen both spouses and their respective teams of witnesses and having deliberately attached the credibility to one side and not to the other, and in which this court is asked to say that the production it may be of a document or a new witness or a new set of witnesses is going to induce some other tribunal to say that the judge believed the wrong set of witnesses, is on the same side of the line or that it is possible to assert of such a case that no error of the court at the hearing is alleged. In saying this I do not ignore the point that in a case in which the process has not been served, or in which the party has deliberately abstained from attendance, it is not possible logically to deny that it is being said that the judge has believed a witness wrongly . . . It may be deliberate perjury. But although it is true that what is being asked is that it shall ultimately be held that the judge believed a witness wrongly and at the re-hearing the judge is to be invited to believe witnesses who will swear exactly the opposite, still, in those circumstances, unless there was something which made the story self condemnatory, the judge had no option but to believe the witness; there was no contest; there was no test of the credibility of the witnesses believed, unless it were what I might call some psychic test which would manifest itself through mere demeanour during the brief appearance of the witness in the witness box . . . Such a case as the present is, in my opinion, on the other side of any line which can be drawn, and is quite plainly a case which must be dealt with by the Court of Appeal."

HENN COLLINS, J., in his judgment, said (*ibid.*, 514):

"One thing, however, seems to me to be quite clear, that, if it is alleged that on the materials before it that the court has arrived at a wrong conclusion, that is an error of the court. What exactly is meant by 'the material before the court' is another matter. In this case the materials before the court were witnesses on one side or the other, and the stories to which they deposed . . . It is now said that in truth and in fact HODSON, J., believed the wrong set of witnesses; if he had known some separate facts which it is proposed to adduce he would have discredited those whom he believed and believed those whom he discredited. That really must mean that he was unable to arrive at what is now alleged to be the truth on the materials before him—in other words, that he made an error. As long as those are the

circumstances, I myself do not see how a case can be brought within the exception expressed in the words 'an error of the court.' "

The next reported case on the problem of the meaning of r. 36 is *Peek v. Peek* (7), which concerned a decree obtained in an undefended divorce petition by a husband on the ground of his wife's desertion. The parties had lived in Australia after their marriage and in about 1922 the husband had left Australia and returned to England on account of his work. The husband's case was that in 1922 his wife had refused to leave the marital home in Australia, and had thereafter refused to come to live with him. He admitted having an adulterous association with another woman in 1924 in respect of which he asked for the discretion of the court to be exercised in his favour. The petition, which was issued in 1946, was served on the wife in Australia in January, 1947, and the wife then wrote to the Divorce Registry in London saying that she had been unable to instruct solicitors and that her husband had deserted her. This letter was before the trial judge. She also applied for legal assistance as a poor person, but before this was granted the husband's petition was heard as an undefended suit and the trial judge granted him a decree *nisi*. The wife then applied to the Divisional Court for a re-hearing and in support of her application produced certain documents which made it highly probable that the husband had deserted the wife in 1922 and had committed adultery in that year, had told the wife about it, and had asked her to divorce him. Having regard to the fact that the wife did not enter an appearance to the petition the case was one in which she could not appeal in the ordinary course to the Court of Appeal, and, therefore, there was no question of trespassing on the exclusive jurisdiction of that court. The question which was much debated before the Divisional Court was whether the case was one in which "no error of the court at the hearing was alleged." LORD MERRIMAN, P., in his judgment, said ([1947] 2 All E.R. 584):

"... to assert of this case that any judge had no option but to come to the conclusion he did is, and must be, nonsense. I say that because the very request for the exercise of the discretion of the court itself implies, whether it is a defended or an undefended case, that the judge has an option. Otherwise, the discretion is meaningless."

LORD MERRIMAN, P., later in his judgment, said (*ibid.*, 585):

"... if ever there was a case, undefended though it be, in which it is perfectly plain, not merely because the discretion was asked for, but also because there was on the face of the case as it was presented to the judge, and avowedly and openly presented, the gravest possible doubt whether any court could hold that desertion had been proved, the plainest possible option to the judge to decide the case otherwise."

LORD MERRIMAN, P., then said that the real point was whether the allegation which was made against the decision was an allegation that the court went wrong on the materials before it, or whether it was an allegation that the court went wrong because evidence on a vital matter was concealed from the court. He continued (*ibid.*, 585):

"To my mind, it cannot make the slightest difference, logically, whether that question falls to be decided in an undefended or a defended case ... I reject altogether the argument that this matter depends solely on the question whether the case is defended or undefended ... this case is an illustration, not of a case in which the court went wrong on the materials before it, but rather of a case in which it is alleged that the court went wrong because evidence on a vital point was concealed from it ... when one analyses this case, the only thing which can be said to be error on the learned judge's part is a failure to appreciate, in the light of the documents which

were not produced before him the full possible implications of those which were produced before him."

WALLINGTON, J., in his judgment, said that, in his opinion, one of the objects of r. 36 was to enable the Divisional Court to secure as far as possible that there should be a new trial of the real issues between the parties before permitting an appeal to the Court of Appeal, and that he entirely agreed that it mattered not whether the question arose in a defended or an undefended case. The Divisional Court, therefore, granted the application for a re-hearing. The husband appealed from this decision to the Court of Appeal, but the appeal was dismissed. The basis of the decision in the Court of Appeal was that on the material before the judge it was impossible to say that there was any error on his part which was alleged, because on the husband's evidence the judge was well entitled to come to the decision to which he came. TUCKER, L.J., and SOMERVELL, L.J., also said that they wished to keep open the question whether it may be immaterial to consider what happened at the trial, provided that the party seeking a re-hearing is basing his whole case on something quite irrespective of the course the case in fact took on the material before the court.

Before passing from *Peek v. Peek* (7) we would point out: (a) So far as the question of trespassing on the exclusive jurisdiction of the Court of Appeal is concerned, the defended case stands in a different light from the undefended case. If undefended, the respondent has in the ordinary course no right of appeal. If defended, the respondent has a right of appeal, and a further right in certain circumstances to call fresh evidence. In such a case the Court of Appeal may either hear the fresh evidence and dismiss the suit, or order a re-hearing, or dismiss the appeal. (b) Where the case is defended, and the trial judge on the vital issues prefers one set of witnesses to the other set, it appears to us that an error in the court at the hearing is, and must be, alleged if it is sought to call further evidence in order to try to persuade the court on a re-hearing that the judge's preference was erroneous. We think there is a difference, albeit a fine one, between an incorrect selection of conflicting testimony and an erroneous inference drawn therefrom, and an inference drawn from undisputed evidence which was justifiable on the materials before the court, although subsequently proved to be incorrect.

The question may be asked: What remedy the respondent spouse has in an undefended case if he is precluded from appealing to the Court of Appeal because he has not appeared in the suit and is precluded from asking the Divisional Court for a re-hearing because he cannot say that the court has not made an error at the hearing? It would seem that his remedies would be to obtain the intervention of the King's Proctor or of a *bona fide* member of the public under s. 183 (2) of the Supreme Court of Judicature (Consolidation) Act, 1925. That sub-section is as follows:

"(2) After the pronouncing of the decree *nisi* and before the decree is made absolute, any person may, in the prescribed manner, show cause why the decree should not be made absolute by reason of the decree having been obtained by collusion or by reason of material facts not having been brought before the court, and in any such case the court may make the decree absolute, reverse the decree *nisi*, require further inquiry or otherwise deal with the case as the court thinks fit."

In *Howarth v. Howarth* (8) LINDLEY, L.J., said, when considering the application of this section (9 P.D. 229):

"... so far as I know 'any person' means anybody except the respondent and somebody who is the respondent in disguise, his agent, or his puppet."

We do not think, in considering whether r. 36 applies, that the test whether the case is defended or undefended is conclusive. For instance, a petitioner in an

undefended case, whose petition has been dismissed, can appeal to the Court of Appeal and apply for leave to call fresh evidence which was not available at the trial. The judge might have said that on the evidence he was not satisfied that the adultery complained of had been established, but the fresh evidence, if admitted, might establish adultery conclusively. Though the distinction is a fine one there is, we think, a real difference between such a case as that supposed where the judge having evidence before him has (erroneously) failed to accept it or to draw the right inference from it, and the case earlier mentioned where the judge, because the evidence has been unchallenged and could not be tested, had, in effect, no option but to accept it. The distinction corresponds with the presence or absence of jurisdiction in the Court of Appeal. In the former case the unsuccessful party alleges (as in the latter he does not) error in the court. In the former case we think the Divisional Court would not have jurisdiction under r. 36, because the Court of Appeal has it and because error in a limited sense at least must be alleged.

We have set out the relevant decisions on the meaning of this rule and its predecessors before considering the precise point raised in the Divisional Court in the present case. The point is raised in the judgment of LORD MERRIMAN, P., where he said that there is no real distinction between the present case and *Petty v. Petty* (5), but that the observations made in the Court of Appeal in *Peek v. Peek* (7) raise the point which has not yet been decided, viz., that, if the principle is accepted that deception of the trial judge, by suppression of material facts, is the antithesis of his going wrong on the material before him, it makes no difference, provided the course of the trial warrants it, whether the suppression of the evidence or other malfeasance alleged as ground for a re-hearing is committed by the petitioner in presenting the case or by the respondent in rebutting it. The question is whether the decision of the Divisional Court in *Petty v. Petty* (5) imposed too strict a limitation on the jurisdiction of the court and whether it can be extended without trespassing beyond the bounds which, to use the words of LORD MERRIMAN, P., in his judgment in the present case in the court below,

“must necessarily be imposed at some point or another to avoid an overlap of jurisdiction between this court and the Court of Appeal?”

In this appeal we think that the application for a re-hearing does trespass on the jurisdiction of the Court of Appeal, because the husband could have appealed from the decision of the judge on the ground that his decision was against the weight of evidence, and could also have applied for leave to call before the Court of Appeal the evidence which is indicated in his affidavit, and we think that it follows also from what we have just said that error of the court (*i.e.*, in wrongly estimating the evidence) is necessarily alleged. In our opinion, therefore, the decision of the Divisional Court was right, and the appeal should be dismissed.

Having examined the history since 1857 of the statutes relating to appeals in matrimonial causes and the rules made thereunder, it seems to us from the circumstances in which r. 46 of the Matrimonial Causes Rules, 1924 (which was the forerunner of the present r. 36), came into existence (namely, the apparent conflict between the earlier matrimonial causes rules and the general jurisdiction of the Court of Appeal pursuant to the Supreme Court of Judicature Act, 1890, and the rules made thereunder) that r. 36 was intended, or ought to be treated as having been intended, to give or preserve to a Divisional Court (because of the peculiar public concern in matrimonial matters) the right to order a new trial or a re-hearing in cases in which the parties themselves would not in the ordinary course be entitled to go to the Court of Appeal. If this view is right, then it appears to us that by the phrase “no error of the court at the hearing is alleged” it was intended to exclude all cases in which an aggrieved party might seek, on application according to the ordinary general procedure of the

Court of Appeal, to challenge as erroneous the conclusion of the judge at the trial or hearing in the court below. We add that, having regard to the difficulties of interpretation that have now emerged from the rule and because we think that the jurisdiction of the Divisional Court is, in the class of cases to which (as we think) it was intended to be confined, extremely valuable, consideration should be given to the drafting of a new rule in terms that would express more precisely the scope and limitation the jurisdiction is intended to have.

Appeal dismissed with costs.

Solicitors: *Chamberlain & Co.*, agents for *Stanley Williams & Elsbey*, Liverpool (for the husband); *Jaques & Co.*, agents for *T. R. Jones & Co.*, Liverpool (for the wife).

[*Reported by F. GUTTMAN, Esq., Barrister-at-Law.*]

COON v. DIAMOND TREAD CO. (1938), LTD.

[CHANCERY DIVISION (Wynn-Parry, J.), June 6, 1950.]

Costs—Taxation—Review by court—Objection as to quantum—No error by master in principle.

On an inquiry as to damages, an official referee awarded the plaintiff a sum of £10,541, together with costs which he directed should be taxed. A bill of costs brought in by the plaintiff was reduced by the taxing master in respect of sums included in the bill in respect of the items "instructions for brief," fees and refreshers to leading and junior counsel, and fees of accountants whose services the plaintiff had used at the inquiry. The plaintiff objected to the reductions on the ground that the fees allowed were inadequate, and asked for the decision of the taxing master to be reviewed.

HELD: the complaint went to *quantum* only; it had not been shown that the taxing master had erred on a question of principle; and, therefore, the court had no jurisdiction to interfere with his decision.

Re Ogilvie ([1910] P. 243) and *White v. Altrincham Urban District Council* ([1936] 1 All E.R. 923), *followed*.

Re Lindsay's Estate ([1915] W.N. 246), *explained*.

[AS TO REVIEW OF TAXATION, see HALSBURY, Hailsham Edn., Vol. 31, pp. 227-230, paras. 251-254; and FOR CASES, see DIGEST, Vol. 42, pp. 210-217, Nos. 2346-2439.]

Cases referred to:

- (1) *Re Ogilvie*, [1910] P. 243; 79 L.J.P. 113; 103 L.T. 154; 42 Digest 216, 2430.
- (2) *Alsop v. Oxford (Lord)*, (1833), 1 My. & K. 564; 2 L.J.Ch. 174; 39 E.R. 794; 42 Digest 214, 2390.
- (3) *Re Catlin*, (1854), 18 Beav. 508; 52 E.R. 200; 42 Digest 216, 2423.
- (4) *White v. Altrincham Urban District Council*, [1936] 1 All E.R. 923; [1936] 2 K.B. 138; 105 L.J.K.B. 366; 154 L.T. 656; 29 B.W.C.C. 105; Digest Supp.
- (5) *Re Lindsay's Estate*, [1915] W.N. 246.
- (6) *Boswell v. Coaks*, (1887), 57 L.J.Ch. 101; 57 L.T. 742; 21 Digest 431, 131.
- (7) *Smith v. Buller*, (1886), 5 N.Z.L.R. 41; 42 Digest 142, g.
- (8) *Re Bennett*, [1950] 1 All E.R. 435 (n).

SUMMONS taken out by the plaintiff asking that an order of the taxing master

as to the costs of an inquiry held by an official referee should be reviewed. The facts are fully set out in the judgment.

F. B. Alcock for the plaintiff.

E. I. Goulding for the defendants.

WYNN-PARRY, J.: The plaintiff, who is a fruit farmer in Kent, brought an action against the defendants, who owned a quarry and a crushing mill near the plaintiff's orchards, for an injunction and damages, the cause of action being rested in nuisance. In 1948 the action was heard by JENKINS, J., and, in the result, so far as is material for the purposes of this summons, certain undertakings were given by the defendants, the defendants were ordered to pay the plaintiff's costs of the action (as to which costs no question arises), and an inquiry was directed to be taken before an official referee as to the damage, if any, suffered by the plaintiff as the result of the acts of the defendants complained of in the action. The order directing that inquiry provided that the costs of the inquiry should be in the discretion of the official referee. The inquiry was heard before His Honour SIR TOM EASTHAM, K.C., on four and a half days in March, 1949, the plaintiff being represented by leading and junior counsel and the defendants by junior counsel. In the result, the plaintiff, in substance, was successful, the official referee awarding him £10,541 with costs which he directed should be taxed. In due course an order was made by ROMER, J., directing the defendants to pay the plaintiff the costs of the inquiry on the motion before him and the question of the costs was referred to the taxing master.

A bill of costs brought in by the plaintiff was taxed by the taxing master and a number of items were reduced. The matters in respect of which complaint is made are the reductions in respect of the figures included in the bill regarding the items "instructions for brief," fees and refreshers to leading and junior counsel for the plaintiff, and fees of accountants whose services were retained and used by the plaintiff on the inquiry. Following on the reduction of those items by the taxing master, objections were brought in on behalf of the plaintiff.

As regards the first item in respect "instructions for brief" it is said:

"The fee allowed is inadequate in a claim in which (a) damage and *quantum* are in issue; (b) the amount claimed was £16,347 and the amount admitted was £4,500 and final judgment was obtained for £10,574; (c) the vital importance of the case to plaintiff, not only in respect of heavy financial loss, but also possible future damage; (d) the case required a detailed examination of many schedules and pages of figures covering market prices, actual sale prices, numbers of trees, and the amount of crops of many varieties of apples, plums and pears, the inquiry occupying the time of the learned official referee for four and a half days."

To that the taxing master made this answer:

"This case was originally before the court on the question of liability, the costs of which I have previously taxed. The present taxation concerns the assessment of damages by the official referee. Having heard lengthy argument both on the taxation proper and on these objections I am satisfied that the fee which I have in the exercise of my discretion allowed for this item is fair and adequate. I, therefore, overrule this objection."

The reason for objecting to the first item was meant to cover the items relating to the fees and refreshers of both leading and junior counsel, and the master's answer on item 1 is expressed by him to cover those further items.

As regards the items in respect of the accountants' fees, the reasons for objection are given as follows:

"The reasons (b), (c) and (d) above are also relied on. The fees were wholly and necessarily incurred by the plaintiff to enable him to recover the damages to which he was entitled."

In reply to that the master's answer is:

"In allowing this fee I have taken into account the work done in preparing schedules and accounts, investigating the books, and perusing all necessary documents and papers. I consider that the fee which I have in the exercise of my discretion allowed to be fair and adequate. I, therefore, overrule this objection."

A The master adopts that reason in regard to the other two items respecting the accountants' fees. The whole case of the plaintiff is really expressed in the opening words of the objection: "The fee allowed is inadequate." It is against that background that I have to consider whether or not any case is made out for allowing a review.

B The law to be applied in such a case as this is conveniently stated by the Court of Appeal in *Re Ogilvie* (1). In the course of his judgment COZENS-HARDY, M.R., said ([1910] P. 244):

"It is of extreme importance that there should be no doubt as to the general rule on this subject."

C He then quoted with approval from the judgment of SIR JOHN LEACH, M.R., in *Alsop v. Oxford (Lord)* (2), where SIR JOHN LEACH, M.R., said (1 My. & K. 566):

D "Generally speaking, the decision of the master on taxation is final: he is the sole judge of the fact, whether the business has been done, and of the proper charge to be made for it; and it is further his duty to inquire whether the business was required to be done; for, if the solicitor negligently or ignorantly takes any unnecessary proceedings, it is the duty of the master to protect the client from any charge in respect of such proceedings. The court will only interfere where the master acts upon some mistaken principle."

After referring to the later case of *Re Catlin* (3), COZENS-HARDY, M.R., continued ([1910] P. 244):

E "I should be very sorry if any doubt were cast on that, for I can scarcely imagine a tribunal more unfit than a judge of the High Court to deal with questions of *quantum* on the taxation of costs. The taxing master is the person whose duty it is to decide questions of *quantum*, and it is not right for the judge to interfere in such a matter. If a question of principle arises, no doubt the court ought to interfere and consider and if necessary correct the view taken by the taxing master."

F BUCKLEY, L.J., said (*ibid.*, 245):

G "On questions of *quantum* the decision of the taxing master is generally speaking final. It must be a very exceptional case in which the court will even listen to an application to review his decision. In questions of *quantum* the judge is not nearly as competent as the taxing master to say what is the proper amount to be allowed; the court will not interfere unless the taxing master is shown to have gone wholly wrong. If a question of principle is involved it is different; on a mere question of *quantum* in the absence of particular circumstances the decision of the taxing master is conclusive."

H That case was quoted with approval and the observations of COZENS-HARDY, M.R., and BUCKLEY, L.J., were adopted and followed in *White v. Altrincham Urban District Council* (4). That was a case which came before the Court of Appeal on appeal from the county court. The facts were that the applicant claimed compensation under the Workmen's Compensation Act, 1925, in respect of injuries sustained by him arising out of and in the course of his employment. At the hearing the judge took the view that the evidence given on behalf of the applicant did not support the claim made by him, and leave to amend was given as the evidence might support a different claim, but on the terms that the

applicant should pay the employers' costs which had been thrown away, those costs to be taxed by the registrar. Included in those costs were fees paid to three medical witnesses, two for £8 8s. each and one for £10 10s., and on taxation the registrar allowed only £3 3s. for each witness. It was clear from the statement of the registrar of his reasons on the objection to the taxation carried in by the employers that he had properly directed his mind to the matters to which he was bound to give consideration. On an application for a review of the taxation the county court judge allowed the appeal, holding that £7 7s. was a reasonable allowance for each of the medical witnesses. He said this ([1936] 2 K.B. 40):

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"In exercising my discretion in this particular case as to what should be a reasonable allowance for attendance, I had regard to (1) the nature of the injury to the workman and the alleged consequential symptoms; (2) the difficulty of the surgical and medical questions which might arise; (3) the advantage under the circumstances to have expert testimony from distinguished members of the profession; (4) the fee usually payable to such members to secure their attendance as witnesses in court at a distance from the centre where they practise; (5) my knowledge that in most if not all my courts in Circuit No. 7 allowances from five to eight guineas have in fact been made on taxation of such witnesses for similar attendances."

The Court of Appeal held that the county court judge had no jurisdiction to interfere with the discretion of the registrar in fixing the *quantum* of fees for medical witnesses. The judgments given were written. They deal, *inter alia*, with a point which was argued on the appeal that different considerations apply in regard to taxation of costs in the county court from those which apply in the High Court. The Court of Appeal decided that there was no such distinction and, therefore, applied the rule which prevailed in the High Court. In the course of his judgment SLESSER, L.J., said ([1936] 1 All E.R. 926):

"In my opinion, the judge had no power to disturb the discretion of the registrar expressly given him by the rule on a mere question of *quantum* unless the registrar has purported to exercise that discretion in a way not warranted by law."

GREENE, L.J., said (*ibid.*, 928):

"The rule that the decision of a taxing officer on questions of *quantum* ought not to be overruled by the judge on a review of taxation has long been established. This rule, in my opinion, applies generally to taxation in the county court as it applies to taxation in the High Court, and it is only in exceptional circumstances (which do not exist in the present case) that a decision of the taxing officer on a question of *quantum* should be overruled."

GREENE, L.J., did not expressly refer to *Re Ogilvie* (1), but that case was specifically referred to both by SLESSER and SCOTT, L.JJ., in each case with approval.

Guided by the principles which emerge from those cases, the present case is, in my view, simply one in which the complaint goes to *quantum* and nothing more, and on that short ground is completely covered by those principles. It was sought to be argued by counsel for the plaintiff that the figures allowed in regard to the items in question were so inadequate as to lead to the conclusion that they could not be supported as being figures which any taxing officer exercising his judicial discretion could arrive at. In my view, there is no material before me which could possibly have enabled me to share that view. My attention was directed to a number of documents, including the points of claim and a number of schedules, prepared both on behalf of the plaintiff and the defendants, with a view to showing that the matter was complicated. It was not, however, disputed by counsel for the defendants that the matter might accurately be regarded as complicated, but it appears to me that the documents which were put before me and were described as showing on the face of them that the matter

was complicated afford material against the plaintiff, for those documents were before the master and it is made plain by the wording of the master's answers that he considered not only the reasons for rejection stated in writing on behalf of the plaintiff, but also a lengthy argument on the matter. Therefore, it cannot be said that he did not have in his mind those considerations which he ought properly to have had in mind. Further, when one considers the type of objection which is made here, based as regards each item on alleged inadequacy as regards the amount allowed, and compares those items with the reasoning which led the county court judge to allow the appeal from the registrar in *White v. Altrincham Urban District Council* (4) it appears to me that there is good ground for the submission by counsel for the defendants that that case directly covers the present case.

In my judgment, I should be going directly contrary to the directions which I find in *Re Ogilvie* (1) and *White v. Altrincham Urban District Council* (4) if I were to accede to this application. It is entirely immaterial in such a case as the present whether the court would have been inclined to take a different course from that taken by the taxing master. Unless it be shown that the taxing master has erred on a question of principle, there is, on the authorities, no jurisdiction in this court to interfere with what he has done.

I ought, perhaps, to refer to the case which was relied on by counsel for the plaintiff, *viz.*, *Re Lindsay's Estate* (5). That was a summons to review taxation and it was sought to be relied on as affording authority for the proposition that the court has jurisdiction to interfere if it emerges that the taxing master has acted on a mistaken impression with regard to the amount of work which was involved. The case is very shortly reported, particularly as regards the judgment of YOUNGER, J., which is as follows ([1915] W.N. 246):

"YOUNGER, J., said that it seemed clear that the taxing master had acted on a mistaken impression with regard to the work to be done on the hearing before ASTBURY, J. His lordship thought that the objections should be allowed, and as the same taxing master allowed the same fees on the original hearing, the amounts marked would be allowed."

There had been an original hearing before NEVILLE, J., in 1913. The matter stood over for a master's certificate to be made. The matter came back before the court, this time before ASTBURY, J., in July, 1914, when a different leading counsel was briefed for the applicant. His brief was marked with the same fee as that of the previous leading counsel, and, substantially speaking, the papers used on the original hearing were included. The taxing master struck off, first of all, about sixty-five per cent., but, on re-consideration, forty per cent. of the fees marked on the hearing before ASTBURY, J. Apparently, he took the view that unnecessary papers had been included in the briefs, and that the master's certificate made it clear that the applicant was entitled to the whole fund in the dispute, and that there was nothing left to be decided either by way of construction or contention. In other words, he had taken the view that there was nothing left to do but to work out the certificate. In my opinion, the correct explanation of the matter is that YOUNGER, J., formed the opinion on the argument of counsel for the applicant that the master had acquired a wrong impression as regards the effect of the master's certificate. So looked at, the case is one in which a question of principle and not merely of *quantum* was involved. As such, the case is entirely in harmony with the decided cases and is in no way inconsistent with either *Re Ogilvie* (1) or *White v. Altrincham Urban District Council* (4). In the result, the summons must be dismissed with costs.

Summons dismissed with costs.

Solicitors: *Chamberlain & Co.* (for the plaintiff); *W. C. Crocker* (for the defendants).

[Reported by H. McL. MORRISON, Esq., Barrister-at-Law.]

BRITISH MOVIE-NEWS, LTD. v. LONDON AND
DISTRICT CINEMAS, LTD.

[COURT OF APPEAL (Bucknill and Denning, L.J.J., and Roxburgh, J.), May 23, 24, June 21, 1950.]

Contract—Frustration—Change of circumstances—Power of court to qualify literal words of contract—Agreement to remain in force during continuance of statutory Order—Order continued by different statute and for different reasons.

On July 25, 1941, film distributors contracted with exhibitors to supply "news reels" for showing at a cinematograph theatre for a minimum of twenty-six weeks, the agreement (the "principal agreement") being thereafter terminable at four weeks' notice by either party and by the exhibitors on four weeks' notice at any time during the currency thereof after the first month. In March, 1943, the supply of film to the distributors was cut by one-third under the Cinematograph Film (Control) Order, 1943, and consequent thereon the distributors and exhibitors entered into a supplemental agreement, which provided: "1. That during the continuance of the Cinematograph Film (Control) Order, 1943, the following special conditions shall apply to the principal agreement: (a) the principal agreement shall remain in full force and effect until such time as the said Order is cancelled and thereafter for any unexpired period stipulated in the principal agreement . . ." On May 24, 1948, although the Order of 1943 had not been cancelled, the exhibitors purported to give four weeks' notice to terminate the agreements. The Order of 1943 had been made under the Defence (General) Regulations, 1939, reg. 55 (which was made under the Emergency Powers (Defence) Act, 1939), because it appeared to be necessary for maintaining during the war essential supplies of raw film. On Feb. 24, 1946, the Act of 1939 expired, and was replaced by the Supplies and Services (Transitional Powers) Act, 1945, but the Order of 1943 was continued in force to maintain and control essential supplies owing to the economic situation which had arisen after the war and to secure their equitable distribution.

HELD: although the supplemental agreement was framed in language which, taken literally, resulted in the agreement still being in force, the parties could not have contemplated that the Order of 1943 would be continued for a purpose different from its original purpose and could not have intended that the supplemental agreement should apply to the new situation which had arisen, and, therefore, notwithstanding the literal meaning of the words of that agreement, the court would not apply them to the un contemplated turn of events, but would hold that the exhibitors were entitled to give the notice of May 24, 1948.

Per curiam: No matter that a contract is framed in words which, taken literally or absolutely, cover what has happened, nevertheless, if the ensuing turn of events was so completely outside the contemplation of the parties that the court is satisfied that the parties, as reasonable people, cannot have intended that the contract should apply to the new situation, then the court will read the words of the contract in a qualified sense; it will restrict them to the circumstances contemplated by the parties; it will not apply them to the un contemplated turn of events, but will do therein what is just and reasonable.

Sir Lindsay Parkinson & Co., Ltd. v. Commissioners of Works and Public Buildings [1950] 1 All E.R. 208, *applied*.

[AS TO EXCUSES FOR NON-PERFORMANCE OF A CONTRACT, see HALSBURY, Hailsham Edn, Vol. 7, pp. 212-220, paras. 296-298; and FOR CASES, see DIGEST, Vol. 12, pp. 383-385, Nos. 3159-3166.]

Cases referred to:

- (1) *Inland Revenue Comrs. v. Raphael, Inland Revenue Comrs. v. Ezra*, [1935] A.C. 96; *sub nom., Re Sassoon*, 104 L.J.Ch. 24; 152 L.T. 217; Digest Supp.
- (2) *The Moorcock*, (1889), 14 P.D. 64; 58 L.J.P. 73; 60 L.T. 654; 12 Digest 611, 5048.
- A (3) *Shirlaw v. Southern Foundries* (1926), *Ltd.*, [1939] 2 All E.R. 113; [1939] 2 K.B. 206; 108 L.J.K.B. 747; 160 L.T. 353; Digest Supp.
- (4) *Joseph Constantine S.S. Line, Ltd. v. Imperial Smelting Corp., Ltd.*, [1941] 2 All E.R. 165; [1942] A.C. 154; 110 L.J.K.B. 433; 165 L.T. 27; 2nd Digest Supp.
- B (5) *Denny, Mott and Dickson, Ltd. v. Fraser (James B.) & Co., Ltd.*, [1944] 1 All E.R. 678; [1944] A.C. 265; 113 L.J.P.C. 37; 171 L.T. 345; 2nd Digest Supp.
- (6) *Sir Lindsay Parkinson & Co., Ltd. v. Commissioners of Works and Public Buildings*, [1950] 1 All E.R. 208; [1949] 2 K.B. 632.
- (7) *Bush v. Whitehaven Town and Harbour Trustees*, (1888), 52 J.P. 392; 2 Hudson's B.C., 4th ed., 118; 12 Digest 385, 3167.
- C (8) *Jackson v. Union Marine Insurance Co., Ltd.*, (1874), L.R. 10 C.P. 125; 44 L.J.C.P. 27; 31 L.T. 789; 12 Digest 386, 3175.
- (9) *Chandris v. Isbrandtsen-Moller Co. Inc.*, [1950] 1 All E.R. 768.
- (10) *John Lee & Son (Grantham), Ltd. v. Railway Executive*, [1949] 2 All E.R. 581.
- (11) *Dennis Reed, Ltd. v. Goody*, [1915] 1 All E.R. 919.
- D (12) *Bennett, Walden & Co. v. Wood*, [1950] 2 All E.R. 134.

APPEAL by the defendants, London and District Cinemas, Ltd., from an order of SLADE, J., dated Feb. 17, 1950.

SLADE, J., found that the defendants were liable to pay to the plaintiffs under two agreements dated respectively July 25, 1941, and May 3, 1943, the weekly sum of ten guineas in respect of the rental of news reel films until the expiration of the Cinematograph Film (Control) Order, 1943 (S.R. & O. 1943, No. 430). The facts appear in the judgment of DENNING, L.J.

Sir Roland Burrows, K.C., Pearson, K.C., and K. Potter for the defendants.
Paull, K.C., and T. G. Roche for the plaintiffs.

Cur. adv. vult.

F June 21. DENNING, L.J., read the following judgment. The question in this case is whether an agreement between the plaintiffs as film distributors and the defendants as film exhibitors, which was made during the war for the exhibition of news reels, is still in force. That agreement was expressed to remain in full force and effect "during the continuance of the Cinematograph Film (Control) Order, 1943," and that Order does still continue. So the film distributors insist that the agreement still remains in force, but the exhibitors say that the circumstances have changed so much that it has come to an end.

G That is the real question at issue, but before discussing it I must set out the facts more in detail. On July 25, 1941, the distributors agreed to supply news reels of British Movietone News to the exhibitors for showing at the Pavilion Theatre, Aylesbury, at ten guineas a week for a minimum period of twenty-six weeks, the agreement being thereafter determinable by four weeks' notice. It was agreed, however, that, notwithstanding the minimum period of twenty-six weeks, the exhibitors might terminate the agreement by one month's notice at any time after the first month. That agreement was still running when, in March, 1943, the Board of Trade decided to control the supply of cinematograph films. There was, of course, at that time a great demand for raw film for military purposes, and, in consequence, less was available for civilian purposes. The result was that the film distributors had their own supplies cut by one-third.

The legal machinery by which this was done was the Cinematograph Film (Control) Order, 1943, under which no person in the film industry was to acquire or supply any film except under the authority of a licence granted by the Board of Trade. The Board of Trade only granted the distributors of news reels two-thirds of what they had previously used.

Nevertheless, at that time nobody wanted the exhibition of news reels to be cut down. They were practically all war films supplied by film service units, and played a considerable part in the war effort. In Sir Gordon Craig's words "it was necessary to obtain the widest possible distribution of the news reel in the national interest." The difficulty caused by the shortage was solved by a "cross-over" system under which one news reel was made to serve two cinemas in one town, by being sent from one cinema to the other during the performance and shown at both. Furthermore, the news reels of the various distributors—there were five of them—were made interchangeable, so that a cinema which, for instance, took the British Movietone News would, if necessary, accept the Pathé Gazette instead. There was no difficulty at that time about an interchange, because the news reels were all much the same, being nearly all war films. The exhibitors still made the same weekly payment as they did before, so that, in spite of the cut, the distributors received the same income from the cinemas as before. In addition the exhibitors bound themselves to take the films, because that was in the national interest. All these arrangements were made under the aegis of the Board of Trade. Indeed, Sir Gordon Craig went so far as to say that the Board of Trade "were the instigators of the whole thing."

The new arrangements were embodied in a number of supplemental agreements between the distributors and the exhibitors. They were all in the same form, but the one we have to consider is a supplemental agreement dated May 3, 1943. It recited the principal agreement of July 25, 1941, and went on:

"Whereas by the Cinematograph Film (Control) Order, 1943, it has become necessary to restrict the consumption of raw film stock, now it is hereby agreed as follows : 1. That during the continuance of the Cinematograph Film (Control) Order, 1943, the following special conditions shall apply to the principal agreement: (a) The principal agreement shall remain in full force and effect until such time as the said Order is cancelled and thereafter for any unexpired period stipulated in the principal agreement; (b) One copy of a news reel will if necessary be used to serve two exhibitors during the same period, and this shall if necessary be deemed to include news reels supplied by other distributors not parties hereto; ... (d) The stipulated rental payable under the principal agreement shall continue to be paid irrespective of ownership of the film which is supplied to the exhibitor and notwithstanding that the same may not be that stipulated for in the principal agreement or not actually supplied by the distributor party hereto ... 3. All the conditions of the principal agreement shall remain in full force and effect in so far as the same are not excluded modified or varied hereby."

That supplemental agreement was clearly sufficient to bind the exhibitors to the "cross-over" and interchange arrangements, but the question is: For how long did it bind them? They want now to cancel the whole of their agreement with the distributors. They say that after the war was over the news reels ceased to consist largely of war news, and that the audiences did not find them acceptable. They, therefore, on May 24, 1948, gave four weeks' notice to terminate the agreements, and stopped taking the news reels altogether. But the distributors say that they have no right to do this. They say that, whether the exhibitors like to take the news reels or not, they must pay the £10 10s. a week until the Cinematograph Film (Control) Order, 1943, is cancelled. The judge has upheld their contention, and the exhibitor now appeals to this court.

The first point taken by the exhibitors is that they were entitled by the terms of the two agreements taken together to give four weeks' notice to determine them. They say that in the principal agreement there was a special condition enabling them, notwithstanding the minimum period of twenty-six weeks, to determine the agreement on four weeks' notice. They say that this special condition still remains in full force and effect notwithstanding that the supplemental agreement introduced a new minimum period, *viz.*, "during the continuance of the Cinematograph Film (Control) Order, 1943." This is an attractive argument, but I doubt whether it is correct. The supplemental agreement says distinctly that the principal agreement shall remain in full force and effect "until such time as the said Order is cancelled." That seems to be inconsistent with any power to terminate beforehand. Any special condition enabling the distributor to terminate by four weeks' notice is clearly gone. So also the special condition providing for prior determination by the exhibitor also goes.

The second point taken by the exhibitors is that the supplemental agreement must be regarded as having come to an end on Feb. 24, 1946, or, at any rate, before they gave notice in May, 1948. They say that the change of circumstances justifies this conclusion. It cannot be doubted that there was a great change of circumstances. In 1943 the war was still on. The Cinematograph Film (Control) Order, 1943, was made under the Defence (General) Regulations, 1939, reg. 55, which in turn was made under the Emergency Powers (Defence) Act, 1939, which expired on Feb. 24, 1946. It was only made because it appeared to be necessary or expedient (in the words of s. 1 (1) of the Act of 1939)

"... for securing the public safety, the defence of the realm, the maintenance of public order and the efficient prosecution of any war in which His Majesty may be engaged, and for maintaining supplies and services essential to the life of the community."

No doubt, it was expedient in 1943 to make the Order, so as to maintain the supplies of raw film which were essential for the life of the community, but after Feb. 24, 1946, the Order could not be justified on that ground. The war was over.

The life of the community was no longer in jeopardy. The military forces no longer required raw film with which to take photographs of the enemy positions. They were being demobilised. The service film units were being disbanded. The news reels were no longer all of one pattern, filled with war films supplied by the services departments. They were supplied by the producers who had to go out to find their own subjects and make their own photographs. So the news

reels of one distributor might be of a very different pattern from those of another. This change of circumstance was reflected by a change in the statutes. The Emergency Powers (Defence) Act, 1939, expired on Feb. 24, 1946, and was replaced by the Supplies and Services (Transitional Powers) Act, 1945. The Cinematograph Film (Control) Order, 1943, was continued in force, but it was no longer continued for the same purposes. It was only continued because it appeared to be necessary or expedient (see s. 1 of the Act of 1945)

"... for the purpose of so maintaining controlling and regulating supplies and services as—(a) to secure a sufficiency of those essential to the wellbeing of the community or their equitable distribution or their availability at fair prices ..."

No doubt, supplies of raw film were essential to the wellbeing of the community, and no doubt in February, 1946, they were in short supply and it was expedient to continue the Order so as to secure their equitable distribution, but this is a very different justification for the Order from that which held during the war. Then supplies of film were essential to the "life" of the community. Now they were only essential to its "wellbeing." In the course of 1946 it evidently became easier to obtain supplies of films, because on July 15, 1946, the Board of Trade took off all restrictions on cinematograph films "except the acquisition of news

reel prints by a distributor for distribution in the United Kingdom." This meant that films were free of any control for all purposes and for all persons—big film companies and small home photographers alike—except for news reels. It may be that news reels used up so much raw film that there was not at that time enough available to free them too, but, as more supplies became available, this particular restriction might not be justified on the ground of shortage alone. It might have to be justified by additional grounds such as conserving dollars. If we imported less raw film, we spent less dollars; and one way of keeping down the imports of raw film was by keeping the restriction on news reels. So long as the restriction existed, it was an inducement for the trade to keep the "cross-over" arrangements which meant, of course, that less film would be used and less dollars expended. This change of circumstances was reflected by another change in the statutes. The Supplies and Services (Extended Purposes) Act, 1947, was passed which enabled the regulations and Orders to be continued in force, amongst other things, "for ... reducing imports ... from ... any countries and for redressing the balance of trade."

To sum up these changes, therefore, the Cinematograph Film (Control) Order, 1943, was made in 1943 in order to maintain supplies of raw film which was essential to the life of the community in time of war. It was continued after Feb. 24, 1946, in order to ensure the equitable distribution of raw film which was essential to the wellbeing of the community in time of peace, but which then was in short supply owing to the difficulties of transition from war to peace. It was continued after July, 1946, for news reels alone, probably in order to maintain the cross-over arrangements and thus import less raw film and save dollars. Alongside these changes in the legal position, there were the great changes in the general situation. In 1943, when the supplemental agreement was made, the war was on, the news reels of all five distributors were all of one pattern, being nearly all war films supplied by the service units, the exhibitors were expected, if not required, to show them in the national interest, and there was a shortage of raw film owing to military need. In 1948, when the exhibitors gave notice to terminate, the war was over, the news reels of the five distributors were of different patterns, being made by the various producers on their own lines, and there was no national interest which required them to be shown. There was still a restriction on raw film for news reels, but this was not owing to military needs, but to conserve dollars. In this new situation, rival views may be entertained as to what is the best policy. Why, it may be asked, should not an exhibitor be able to give up taking the news reels if he wants to? That would appear to save raw film, not expend it. But, it may be answered, the cross-over arrangement is the best way of saving film. It is dependent on all exhibitors being parties to it; and if any one can fall out if he likes, the whole arrangement is imperilled. These arguments of policy are, however, not for us. We must consider the legal position without regard to them.

The contest is a familiar one. On the one hand, the distributors point to the letter of the contract and say that it governs the case. "The words 'during the continuance of the Cinematograph Film (Control) Order, 1943,' are plain enough. So apply them. The Order still continues." On the other hand, the exhibitors say that, as events have turned out, we must disregard the letter of the contract and look to what the parties really had in mind. The Order was made in war to cover war conditions. The parties did not contemplate that it would be continued in peace, and they should not be held bound to it now.

Counsel for the exhibitors put his argument on three grounds:—(i) on the true construction of the supplemental agreement; (ii) on an implied term in it; (iii) on the change of circumstances since it was made, which was, he said, analogous to a frustration. But he said that these three grounds shaded into one another, because they were all really concerned in finding out whether the contract applied in the new situation. I agree with him. Let me explain why.

(i) When we construe a contract we see whether the parties have actually

expressed in words an intention which covers the situation, and we apply the principles stated by LORD WRIGHT in *Inland Revenue Comrs. v. Raphael*; *Inland Revenue Comrs. v. Ezra* (1) ([1935] A.C. 42). (ii) When we imply a term, we recognise that the parties have not expressed themselves in words which cover the situation, but we impute to them an intention which we say they would have expressed if they had put their minds to it, and we apply the principles stated by BOWEN, L.J., in *The Moorcock* (2) (14 P.D. 68 *et seq.*), and by MAC-KINNON, L.J., in *Shirlaw v. Southern Foundries* (1926), *Ltd.* (3) ([1939] 2 All E.R. 124). (iii) When we say that a contract does not apply in a new situation because it is frustrated, we recognise that the words are wide enough to cover the situation, but we hold that they do not apply because the parties did not contemplate such a surprising turn of events, and we apply the principles stated by LORD WRIGHT in *Joseph Constantine S.S. Line, Ltd. v. Imperial Smelting Corp., Ltd.* (4) ([1941] 2 All E.R. 185, 186, 187) and *Denny, Mott and Dickson, Ltd. v. Fraser (James B.) & Co., Ltd.* (5) ([1944] 1 All E.R. 683).

In these frustration cases, as LORD WRIGHT said, the court really exercises a qualifying power—a power to qualify the absolute, literal or wide terms of the contract—in order to do what is just and reasonable in the new situation, and it can now by statute make ancillary orders to that end. Until recently the court only exercised this power when there was a frustrating event, that is a supervening event which struck away the foundations of the contract. In the important decision of *Sir Lindsay Parkinson & Co., Ltd. v. Commissioners of Works and Public Buildings* (6), however, this court exercised a like power when there was no frustrating event, but only an unanticipated turn of events. The facts were that under a building contract the employer stipulated, in addition to the contract work, for power to order extra work without any stated limit, and it was expressly provided that the sum to be paid to the contractor “should not be greater than the actual cost plus a net profit remuneration of £300,000.” The parties had contemplated that the work would cost about £5,000,000, but there was no provision in the contract to that effect. Extras were ordered, bringing the total cost up to £6,683,056. The employers paid that sum, plus the profit of £300,000. The contractors then claimed extra profit because of the extra work, and, despite the absolute terms of the contract, this court held that they were entitled to reasonable extra remuneration on this account. The judgments, if I may say so, are so valuable that they should be read in full, and I will not venture to read extracts from them. They are based on *Bush v. Whitehaven Town and Harbour Trustees* (7), which, in turn, was based on the leading frustration case of *Jackson v. Union Marine Insurance Co., Ltd.* (8). The judgments show that, no matter that a contract is framed in words which, taken literally or absolutely, cover what has happened, nevertheless, if the ensuing turn of events was so completely outside the contemplation of the parties that the court is satisfied that the parties, as reasonable people, cannot have intended that the contract should apply to the new situation, then the court will read the words of the contract in a qualified sense; it will restrict them to the circumstances contemplated by the parties; it will not apply them to the unanticipated turn of events, but will do therein what is just and reasonable.

This principle, as DEVLIN, J., has since pointed out, is the same principle as that which underlies the *ejusdem generis* rule and the suspension clauses in frustration cases: see *Chandris v. Isbrandtsen-Moller Co. Inc.* (9) ([1950] 1 All E.R. 772). It is, as he says, a recognition of the fact that parties with their minds concerned with the particular objects about which they are contracting are apt to use words, phrases or clauses which, taken literally, are wider than they intend, or, I may add, cover situations which they never contemplated. Recognising this fact, the court refuses to apply them literally to an unanticipated turn of events. This does not mean that the courts no longer insist on the binding force of contracts deliberately made. It only means that they will

not allow the words in which they happen to be phrased to become tyrannical masters. The court qualifies the literal meaning of the words so as to bring them into accord with the contemplated scope of the contract. Even if the contract is absolute in its terms, nevertheless, if it is not absolute in intent, it will not be held absolute in effect. The day is gone when we can excuse an unforeseen injustice by saying to the sufferer: "It is your own folly. You ought not to have passed that form of words. You ought to have put in a clause to protect yourself." We no longer credit a party with the foresight of a prophet, or his lawyer with the draftmanship of a Chalmers. We realise that they have their limitations and make allowances accordingly. It is better thus. The old maxim reminds us that *qui haeret in litera, haeret in cortice*, which, being interpreted means: He who clings to the letter clings to the dry and barren shell, and misses the pith and substance of the matter. We have of late in this court paid heed to this warning, not only in *Parkinson's* case (6), but also in *John Lee & Son (Grantham), Ltd. v. Railway Executive* (10), *Dennis Reed, Ltd. v. Goody* (11), and *Bennett, Walden & Co. v. Wood* (12): and we must pay like heed now.

Applying these principles, the supplemental agreement says that it is to apply "during the continuance of the Cinematograph Film (Control) Order, 1943." Those words, taken literally, mean that the supplemental agreement is in full force and effect today, for the Order still continues and may, for aught one knows, continue for a long time yet. But the parties cannot have contemplated that it would ever last so long. It was made in war-time to deal with war conditions, and they must have contemplated that it would be cancelled at or shortly after the end of the war. They cannot have contemplated that it would be continued in peacetime to deal with dollar shortages—certainly not that it would still be continuing five years after the war had ended. That being so, the court should not apply the agreement in this un contemplated turn of events.

Counsel for the distributors says (and he put it in the forefront of his argument) that the court can only do this by virtue of an implied term, and he challenged counsel for the exhibitors to formulate the term which should be implied. That is, I think, a fallacy, because the principle to be applied is not based on a term implied by the parties. It is a qualifying power exercised by the courts, but if it is necessary to formulate the term I think that counsel for the exhibitors gave the right answer when he said that it was to be implied that the supplemental agreement continued for the duration of the emergency contemplated by the Emergency Powers (Defence) Act, 1939, under which and for the purposes of which alone the Order was made in 1943, and, therefore, came to an end when that Act came to an end on Feb. 24, 1946, and with it the purposes for which the order was made.

In my opinion, the supplemental agreement ceased to apply before May, 1948, and the exhibitor was entitled to give, as he then did, four weeks' notice to terminate the principal agreement. The appeal should, therefore, be allowed, and the action dismissed with costs.

BUCKNILL, L.J.: I agree that the appeal should be allowed for the reasons given by DENNING, L.J., in the judgment which he has just delivered.

ROXBURGH, J.: I agree.

Appeal allowed with costs.

Solicitors: *Sydney Morse & Co.* (for the exhibitors); *Freshfields* (for the distributors).

[Reported by C. N. BEATTIE, ESQ., Barrister-at-Law.]

R. v. SEDGWICK.

[COURT OF CRIMINAL APPEAL (Lord Goddard, C.J., Humphreys and Parker, JJ.), June 19, 1950.]

Criminal Law—Sentence—Preventive detention—Length of sentence—Normal period of eight years—Criminal Justice Act, 1948 (c. 58), s. 21 (2).

A A sentence of preventive detention should be for seven years at least and should normally be for eight years, though it is proper to pass a sentence of even five years in the case of an old person in order to prevent him from spending the rest of his life in prison.

[FOR THE CRIMINAL JUSTICE ACT, 1948, s. 21, see HALSBURY'S STATUTES, Second Edn., 1948 Statutes, pp. 175, 176.]

B Case referred to:

(1) *R. v. Askew*, [1949] 2 All E.R. 687; 113 J.P. 511.

APPEAL against a sentence of five years' preventive detention passed at Bradford Quarter Sessions on the conviction of the appellant on charges of office-breaking and larceny. The appellant had eleven previous convictions, but he had not previously been sentenced to penal servitude.

C No counsel appeared.

The following judgment of the court was delivered by

LORD GODDARD, C.J.: The appellant was convicted at Bradford City Quarter Sessions of office-breaking and larceny and was sentenced to five years' preventive detention. The court gave leave to appeal because, in their opinion, it is not a case for such a sentence. On more than one occasion we have called the attention of courts of quarter sessions to the fact that (except to prevent an old man from spending the last days of his life in prison) five years' preventive detention is not a sentence which should be given. We laid this down in *R. v. Askew* (1). Preventive detention is justified where the court is of opinion that the public have to be protected against the depredations of the prisoner for a long period. A sentence of five years—which means, if the man behaves himself in prison, three years and four months—is not appropriate for preventive detention. If the court thinks it is a proper case for a sentence of preventive detention the irreducible minimum is seven years at least, and generally it should be eight years or even longer. We have called the attention of courts to the fact that when preventive detention was first brought into force by the Prevention of Crimes Act, 1908, the court had to give a sentence of not less than eight years because they had to pass first a sentence of penal servitude, which could not be for less than three years, and then a sentence of not less than five years' preventive detention. Now it is not necessary to pass a sentence of imprisonment before a sentence of preventive detention. Special places have to be set aside for prisoners undergoing preventive detention, and if courts continue to give sentences of five years the Prison Commissioners will be in difficulty because the places so set aside will be filled by people who are sent there for this short period instead of for the longer period which Parliament evidently desired. The statutory minimum of five years is very useful because, if a man aged, say, sixty-five years or more is brought before the court, it may be that the court does not wish him to spend his last years in prison. A sentence of five years' preventive detention would be properly given in that case, but in other cases it is useless to give such a sentence. If the court thinks that the longest time for which the man ought to be deprived of his liberty is five years, subject to the remission of one-third, then the proper sentence to give is five years' imprisonment and not five years' preventive detention.

H In the present case the appellant is obviously a public nuisance. He is thirty-nine years old and he has eleven convictions of dishonesty recorded against him.

He might well have been sent to preventive detention for a long time. The court has decided, however, that it is not going to increase the sentence, but it is going to do what the recorder ought to have done if he thought that five years was the proper period of punishment, and that is to impose a sentence of five years' imprisonment in place of one of preventive detention.

Sentence varied.

[Reported by H. McL. MORRISON, Esq., Barrister-at-Law.]

A

KASLEFSKY v. KASLEFSKY.

B

[COURT OF APPEAL (Bucknill, Somervell and Denning, L.J.J.), June 16, 20, 1950.]

Divorce—Cruelty—Neglect by wife of husband and child—Refusal of sexual intercourse—Desire to end marriage—No evidence of intention to wound husband or of injury to his health.

A wife wrote to her husband while he was overseas with the forces asking for her freedom, and saying that she no longer wished to keep the child of the marriage and wished to have it adopted. On the husband's return she spent one night with him, refusing sexual intercourse, and thereafter slept in a separate bedroom. On one other occasion during the next two and a half years she declined to accede to the husband's request for intercourse, but no evidence was given to show why she refused. She showed a complete disregard of her wifely duties, neglecting to prepare meals for her husband and child, getting up late, and leaving the child to be cared for by the husband or by her mother.

C

D

HELD: in the absence of evidence that the wife's conduct was due to her intention to wound the husband's feelings, or that it had resulted in injury, or reasonable apprehension of injury, to his health, neither the writing of the letter in which the wife asked for her freedom and indicated indifference to the child of the marriage, nor her refusal of sexual intercourse, nor her neglect of the husband and the child could be held to be cruelty.

E

Birch v. Birch (1873) (42 L.J.P. & M. 23) and *Squire v. Squire* ([1948] 2 All E.R. 51), applied.

Per DENNING, L.J.: Gross neglect or chronic discord is not yet a ground for divorce . . . If the door of cruelty were opened too wide, we should soon find ourselves granting divorce for incompatibility of temperament. That is an easy path to tread, especially in undefended cases. The temptation must be resisted lest we slip into a state of affairs where the institution of marriage itself is imperilled.

F

[AS TO LEGAL CRUELTY, see HALSBURY, Hailsham Edn., Vol. 10, pp. 649-654, paras. 954-962; and FOR CASES, see DIGEST, Vol. 27, pp. 281-293, Nos. 2513-2694, Digest Supp., and 2nd Digest Supp.]

G

Cases referred to:

- (1) *Westall v. Westall*, (1949), 65 T.L.R. 337.
- (2) *Birch v. Birch*, (1873), 42 L.J.P. & M. 23; 28 L.T. 540; 27 Digest 288, 2608.
- (3) *Squire v. Squire*, [1948] 2 All E.R. 51; [1949] P. 51; [1948] L.J.R. 1345; 112 J.P. 319; 2nd Digest Supp.
- (4) *Lauder v. Lauder*, [1949] 1 All E.R. 76; [1949] P. 277.
- (5) *Usmar v. Usmar*, [1949] P. 1; [1948] L.J.R. 1418; 2nd Digest Supp.
- (6) *Lissack v. Lissack*, [1950] 2 All E.R. 233.

H

APPEAL by the husband from a judgment of His Honour JUDGE PUGH, sitting as a special commissioner in divorce, given on Mar. 2, 1950, whereby he dismissed the husband's petition for divorce presented on the ground of the wife's cruelty.

The learned commissioner found that the wife was lazy and neglected her duties as a wife and mother, but that there was no evidence that her acts were aimed specifically at the husband and no evidence that his health had been injured to any extent in consequence. The facts appear in the judgment of BUCKNILL, L.J.

Simon for the husband.

A The wife did not appear.

Cur. adv. vult.

June 20. BUCKNILL, L.J.: This is an appeal by a husband from a judgment of His Honour JUDGE PUGH, sitting as a special commissioner in divorce, dismissing his petition for dissolution of his marriage presented on the ground that his wife had treated him with cruelty. The husband asked the court to exercise its discretion in his favour because he has himself committed adultery. He is, in fact, living with the woman named in his statement, and she is pregnant by him. He told his wife about the adultery before this petition was filed, but the wife has not appeared to this suit, or made any cross-charges of adultery, nor does she seek to have the custody of the child of the marriage. She appears to be completely indifferent to the marriage, her husband and her son. Before I deal with the facts and the law I will read part of the commissioner's judgment, as follows:

D "I am most assisted by *Westall v. Westall* (1) and I hope I am following the guidance laid down for me by DENNING, L.J. I am prepared to find that this wife was lazy—I used the word 'sluttish'—and neglected her proper duties as a wife and mother, but there is no evidence before me that those acts were what are called intentional acts or aimed specifically at the husband. I have no evidence that those acts amounted to cruelty. I am satisfied of nothing more than that the husband was considerably worried. I am quite satisfied that his health was not to any serious extent injured. For all these reasons I refuse to grant a decree."

E I think the three points in the judgment are: (i) there is no evidence that the acts of the wife were intentional acts or aimed specifically at the husband; (ii) the health of the husband was not to any serious extent injured, and (iii) (although it does not appear in the words I have quoted) the commissioner expresses a very definite view that the wife's conduct amounted to constructive desertion. After the commissioner had given judgment counsel for the husband said: "It must be on a hypothetical basis. I understood your Lordship to say that the wife had deserted the husband?" The commissioner replied, "Yes, certainly. It looks as though there were all the materials there in the course of time." I mention that because it shows that the commissioner took a serious view of the conduct of the wife, because, in order to come to a conclusion that there has been constructive desertion, he must have thought that the conduct of the deserting spouse had been such as, in effect, to drive the innocent spouse away from home.

H First of all, was the commissioner justified in coming to the conclusion that there was no evidence before him that these acts were what are called intentional acts or aimed specifically at the husband? The parties were married in 1942, when they were each twenty-five years of age. In March, 1943, the son, Alan, was born, and in September, 1943, the husband went overseas in the forces of the Crown. He stayed overseas until April, 1946. According to his evidence, in October, 1944, while he was serving abroad he got a letter from his wife. He was asked this question: "What did that letter say? (A) It implied my wife wanted her freedom, and she no longer wanted to keep the child. She wanted it to be adopted." Unfortunately, the letter has not been available for the use of the court. I do not know what his answer to it was, and I do not know what happened thereafter between that time and his return in April, 1946. He said

he tried to get home on a compassionate posting and failed, and when he was repatriated he was suffering from anxiety neurosis caused by worrying about his wife. That is his first charge of cruelty. That raises the point which runs through the whole of this case, namely, whether a wife who writes a letter of that kind, providing she genuinely means what she says, is treating her husband with cruelty. I think one cannot call such conduct cruelty if she was weary of her husband and weary of married life and wanted to be free. However reprehensible it may be from a matrimonial point of view, I do not think it amounts to cruelty. A

The next charge made against the wife by the husband is that she refused him sexual intercourse. He says that as soon as he got home she asked for a divorce, and refused to kiss him. They slept one night in the same room and she refused sexual intercourse. On the next night she slept in her mother's room and has slept there ever since. Only on one occasion after that first night did he ever ask his wife for sexual intercourse and she then refused. There, again, it seems to me that it depends on the motive behind the wife's conduct. If she had arrived at a state of mind during the years that her husband was overseas which made him quite repugnant to her from a sexual point of view, I think she was not cruel in declining to have sexual intercourse. It may be that she was not complying with her matrimonial vows, and in some respects it may be reprehensible, but to say that a wife who refuses to have sexual intercourse with her husband is being cruel to him seems to me to be a misuse of the word. If it could be proved that she refused intercourse solely because she knew it would injure his health and because she wished to inflict unnecessary pain and suffering on him, that would put the matter in quite a different light, but there is no evidence of that, and the letter which she wrote in October, 1944, seems to contradict it. D

The next charge against her is that she used to stay up rather late after everybody went to bed, and that she did not do any work at all, but stayed in bed late in the morning. During the whole of the time that the husband and wife were living together after the husband came back from the war they were living in the house of the wife's mother. The wife's mother owned a newsagent's business and the husband was working in it. I expect they went off early in the morning to get to their work and the husband says the wife's mother did all the cooking and the cleaning—I suppose because the wife refused to help in the work. The same remarks apply to that kind of behaviour of the wife as apply to the question of sexual intercourse. There is no evidence that she refused to do these things from any desire to inflict injury upon the husband. She did it because, as the commissioner says, she was sluttish and preferred to stay in bed to getting up. E F

The next charge at one time seemed to have a little more substance in it. The husband said that the boy, who was three years old when he came back from the army, was neglected by the wife. She kept him up until about nine o'clock in the evening, and the parties quarrelled about that. The husband was forced to put the child to bed, and when the child cried the wife wanted to go up and bring him down again and the husband had to restrain her from doing that. She did not keep the child very clean, and when the husband left on business in the morning the wife was still in bed and he had to give the boy his breakfast. When the husband left, the child was outside the wife's door crying for her to open the door and let him in. The husband said that either he or his mother-in-law used to wash and bathe the child because the wife would not do it. G

Did that amount to cruelty? We have been referred to a case which is relevant to the point, *Birch v. Birch* (2), heard before SIR JAMES HANNEN in 1873. It was a wife's suit for dissolution in which she alleged as cruelty to her that the husband frequently beat one of her children in her presence without cause. SIR JAMES HANNEN held that that conduct did not amount to cruelty. I will read the material part of his judgment (28 L.T. 540): H

“The cruelty proved by the wife was of this nature: The husband frequently beat one of his children with great violence and without cause . . .

A I have come to the conclusion that consistently with the authorities I cannot find that the petitioner has proved her case as regards cruelty. I must hold fast to the rule of my predecessors, that cruelty must be of such a character that it is dangerous to life, limb, or health. In saying that it must be such as is injurious to health, it does not follow that it must actually have reached that point at which injury has been caused. If there is reasonable ground to believe that it will be persisted in so as to cause mischief, then the party may bring that matter into court, because it is not necessary that he or she should wait until violence has actually occurred . . . With regard to the brutality of the husband towards the child, that cannot be relied upon. I do not say that it could not be under all circumstances; because, undoubtedly, if the evidence showed that the violence was committed upon the child for the express purpose of wounding the feelings of the mother to such an extent as to injure her health it would amount to cruelty. But there is nothing to support such a charge in this case . . .”

B That is a clear statement that brutality to the child would not amount to cruelty to the wife unless it was shown to have been done for the express purpose of wounding her feelings in such a way as to injure her health.

C The question to be considered is whether the law contained in that decision of SIR JAMES HANNEN, J.O., has been modified by the decision of the Court of Appeal in *Squire v. Squire* (3). I do not think the decision in *Squire v. Squire* (3) has had that effect. In that case the wife was found guilty of cruelty because she made excessive demands on her husband which included requiring him to read to her through the night and preventing him from sleeping, and the Court of Appeal held that the absence of a malignant motive did not prevent that conduct from amounting to cruelty in that particular case.

D I would refer to a passage in the judgment of EVERSHERD, L.J., where he said ([1948] 2 All E.R. 55):

E “As I read his judgment, the learned judge was of opinion that the absence of any spiteful or malignant intention on the part of the wife (as he found to have been the fact) was fatal to the husband’s claim. I am unable to agree with this view of the law. I do not say that proof of such an intention may not be an important, or, in some cases, even an essential, consideration, but in the circumstances of the present case, for reasons which have been stated by TUCKER, L.J., and which I need not repeat, I do not think proof of such an intention was a requisite for the husband’s success.”

F When considering what kind of case EVERSHERD, L.J., had in his mind when he said that “proof of such an intention may not be an . . . essential consideration” it may be relevant to note the argument put forward by counsel for the wife, when he said ([1949] P. 54):

G “This wife’s motives and intention become relevant when conduct otherwise innocent is shown to have had such an effect on the health of the victim as might amount to cruelty. Then the state of mind of the party complained of must be examined. If it can be shown that in a particular case a certain act was done with the purpose of causing harm, that may be cruelty.”

H I venture to think that that is one of the tests which one has to apply: Is the conduct of the wife, unless done for the express purpose of injuring the health of the husband, innocent in the sense that it is justified or justifiable in the circumstances? In cases such as refusal of sexual intercourse, or sheer laziness, or neglect of a child, I think that is conduct which is innocent so far as any charge of cruelty is concerned, unless it is done for the express purpose of causing injury to the health of the complaining spouse.

The statute which first made cruelty a ground for divorce introduced a new word on the subject. Section 2 of the Matrimonial Causes Act, 1937, which

substituted a new s. 176 of the Supreme Court of Judicature (Consolidation) Act, 1925, gave power to the court to grant a decree of divorce if the offending spouse has, since the celebration of the marriage, "treated" the petitioner with cruelty. The earlier Acts simply said "guilty of cruelty." I think the use of the word "treated" indicates conduct aimed at the offended spouse. I respectfully agree with the judgment of DENNING, L.J., in *Westall v. Westall* (1), where he said (65 T.L.R. 337):

"Although malignity is not an essential element of cruelty as *Squire v. Squire* (3) shows, nevertheless intention is an element in this sense, that there must be conduct which is, in some way, aimed by one person at the other."

I think, therefore, that on the first point the commissioner was justified in coming to the conclusion that this wife had not treated her husband with cruelty because she had not been guilty of conduct which was aimed at the husband and which produced injury to health or reasonable apprehension of injury. That being so, I need not deal with the second point, in which I think there is substance, namely, that the commissioner said that he was satisfied of nothing more than that the petitioner was considerably worried. I think that reasonable apprehension of injury to health would be sufficient, and that the evidence does indicate that there was some reasonable apprehension of injury to health. It must be remembered, however, that the husband had met the woman with whom he started subsequently to live in adultery in August, 1948, and he did not see the doctor on the subject of his health until the autumn of 1948. "Autumn" is a vague word, and it may be that the injury to the health of which he complained, sleeplessness, and so on, was due to the fact that he had already formed an attachment for the other woman. It is not necessary for me to express an opinion on that point, because I think the case fails on the first point, that no conduct amounting to cruelty has been established in this case. That being so, in my view, this appeal must be dismissed.

SOMERVELL, L.J.: I agree with the reasons which have been given by BUCKNILL, L.J., on the issues raised and wish to add nothing.

DENNING, L.J.: In *Westall v. Westall* (1) we all said, if I remember rightly, that an essential element in cruelty is that there must be conduct which is in some way aimed at one person by the other. I adhere to all I there said, but the question now is what is meant by "aimed at." The cases fall into two categories. First, when the conduct consists of direct action by one against the other, it can then be properly be said to be aimed at the other, even though there is no desire to injure the other or to inflict misery on him. Thus, it may consist of a display of temperament, emotion, or perversion whereby the one gives vent to his or her own feelings, not intending to injure the other, but making the other the object—the butt—at whose expense the emotion is relieved. The sick wife in *Squire v. Squire* (3) had no desire to injure her husband, but she was guilty of cruelty because she made her husband the butt of her inordinate demands. The moody husband in *Lauder v. Lauder* (4) directed his sulkiness at his wife, although he had no wish to hurt her. So, also, the nagging wife in *Usmar v. Usmar* (5). Cases of this kind must, however, be carefully watched. When there is no intent to injure, they are not to be regarded as cruelty unless they are plainly and distinctly proved to cause injury to health.

Secondly, when the conduct does not consist of direct action against the other, but only of misconduct indirectly affecting him or her, such as drunkenness, gambling, or crime, then it can only properly be said to be aimed at the other when it is done, not only for the gratification of the selfish desires of the one who does it, but also in some part with an intention to injure the other or to inflict misery on him or her. Such an intention may readily be inferred from the fact that it is the natural consequence of his conduct, especially when the one spouse knows, or it has already been brought to his notice, what the consequences

will be, and nevertheless he does it, careless and indifferent whether it distresses the other spouse or not. The court is, however, not bound to draw the inference. The presumption that a person intends the natural consequences of his acts is one that may—not must—be drawn. If in all the circumstances it is not the correct inference, then it should not be drawn. In cases of this kind, if there is no desire to injure or inflict misery on the other, the conduct only becomes cruelty when the justifiable remonstrances of the innocent party provoke resentment on the part of the other, which evinces itself in actions or words actually or physically directed at the innocent party.

- A This case involves the application of these principles to two matters of common occurrence. (i) This wife grossly neglected her husband and child, but her conduct was not aimed at him, nor had she any desire to injure or inflict misery on him. She was simply lazy. It was all very wrong of her, but it was not cruelty. It was a defect of character and temperament which he, having married her, must put up with. It led, no doubt, to discord between them, but gross neglect or chronic discord is not yet a ground for divorce. Even if the wife had herself been cruel to the child, that would not by itself be cruelty to the husband unless there was in some part an intention on her part to inflict misery on him. The converse case of cruelty by a husband to the children has, like habitual drunkenness, been specially made by statute a ground on which a wife can obtain an order against him in a magistrates' court, but it has not yet by itself been made a ground for divorce. In many cases, however, it will be so likely to cause distress to the wife that the husband may be presumed to have intended in some part to inflict misery on her. In the extreme case where a husband kills a child, the presumption becomes conclusive and he will be held to have treated his wife with cruelty even though he is insane: see the recent decision of PEARCE, J., in *Lissack v. Lissack* (6).

- (ii) This wife refused her husband sexual intercourse. If there was any ground for inferring that this was an intention to inflict misery on him it would, I think, be cruelty. The wilful and unjustifiable refusal of sexual intercourse is destructive of marriage, more destructive, perhaps, than anything else. Just as normal sexual intercourse is the natural bond of marriage, so the wilful refusal of it causes a marriage to disintegrate. It gives rise to irritability and discord, to nervousness and manifestations of temper, and hence to the breakdown of the marriage. The law should not look to those outward symptoms only. It should have regard to the underlying cause. If the refusal is persisted in so unreasonably and for so long that the court is able to infer that it was intended to inflict misery on the other, then it may be cruelty. That is not the case here. The disinclination on the wife's part may have proceeded from a faulty approach on the husband's side, or from ill-health or reluctance on her side, with no intention whatever of affecting him. It was, therefore, not cruelty.

- The result is that the husband's petition must be refused. I cannot help feeling, however, that in this case it might be a good thing if there were a divorce. The wife has shown a complete disregard of her wifely duties. She does not care for her child and is quite content for him to be brought up by another woman with whom her husband is now living. It might be a good thing if the union of the husband with this other woman could be regularised. The wife could facilitate this by herself suing for a divorce, but it is for her to decide whether she should do so or not. We cannot find that she has treated her husband with cruelty simply because she does not do so. If the door of cruelty were opened too wide, we should soon find ourselves granting divorce for incompatibility of temperament. This is an easy path to tread, especially in undefended cases. The temptation must be resisted lest we slip into a state of affairs where the institution of marriage itself is imperilled. I agree the appeal should be dismissed.

Solicitors: *Montagu's and Cox & Cardole* (for the husband).

[Reported by C. N. BEATTIE, ESQ., Barrister-at-Law.]

PAOLANTONIO v. PAOLANTONIO.

[COURT OF APPEAL (Tucker, Asquith and Jenkins, L.JJ.), June 19, 1950.]

Divorce—Petition—Service—Dispensing with service—Substituted service ineffective—Discretion of judge—Matrimonial Causes Act, 1857 (c. 85), s. 42.

In a petition for divorce on the ground of the husband's desertion the wife sought leave to dispense with service of the petition on the husband whose last known address was in the United States. Repeated inquiries made by the wife over a period of three years through relatives and official channels had failed to trace the husband's whereabouts, the only information which she was able to obtain being that the husband had left for Europe and had not been heard of for some time. On an application by the wife under s. 42 of the Matrimonial Causes Act, 1857, for service of the petition on the husband to be dispensed with,

HELD: in exceptional cases the court had a discretion to dispense with service notwithstanding that the requirements laid down in *Luccioni v. Luccioni* ([1943] 1 All E.R. 384) (that the husband should be aware of the prosecution of the petition or of the intention of the wife to prosecute it and should have an opportunity to defend) were not present; in the present case the court was satisfied that the only possible method of substituted service was not only beyond the means of the wife, but would be ineffective; and, therefore, the court would exercise its discretion to dispense with service of the petition.

[AS TO DISPENSING WITH SERVICE, see HALSBURY, Hailsham Edn., Vol. 10, p. 706, para. 1060; and FOR CASES, see DIGEST, Vol. 27, p. 396, Nos. 3928, 3929.]

Cases referred to:

- (1) *Luccioni v. Luccioni*, [1943] 1 All E.R. 260; *affmd.*, [1943] 1 All E.R. 384; [1943] P. 49; 112 L.J.P. 51; 168 L.T. 263; 2nd Digest Supp.
- (2) *Evans v. Bartlam*, [1937] 2 All E.R. 646; [1937] A.C. 473; 106 L.J.K.B. 568; *sub nom.*, *Bartlam v. Evans*, 157 L.T. 311; Digest Supp.
- (3) *Weighman v. Weighman*, [1947] 2 All E.R. 852; 2nd Digest Supp.

APPEAL by the wife from an order of WALLINGTON, J., in chambers, dated May 17, 1950, refusing to dispense with the service on the husband of a petition for dissolution of the marriage on the ground of the husband's desertion.

The parties were married on July 12, 1944. At that time the husband was domiciled in the United States. The parties lived in England until September, 1945, when the husband left the matrimonial home and went to the United States. In December, 1945, the wife received three letters from the husband informing her of his intention never to live with her again. On Nov. 14, 1949, a copy of the wife's petition for divorce on the ground of desertion, a notice to appear, a memorandum of appearance, and a form of acknowledgement of service, were served on the husband by registered post at his last known address in the United States. Those documents were returned with a covering letter from the husband's mother stating that he had left for Europe and had not been heard of for some time. The wife then made additional inquiries through the husband's relatives and through the United States War Department, but she was unable to trace his whereabouts. In those circumstances she applied under s. 42 of the Matrimonial Causes Act, 1857, to dispense with the service on the husband of the petition for divorce, but her application was refused by WALLINGTON, J. The wife appealed.

B. Garland for the wife.

The husband did not appear.

TUCKER, L.J.: This is an appeal by the wife from an order made by WALLINGTON, J., in chambers, dismissing an application, pursuant to s. 42 of the Matrimonial Causes Act, 1857, to dispense with the service of a petition for divorce. Section 42 reads as follows:

"Every such petition shall be served on the party to be affected thereby, either within or without Her Majesty's dominions, in such manner as the court shall, by any general or special order from time to time direct, and for that purpose the court shall have all the powers conferred by any statute on the Court of Chancery: Provided always that the said court may dispense with such service altogether in case it shall seem necessary or expedient so to do."

A To my mind it is clear from the facts that every conceivable effort has been made and all reasonable steps taken to ascertain the whereabouts of the husband. I approach this case from the point of view that it is essential to our system of justice that parties to suits should be made aware that proceedings are being brought against them and that this is of supreme importance in matters like
B divorce which involve the status of parties and the welfare of children. The fullest inquiries, therefore, must always be made, and the circumstances must be exceptional before the court is justified in dispensing with the service of a petition. In the present case, actual service being impossible, the only possible substituted service would be by advertisement in some newspaper, but I think the probability of any advertisement reaching the notice of the husband is so
C remote that it can be dismissed from the case as a reasonable possibility or probability. Therefore, one is driven to inquire whether there is anything in the authorities which would prevent the learned judge, in the exercise of his discretion, dispensing with a form of service which on the face of it would be an expensive waste of time and serve no useful purpose.

D The leading authority in this class of case is *Luccioni v. Luccioni* (1). There the petition of the wife was dated Oct. 21, 1942. The wife charged her husband with desertion as from October, 1936, when, it was alleged, he had left her and gone to Morocco or to France. The husband was a French national and the wife went to Paris and ascertained an address at which it was believed he was living until shortly after the outbreak of war in 1939, since when she had received no communication from him or anyone on his behalf, and did not know his present
E whereabouts. As a result of the capitulation of France in July, 1940, substituted service was impossible, but, of course, the wife might have presented her petition in October, 1939, when service would have been possible. In dealing with the case, LORD MERRIMAN, P., said ([1943] 1 All E.R. 262):

"... in the case of petitions which involve a change of status, and where any form of substituted service is impossible, the court, before dispensing with service, should require to be satisfied that the respondent spouse has become aware of the fact that the petition is being prosecuted, or, at the very least, of the intention to prosecute it, and in either case has had time and opportunity to indicate whether he or she desires to defend. Whether this requirement is satisfied will, of course, be decided upon the merits of the individual case."

G On appeal to this court it was contended that that statement of the President amounted to his having imposed a fetter on himself in the exercise of his discretion under s. 42 of the Matrimonial Causes Act, 1857. This court rejected that contention and SCOTT, L.J., in his judgment, cited the passage from the President's judgment in which he quoted from *Evans v. Bartlam* (2), and
H proceeded (*ibid.*, 385):

"In my view, however, LORD MERRIMAN, P., was not for one moment intending to impose limitations of that kind. The two or three hypothetical events connected with a petition to which he refers are each of them within the category of relevant matters for consideration in connection with the exercise of discretion: but I think he only spoke of them in that context as conceivably relevant matters which, if proved, would undoubtedly be additional reasons for the exercise of the discretion ..."

The other members of the court agreed and they also agreed with the decision arrived at by the learned President on the facts of the particular case. DU PARCQ, L.J., said (*ibid.*, 386):

"I think that what was said by LORD MERRIMAN, P., may properly be regarded as a statement of such a general indication, though it is most important that every judge who is asked to make an order dispensing with service of a petition of divorce should remember that in matters of discretion no one case can be an authority for another."

Pausing there for the moment we reach the result that the matters referred to by the learned President were all very relevant matters proper to be taken into consideration when a judge is exercising his discretion under s. 42, but they are not conclusive, and it remains for the learned judge in every case to exercise his discretion unfettered by any rule which might tend to bind him.

In the present case, as it seems to me, the learned judge was concerned to see whether he could properly bring the case within the decision of this court in *Weighman v. Weighman* (3). In that case the respondent husband had gone to Canada in search of employment in 1926. From that date until 1943 he sent numerous letters to the wife, who continued to reside in England, in which he expressed his intention of returning to England when he could afford to do so. On July 7, 1943, however, he wrote a letter, which gave no address, informing his wife that he had left his previous address and that he never intended to return to England. After inquiries through relatives and official channels had failed to trace the husband's whereabouts, an order was made for substituted service by advertisement in a Canadian newspaper, but the cost of the advertisement was beyond the wife's means. The wife applied for service to be dispensed with altogether. It was held that mere want of means was not sufficient, but, as it was a fair inference from the facts that the husband knew that there was at least a likelihood of proceedings, it was a proper case for dispensing with service. In giving the leading judgment, BUCKNILL, L.J., set out the facts, referred to *Luccioni v. Luccioni* (1), and said that the court was satisfied that FINNEMORE, J., who had refused the application, had properly interpreted the decision of *Luccioni v. Luccioni* (1) and had not regarded himself as tied in the exercise of his discretion. The learned lord justice continued ([1947] 2 All E.R. 853):

"In my view, there are special facts in the present case which FINNEMORE, J., did not consider sufficiently. In view of the terms of the husband's letter of July 7, 1943, and of the facts that he had been away for twenty years and that in 1943 he intimated his intention never to return to his wife, the husband, in my opinion, must have known that he had deserted his wife and that that desertion had continued for more than three years. It is, therefore, in my opinion, a fair inference that he knew that the wife would take proceedings for divorce. In these circumstances I think the conditions laid down by LORD MERRIMAN, P. [in *Luccioni v. Luccioni* (1)] were fulfilled, the appeal should be allowed, and service of the petition on the husband dispensed with."

COHEN, L.J., agreed.

WALLINGTON, J., in the present case, had had *Weighman v. Weighman* (3) brought to his attention and he considered that the court there had evidently paid great attention to the terms of the letter of July 7, 1943, which were not set out in the judgment. Accordingly, he sent for the papers in that case, and it appeared that there were two letters produced, one from the respondent in Canada in November, 1940, indicating his intention to return to England when opportunity offered, and the all important letter three years later of July 7, 1943, which was in these words:

"Dear Mary, you want to know what I intend to do. Well, I know I will never come back to England. I have left Timmins and I do not know where

I am going, but I am only staying here until I make up my mind and so goodbye."

A This court thought that, in view of that letter, written after the respondent had left his wife for very nearly twenty years, and in reply to a letter he had evidently received from his wife asking what he was intending to do, it was a fair inference that he was communicating to her his final decision to leave her in such circumstances that he must have known that proceedings were contemplated and would almost necessarily follow. WALLINGTON, J., appears to have thought that that was the decisive factor in *Weighman v. Weighman* (3) and that he could find no comparable factor in the present case which would bring it within *Weighman v. Weighman* (3). With that decision I respectfully agree. I do not find it possible in the present case to draw the inference that the husband must know that by now proceedings for divorce have been instituted against him. B There is no communication from him since the period of desertion has run out. All that is relied on are statements made by him at the moment when he left his wife and in subsequent correspondence before the period of three years had elapsed. I think that if one was to say that the learned judge was wrong in refusing to draw this inference the result would be that in almost every case where C the petitioner was alleging desertion it might reasonably be argued that the respondent must always know that he has deserted the petitioner, and that, therefore, proceedings have been or will be instituted.

On that ground I should have arrived at the same conclusion as WALLINGTON, J., but that, to my mind, is not the end of this case because, as I have already indicated, the requirements laid down in *Luccioni v. Luccioni* (1) are not all embracing, and there must remain other cases, exceptional cases no doubt, of which I think the present is one, where a learned judge, in the exercise of his discretion under s. 42 of the Matrimonial Causes Act, 1857, may dispense with service notwithstanding that all the requirements suggested by LORD MERRIMAN, P., in *Luccioni v. Luccioni* (1) are not present. That, I think, follows from the decision of the Court of Appeal in that case. To refuse to exercise D the discretion in the absence of those requirements would be in effect to treat them as necessary elements before the discretion can be exercised. I think that is where the learned judge in the present case was led into error. Not being able to bring the case within the four corners of *Weighman v. Weighman* (3), he appears to me to have regarded himself as precluded from dispensing with service. Otherwise there could be no ground for refusing the order. I think E there must be cases of which the present is one, although they will necessarily be few, where once the court is satisfied, as I am in the present case, that the only suggested method of substituted service is not only beyond the means of the applicant, but will be ineffective, justice requires that the court should exercise its discretion to dispense with service of the petition. I would, accordingly, make that order.

G ASQUITH, L.J.: I agree.

JENKINS, L.J.: I also agree.

Appeal allowed.

Solicitor: C. W. H. Davenport, Law Society's Services Divorce Department (for the wife).

[Reported by J. D. PENNINGTON, ESQ., Barrister-at-Law.]

Re S. A. HAWKEN, LTD.

[CHANCERY DIVISION (Wynn-Parry, J.), June 23, 1950.]

Company—Winding-up—Compulsory winding-up—Petition for relief under Companies Act, 1948, s. 210 (1), or for winding-up order—Petitioners' costs—Taxation—Affidavit in support of petition in addition to statutory affidavit—Documents exhibited to statutory affidavit—Acute conflict between parties—Petition grounded on allegation that affairs of company required investigation—Additional affidavit—Companies Act, 1948 (c. 38), s. 210 (1); s. 224 (1)—Companies (Winding-up) Rules, 1949 (S.I. 1949, No. 330), r. 3, r. 30, Appendix, Form 9. A

A petition praying (i) for relief under the Companies Act, 1948, s. 210 (1), and, alternatively, (ii) that the company be wound-up compulsorily, was presented by three shareholders of a company, who were, between them, entitled to almost half of the company's issued share capital of £1,000, and one of whom was also a creditor of the company in respect of a loan of £1,750. The respondents to the petition were the company and Mr. and Mrs. H., who held most of the remaining shares. According to the allegations in the petition there was at the date of its presentation acute conflict between the parties, and, although there was no charge of fraud against any officer of the company, the petition was grounded on an allegation that the affairs of the company required investigation. It also contained an allegation that the company was insolvent and unable to pay its debts. The petitioners filed two affidavits: (i) an affidavit by the petitioners containing the matters set out in the statutory affidavit in verification of a winding-up petition (Form 9 in the Appendix to the Companies (Winding-up) Rules, 1949), but exhibiting, in addition, a large number of documents in support of the allegations in the petition, including a draft balance sheet of the company's business as at Sept. 3, 1949, and a draft trading and profit and loss account for a period ending on that date; and (ii) an affidavit by a former secretary of the company to support certain allegations in the petition on a point which had been contested by the respondent shareholders before the presentation of the petition. The draft balance sheet showed that, after deducting the company's total liabilities from its assets, there was left a sum of £796 2s. 3d. to meet the amount of the share capital of £1,000. At the hearing of the petition the company and the respondent shareholders did not admit any of the allegations on which relief under s. 210 (1) of the Act was sought, but agreed to the winding-up of the company. A winding-up order was made and it was ordered that the petitioners' costs of the petition should be paid out of the assets of the company. On the taxation of costs, the taxing master disallowed the costs of the former secretary's affidavit and all costs in relation to the petitioners' affidavit other than the costs usually allowed in respect of the making and filing of the statutory affidavit, on the grounds (a) that, under s. 210 (5) and s. 365 of the Act, the Companies (Winding-up) Rules, 1949, r. 3 and r. 30, applied to a petition under s. 210 (1), and, therefore, the statutory affidavit was sufficient to support the prayer under that section as well as the prayer for the winding-up of the company, and (b) that, by reason of the allegation that the company was insolvent and unable to pay its debts, the petition was demurrable on the face of it in regard to the relief claimed under s. 210. B
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HELD: (i) if, at the hearing of the petition, the objection had been taken that the petition was on the face of it demurrable as it contained an allegation on behalf of all three petitioners, and not merely on behalf of the creditor petitioner, that the company was insolvent and unable to pay its debts, only the petition could have been looked at, but, on an application to the court to review the decision of the taxing officer, the court was entitled to

look at the draft balance sheet which was before it, and, therefore, it could not proceed on the basis that the petition, so far as it claimed relief under s. 210 of the Act, was necessarily demurrable.

(ii) as the allegations in the petition in respect of the claim under s. 210 showed that there was acute conflict between the parties, and the petition was grounded on an allegation that the affairs of the company required investigation, the petitioners were justified in supplementing the statutory affidavit by exhibiting the documents and by filing the affidavit of the ex-secretary, and, therefore, the costs of these items should be allowed.

Per WYNN-PARRY, J.: "I can imagine few cases of petitions presented under s. 210 in which it would be wise, or even possible, to rely merely on the statutory affidavit."

A [AS TO AFFIDAVIT IN SUPPORT OF PETITION, see HALSBURY, Vol. 5, 1949 Edn., p. 623, para. 978; and FOR CASES, see DIGEST, Vol. 10, p. 850, Nos. 5637-5639.

FOR THE COMPANIES ACT, 1948, s. 210, see HALSBURY'S STATUTES, Second Edn., Vol. 3, pp. 630, 631.]

C Cases referred to:

(1) *Re Rica Gold Washing Co.*, (1879), 11 Ch.D. 36; 40 L.T. 531; 10 Digest 838, 5497.

(2) *Re Kaslo-Slocan Mining & Financial Corp'n., Ltd.*, [1910] W.N. 13; 10 Digest 838, 5499.

(3) *Re Gold Hill Mines*, (1883), 23 Ch.D. 210; 49 L.T. 66; 10 Digest 832, 5426.

(4) *Re New Callao, Ltd.*, (1882), 47 L.T. 175; 10 Digest 850, 5637.

(5) *Re St. David's Gold Mining Co., Ltd.*, (1866), 14 L.T. 539; 10 Digest 1042, 7255.

(6) *Re South Staffordshire Tramways Co.*, (1894), 1 Mans. 292; 10 Digest 850, 5638.

(7) *Re Ilfracombe Permanent Mutual Benefit Building Society*, [1901] 1 Ch. 102; 70 L.J.Ch. 66; 84 L.T. 146; 10 Digest 840, 5512.

E SUMMONS on a review of taxation adjourned into court for judgment.

A petition was presented by three of the shareholders of a company, praying (i) that an order be made under the Companies Act, 1948, s. 210, for (a) the purchase of their shares in the company by the two respondent shareholders or by the company, and (b) for repayment by the respondent shareholders or the company of a debt due to the first petitioner, or (c) for such other order under the section as the court might deem proper with a view to bringing to an end the matters complained of in the petition; (ii) alternatively, that the company be wound-up by the court under the provisions of the Act; (iii) or that such other order be made as to the court should seem meet.

G The nominal capital of the company was £1,000, divided into one thousand shares of £1 each. The petitioners held, between them, 450 shares and the two respondent shareholders held, between them, 510 shares, the remaining forty shares being held by a sixth shareholder. According to the allegations in the petition, there was acute conflict between the petitioners and the respondent shareholders, and the petition alleged *inter alia* that a report of one of the petitioners, prepared on behalf of the directors of the company, showed that the company was suffering from dishonesty, presumably on the part of its employees, and that there was a suggestion by one of the employees that one of the respondent shareholders was responsible for a deficiency in the company's stock. The petition stated that the affairs of the company had been placed under investigation by the police, and it also contained an allegation that the company was insolvent and unable to pay its debts. In verification of the petition, the petitioners filed the statutory affidavit (Form 9 in the Appendix to the Companies

(Winding-up) Rules, 1949), and exhibited thereto a number of documents in support of their allegations. In addition, they filed an affidavit by a former secretary of the company in support of certain allegations which had been the subject of dispute between the petitioners and the respondent shareholders before the petition was presented. A draft balance sheet and trading and profit and loss account, which was among the documents exhibited to the petitioners' affidavit, showed that, after deducting the company's total liabilities from its assets, there was a sum of over £796 to meet the amount of the company's share capital of £1,000. The respondent company and respondent shareholders, while not admitting any of the allegations on which relief under s. 210 was sought, agreed to the petition being treated as a petition to wind-up the company. On Dec. 12, 1949, VAISEY, J., ordered, by consent, that the company should be wound-up, and he further ordered that the costs of the petitioners and the company should be taxed and paid out of the company's assets. On taxing the petitioners' bill of costs, the taxing officer disallowed (a) all costs of the petitioners' affidavit other than the costs usually allowed in making and filing the statutory affidavit, and (b) the whole of the costs relating to the affidavit of the former secretary. The petitioners lodged objections to the taxing officer's decision, but it was upheld by the registrar. The petitioners appealed to the judge from the decision of the registrar. The facts appear in the judgment.

A. F. M. Berkeley for the petitioners.

Denys Buckley for the respondents.

WYNN-PARRY, J.: This is a summons in the compulsory liquidation of the company, taken out by the petitioners on the petition on which the order to wind-up the company was made on Dec. 12, 1949.

The three petitioners petitioned as contributories and the first petitioner, Taylor, also petitioned as a creditor. The petition prayed, first, for relief under the Companies Act, 1948, s. 210, and, alternatively, that the company should be wound-up compulsorily. Put shortly, the case disclosed in the petition was that the three petitioners, on the one hand, and a Mr. and Mrs. Hawken, on the other hand, were between them entitled to the issued capital of the company, which was incorporated on June 17, 1949, namely, one thousand shares of £1 each, held by the two camps in, approximately, equal shares, the shares held by the petitioners having been paid for in cash, while the shares held by the Hawken camp, though treated as having been paid for in cash, appear to have been issued in return for the transfer to the company by the Hawken of an ice cream business and a timber business, perhaps an unusual combination for a business venture. Of the course of the timber business little is to be gleaned from the petition. The ice cream business was successful in its first season, but then the volume of business fell off and a draft account for the period up to Sept. 3, 1949, showed a small trading loss. The third petitioner, Mayhew-Sanders, reported that there was a big deficiency in stock and that the company was suffering from dishonesty, presumably on the part of its employees. He further reported that no proper stock records had been kept, that there were many unsatisfactory features concerning the company's administration and its control over its staff, and that it had been suggested by an employee that Mrs. Hawken was one of the persons responsible for the deficiency of stock. The petition further alleged that, at a directors' meeting held on Dec. 10, 1949, the petitioner, Mayhew-Sanders, proposed that the whole matter should be handed over to the Marlow police for investigation, and a resolution to this effect was passed against the opposition of Mr. and Mrs. Hawken. Mr. Hawken desiring time to consult his solicitors. With a certain economy of language, the petition then avers that thereafter Mr. and Mrs. Hawken adopted a hostile attitude to the petitioners and ceased to co-operate with them. Mr. and Mrs. Hawken are alleged to have opened a new banking account for the company. Mr. Hawken alleged through his solicitors that the two businesses which the company was

carrying on were his, relying, no doubt, on the lack of regularity attending the taking over of these businesses. Finally, Mr. and Mrs. Hawken required the convention of an extraordinary general meeting with a view to passing a resolution removing the petitioners, Mayhew-Sanders and Taylor, from their offices as directors. This move was countered by the petitioner, Taylor, calling in a loan of £1,750, which, it is alleged, he had made to the company, and requiring payment of this sum and interest. Then the petition was launched claiming the alternative forms of relief to which I have referred. It alleged that the company was insolvent and unable to pay its debts.

The petitioners did not content themselves with supporting the petition by an affidavit in the statutory form (Form 9 in the Appendix to the Companies (Winding-up) Rules, 1949), which reads as follows:

"I, A.B., of—, make oath and say that such of the statements in the petition now produced and shown to me, and marked with the letter A, as relate to my own acts and deeds are true, and such of the said statements as relate to the acts and deeds of any other person or persons I believe to be true."

They filed two affidavits. The first was an affidavit by the three petitioners, para. 1 of which contains the matter set out in the statutory affidavit. It then exhibits (i) the memorandum and articles of association of the company; (ii) an agreement, dated Mar. 28, 1929, between a Mr. Whittingham and Mr. Hawken by which Mr. Hawken is said to have acquired the businesses, which were subsequently, though with considerable absence of regularity, alleged to have been transferred by Mr. Hawken to the company; (iii) the minute book of the company; (iv) a draft balance sheet as at Sept. 3, 1949, and draft trading and profit and loss account for the period from Apr. 14, 1949, to Sept. 3, 1949, relating to the businesses [Exhibit "E"]; and (v) a bundle of correspondence containing letters passing between Mr. Hawken's solicitors and the company or the petitioner Mayhew-Sanders. The other affidavit was by the former secretary of the company dealing with registration in the name of the company, under the Registration of Business Names Act, 1916, of two names which had previously been used by Mr. and Mrs. Hawken. The purpose of this affidavit was clearly to support the petitioners' contention that the businesses in question had been acquired by the company.

The petition came before the court on Dec. 12, 1949. The company and Mr. and Mrs. Hawken were represented. The order recites that they did not admit any of the allegations in the petition on which relief under s. 210 of the Companies Act, 1948, was sought, but agreed to the petition being treated as a petition to wind-up the company. On this basis it was ordered by consent that the company should be wound-up. The order further provided that the costs of the petitioners and of the company of the petition should be taxed and paid out of the assets of the company. In due course a bill of costs was brought in on behalf of the petitioners. In taxing the bill the taxing officer disallowed all costs in relation to the affidavit of the petitioners other than the costs usually allowed in respect of the making and filing of the statutory affidavit, and the whole of the costs relating to the second affidavit, the total sum involved being £11 14s. 4d. The petitioners lodged objections to the disallowances, but the registrar upheld the decision of the taxing officer. From his decision the petitioners appeal.

It is said, in the first place, on behalf of the respondents, that the costs in question which relate only to the matters alleged in support of the relief claimed under s. 210 of the Act ought, in any event, to be disallowed, because the petition, so far as that relief is concerned, was demurrable on the face of it. The condition, on the existence of which the jurisdiction of the court depends, is that "the facts would justify the making of a winding-up order on the ground that it was just and equitable that the company should be wound-up," i.e., that, if the petition had been presented as a contributory's petition for the winding-up of

the company, the court could have made such an order: see s. 210 (2) (b). The petition, as I have said, contains an allegation that the company is insolvent and unable to pay its debts, and, therefore, it is said, it is demurrable on the face of it. *Prima facie*, this would appear to be so. A contributory is not entitled to a winding-up order unless he can show that he has a tangible interest in the assets in a winding-up: see *Re Rica Gold Washing Co.* (1), per SIR GEORGE JESSEL, M.R. (11 Ch.D. 43); and an allegation that a company has no assets and is insolvent has been held to disentitle a petitioner to such an order: see *Re Kaslo-Slocan Mining & Financial Corpn., Ltd.* (2).

In the present case, however, this does not appear to me to be the end of the matter. The exhibit "E" to the petitioners' affidavit, *viz.*, the draft balance sheet and trading and profit and loss account, shows that, discounting the items on the assets side of the balance sheet, "preliminary expenses £31 10s." and "Profit and Loss Account £172 7s. 9d.", neither of which can have any realisable value, the assets have a book value of £9,961 3s. 3d. Deducting the total of the liabilities, £9,165 1s., there is left a figure of £796 2s. 3d. to meet the amount of the share capital of £1,000. On those figures the contributories would appear to have, at least, a tangible interest in a winding-up. I am conscious of the fact that the balance sheet is a draft and not an audited document, but it was prepared by the firm of chartered accountants of which the petitioner, Mayhew-Sanders, is a member. The allegation of insolvency and inability to pay debts was, no doubt, included in the petition in aid of the alternative claim that the company should be wound-up because it had failed to pay the first petitioner, Taylor, in his capacity as a creditor, and it is an allegation which is common form in a creditors' petition. It is, however, an allegation which, on the form of the petition, is made on behalf of all three petitioners, and, but for the matters disclosed in the draft balance sheet, would, in my view, have proved fatal to the claim under s. 210 of the Act, had the case been fought and the point taken. The danger is thus disclosed of attempting to combine a claim by or as a creditor with a claim by or as a contributory in the same petition. Then, can I properly take into account the matters disclosed in the draft balance sheet? The objection, if taken at the hearing, would, as I have said, have been that the petition was demurrable. On a demurrer, only the pleadings—in this case, the petition—can be looked at. As the matter comes before me on an application to review the decision of the taxing officer, I necessarily have before me the draft balance sheet. I, therefore, know of evidence which could have been used to ground an application for leave to amend the petition by adding to the allegation that the company was insolvent and unable to pay its debts, an allegation that, nevertheless, the petitioners, on the information available, would have a tangible interest in the winding-up of the company. In these circumstances, in my judgment, I ought not to proceed on the basis that the petition, so far as it claimed relief under s. 210, was necessarily demurrable.

I turn, therefore, to the substantive question which is raised on this summons. Were the applicants right in adding to the statutory affidavit the material which they did add, and in filing the second affidavit by the former secretary? The conjoint effect of s. 210 (5) and s. 365 of the Act is that r. 3 and r. 30 of the Companies (Winding-up) Rules, 1949, apply, and, therefore, having regard to the authorities, *prima facie* the statutory affidavit is sufficient to support a petition under s. 210. It is difficult to see why, on the language of r. 3 and r. 30, the statutory affidavit is applicable. In *Re Gold Hill Mines* (3), LINDLEY, L.J., said (23 Ch.D. 214):

"The statutory affidavit strictly is no proof of anything. It is hearsay as to almost everything in it, but it is sufficient to require an answer."

Its validity was challenged as long ago as 1882 in *Re New Callao, Ltd.* (4), but SIR GEORGE JESSEL, M.R., said that it had then been acted on for twenty years and the court could not throw any doubt on it. Notwithstanding the

opportunities presented by subsequent Companies Acts, the legislature has not seen fit to replace this form of affidavit, which "strictly is no proof of anything," and which, therefore, presumably could not result in anyone who should take his oath on it getting into trouble.

A The result of the decided cases appears to be that, while the statutory affidavit is always necessary, it is not always sufficient: see *Re St. David's Gold Mining Co., Ltd.* (5), and *Re South Staffordshire Tramways Co.* (6); and it is never sufficient where the petition is based on allegations of fraud. In such cases the facts of the alleged fraud must be stated on affidavit: see *Re St. David's Gold Mining Co., Ltd.* (5), *Re South Staffordshire Tramways Co.* (6), and *Re Ilfracombe Permanent Mutual Benefit Building Society* (7), per WRIGHT, J. ([1901] 1 Ch. 110). The court has never attempted to state exhaustively the circumstances in which, apart from cases based on allegations of fraud, the statutory affidavit is to be regarded as insufficient. Each case must depend on its peculiar facts.

B In BUCKLEY ON THE COMPANIES ACTS, 12th ed., p. 1028, it is stated, in the note to r. 30 of the Companies (Winding-up) Rules, 1949:

C "In general the petitioner ought not to file any evidence beyond the statutory affidavit, unless evidence is filed in opposition . . ."

I find this statement also in the 8th edition of BUCKLEY, dated 1902 [in a note to r. 36 of the Companies Winding-up Rules, 1890, at p. 882]. I accept this statement so far as it goes, but, of course, much depends on the scope of the words "in general." In the ordinary case of a creditors' petition for a winding-up order on the ground of insolvency, no more than the statutory affidavit can be D justified in the first instance. On the other hand, where the petition is grounded on an allegation that the affairs of the company require investigation, then, though no charge of fraud is made against any director or officer, it will probably be desirable in many, if not most, cases to supplement the statutory affidavit, and the court, in my view, ought not to be quick to disallow the costs of supplementary evidence in such a case. Again, where a petitioner must rely on documents if the petition is opposed, I should have thought that he would do right E to exhibit those documents. They form part of his case, and the respondents to the petition are entitled to know the case which is made against them. It appears to me to be no answer to say that, in the event, the documents proved unnecessary, because the petition was not resisted. The completeness of a petitioner's case may well induce a respondent not to resist. I can imagine few F cases of petitions presented under s. 210 in which it would be wise, or even possible, to rely merely on the statutory affidavit.

In the present case, according to the allegations in the petition, there was at the date of its presentation acute conflict between the parties. Not only was Mr. Hawken disputing that there was any agreement as to the taking over of the businesses from him by the company, but also it was disputed that there G was any case for relief under s. 210. In these circumstances, I think that the petitioners were justified in supplementing the statutory affidavit by exhibiting the documents which they did exhibit and by filing the affidavit of the former secretary. The application will, therefore, be allowed with costs, and the matter will be referred back to the taxing officer to deal with the question of *quantum*.

Order accordingly.

Solicitors: *Davenport, Lyons & Barker* (for the petitioners); *Stafford Clark & Co.* (for the respondents).

[Reported by H. McL. MORRISON, ESQ., Barrister-at-Law.]

WORKINGTON HARBOUR AND DOCK BOARD v. OWNERS OF THE S.S. TOWERFIELD

[HOUSE OF LORDS (Lord Porter, Lord Normand, Lord Oaksey, Lord Morton of Henryton and Lord Radcliffe), March 13, 14, 15, 16, 20, 22, 27, 28, 29, 30, June 30, 1950.]

Harbour—Pilot—Compulsory pilot—Responsibility of shipowner—Action by shipowner against harbour board for negligence—Counterclaim by board for damage to harbour—Contributory negligence—Harbours, Docks, and Piers Clauses Act, 1847 (c. 27), s. 74—Pilotage Act, 1913 (c. 31), s. 15.

In 1931 the W. Harbour Board notified the maritime public, by means of an inset in the appropriate Admiralty chart and by means of notices to mariners, of the facilities afforded to shipping by their harbour on payment of dues and charges. From 1933 onwards, under the heading "Dredged Depths," the chart bore the words: "In the approach channel and turning basin within the pecked lines a depth of 4½ ft. at chart datum is maintained by dredging (1933)," which meant, in effect, that the depth of the channel was maintained at the level of the dock sill. It was indicated that the channel was 250 feet wide. On Oct. 19, 1941, s.s. Towerfield, having a draft of twenty-three feet forward and twenty-four feet aft, arrived off W. Harbour, and took on the compulsory Trinity House pilot. High water was at 11.8 a.m., producing a predicted depth of thirty feet, one inch, at the dock sill. The pilot, after boarding the vessel, received a message from the harbour-master that the harbour tug was not available to assist in bringing the Towerfield into the dock, but the pilot decided nevertheless to bring her in. At 11.10 a.m. the Towerfield crossed the bar, steamed up the channel at three knots, and, after going about four hundred yards, grounded on the north side of the channel and subsequently broke her back. It was apparent that neither the advertised depth nor the advertised width of the channel had been maintained. The shipowners claimed damages from the harbour board in respect of (i) breach of the board's duty imposed by statute and at common law to take reasonable precautions that the approaches to the port were safe or to give warning that no such care had been exercised, and (ii) breach of contract or warranty that the condition of the harbour was in accordance with the Admiralty chart. The harbour board counterclaimed for damage to the harbour on the ground that it was due to the negligence of those in charge of the Towerfield, and also under the Harbours, Docks, and Piers Clauses Act, 1847, s. 74. The harbour board had given no information either to the shipowners or the pilot as to the state of the channel at the place where the Towerfield went aground (which was within the channel as marked by the line of the northern dredging marks), nor had dredging been carried on continuously in the channel.

The Pilotage Act, 1913, s. 15, provides: "(1) Notwithstanding anything in any public or local Act, the owner or master of a vessel navigating under circumstances in which pilotage is compulsory shall be answerable for any loss or damage caused by the vessel or by any fault of the navigation of the vessel in the same manner as he would if pilotage were not compulsory."

The House found that the harbour board were negligent in not fulfilling their obligations by sounding and dredging and in not ensuring that the pilot and master were warned of the state of the channel, and that the pilot was guilty of negligent navigation. On the questions of liability:

HELD: (i) s. 15 (1) applied to the claim by the shipowners, whether it was in tort for negligence or for breach of contract between the harbour board and the shipowners; the word "answerable" in the sub-section meant "responsible," and (LORD OAKSEY *dissenting*) the shipowners were

responsible under that section for the faulty navigation of the pilot, and, consequently, for the damage sustained by the ship as well as for the damage to the harbour; but, as the harbour board were also negligent, neither could recover from the other.

(ii) on the true construction of s. 74 of the Act of 1847, the shipowners were liable for damage caused by their ship to the harbour works notwithstanding the contributory negligence of the harbour board, but the damages would be limited to the damage directly caused to the works (which was conceded), and would not include, for instance, loss of revenue.

The Mostyn ([1928] A.C. 57), *applied*.

Det Forenede Dampskibs Selskab v. Barry Ry. Co. ([1919] L.L.R. 658), criticised by LORD NORMAND and LORD RADCLIFFE.

Order of the Court of Appeal ([1948] 2 All E.R. 736), *varied*.

[AS TO SHIPOWNER'S LIABILITY UNDER COMPULSORY PILOTAGE, see HALSBURY, Hailsham Edn., Vol. 30, p. 940, para. 1302: AS TO LIABILITY FOR DAMAGE TO HARBOUR, see *ibid.*, p. 985, para. 1374; and FOR CASES, see DIGEST, Vol. 41, pp. 911, 912, 974, 975, Nos. 8044, 8045, 8641-8656.]

Cases referred to :

- C (1) *The Eurymedon*, [1938] P. 41; 107 L.J.P. 81; 158 L.T. 445; *sub nom.*, *Corstar Owners v. Eurymedon Owners, The Eurymedon*, [1938] 1 All E.R. 122; Digest Supp.
- (2) *Boy Andrew (Owners), Ltd. v. St. Rognvald (Owners), Ltd.*, [1948] A.C. 140; [1948] L.J.R. 768; *sub nom.*, *Admiralty Comrs. v. North of Scotland and Orkney and Shetland Steam Navigation Co., Ltd.*, [1947] 2 All E.R. 350; 2nd Digest Supp.
- D (3) *Dennis v. Tovell*, (1872), L.R. 8 Q.B. 10; 42 L.J.M.C. 33; 27 L.T. 482; 37 J.P. 263; 41 Digest 974, 8641.
- (4) *River Wear Comrs. v. Adamson*, (1877), 2 App. Cas. 743; 47 L.J.Q.B. 193; 37 L.T. 543; 42 J.P. 244; *affg.*, (1876), 1 Q.B.D. 546; 46 L.J.Q.B. 83; 45 L.T. 118; 41 Digest 974, 8643.
- E (5) *Great Western Ry. Co. v. Mostyn (Owners), The Mostyn*, [1928] A.C. 57; 97 L.J.P. 8; 138 L.T. 403; 41 Digest 974, 8645.
- (6) *Det Forenede Dampskibs Selskab v. Barry Ry. Co.*, [1919] L.L.R. 658.
- (7) *Anchor Line v. Dundee Harbour Trustees, The Circassia, Ellerman Lines v. Dundee Harbour Trustees, The City of Naples*, 1922 S.C. (H.L.) 79; 58 Sc. L.R. 440; [1922] S.L.T. 137; 41 Digest 970 *t*.
- F (8) *Williams v. Swansea Harbour Trustees*, (1863), 14 C.B.N.S. 845; 143 E.R. 675; 41 Digest 979, 8676.
- (9) *Bede S.S. Co. v. River Wear Comrs.*, [1907] 1 K.B. 310; 76 L.J.K.B. 434; 96 L.T. 370; 41 Digest 979, 8677.
- (10) *The Tactician*, [1907] P. 244; 76 L.J.P. 80; 97 L.T. 621; 41 Digest 902, 7951.
- G (11) *The Prinses Juliana, Esbjerg Owners v. Prinses Juliana Owners*, [1936] 1 All E.R. 685; [1936] P. 139; 105 L.J.P. 58; 155 L.T. 261; Digest Supp.
- (12) *Thom v. Hutchinson (J. & P.), Ltd.*, 1925 S.C. 386; 41 Digest 911 *q*.
- (13) *The Adam W. Spies*, (1901), 70 L.J.P. 25; 41 Digest 683, 5124.
- (14) *Davies (Davis) v. Mann*, (1842), 10 M. & W. 546; 12 L.J.Ex. 10; 7 J.P. 53; 152 E.R. 588; 2 Digest 232, 214.
- H (15) *Davenport v. R.*, (1877), 3 App. Cas. 115; 47 L.J.P.C. 8; 37 L.T. 727; 31 Digest 472, 6195.
- (16) *Admiralty Comrs. v. S.S. Volute*, [1922] 1 A.C. 129; 91 L.J.P. 38; 126 L.T. 425; 41 Digest 780, 6417.

APPEAL by the Workington Harbour and Dock Board from an order of the Court of Appeal dated July 9, 1948, and reported [1948] 2 All E.R. 736, varying an order of WILLMER, J., dated May 23, 1947.

The owners of s.s. *Towerfield* claimed damages against the Workington Harbour and Dock Board in respect of (i) a breach of the board's duty imposed on them by statute and at common law to take reasonable precautions that the approaches to the port and harbour of Workington were safe, or to give warning that no such care had been exercised, and (ii) a breach of contract or warranty by the board that the condition of their harbour was in accordance with a statement inserted at their request on the appropriate Admiralty chart from 1933 onwards, as a result of which on Oct. 19, 1941, the *Towerfield* ran aground on the northern side of the channel to a dock in the harbour. The board counterclaimed in respect of damage to the harbour.

WILLMER, J., held that the compulsory pilot was negligent, and that his negligence was the sole cause of the stranding. The Court of Appeal, by a majority, held that the shipowners succeeded against the board both on their claim in contract and on their claim in tort, and that the counterclaim failed. The facts appear in the opinions of LORD PORTER and LORD NORMAND.

Pritt, K.C., R. F. Hayward, K.C., and Fletcher-Cooke for the appellants, the Workington Harbour and Dock Board.

Carpmael, K.C., Naisby, K.C., and Boyes for the respondents, the owners of the s.s. *Towerfield*.

The House took time for consideration.

June 30. The following opinions were delivered.

LORD PORTER: My Lords, this is an appeal from the Court of Appeal which by a majority reversed the decision of the learned judge, found in favour of the respondents on their claim and dismissed the appellants' counterclaim. BUCKNILL, L.J., who dissented, would also have allowed the appeal in part, but, so far as the claim is concerned, he followed the findings of fact and inferences of WILLMER, J., and differed only in a legal conclusion as to the counterclaim which had been put forward by the respondents. The facts set out below are in the main based on the narrative of the learned judge and BUCKNILL, L.J. In substance they are not in dispute.

The plaintiffs are the owners of s.s. *Towerfield*, and they claim against the defendants, the Workington Harbour and Dock Board, in respect of damage sustained by the *Towerfield* through grounding in the approaches to Workington Harbour on Oct. 19, 1941. The defendants deny liability, and counterclaim against the plaintiffs in respect of loss and damage sustained by them through the grounding of that vessel which, they allege, was solely due to the negligence of those in charge of her. Alternatively, they claim that in the absence of negligence on the part of those in charge of the *Towerfield* the loss and damage sustained by them constituted damage done by the *Towerfield* to the harbour, in respect of which they contend that, under the Harbours, Docks, and Piers Clauses Act, 1847, s. 74, the plaintiffs, as owners, are answerable to them as undertakers. The defendants admit that in consequence of the grounding the *Towerfield* sustained serious damage, and the plaintiffs in their turn concede that the defendants suffered loss and damage such as would constitute damage done to the harbour within the meaning of the Act of 1847.

The port of Workington is formed by the estuary of the River Derwent, and comprises an entrance channel, a turning basin, the Prince of Wales' Dock, and a tidal dock and harbour. The entrance channel runs in a north-west to south-east direction, and parallel with it on the south side is a pier, known as the south pier, extending some distance into the sea. The turning basin, which lies at the inner end of the entrance channel, is protected on the north by an L-shaped jetty, known as the north jetty. Seaward of the outer end of the north jetty, and on the north side of the entrance channel there were at one time two perches, the outer of which was approximately opposite the end of the south pier and was known as the barrel perch. The inner perch, which is known as the bush perch,

is about half-way between the barrel perch and the end of the north jetty. Vessels proceeding to the Prince of Wales' Dock, where the principal loading and discharging berths are situated, must come up the entrance channel between the perches on the north side and the south pier on the south side, and on reaching a certain point must make a turn under port wheel into the turning basin, whence access to the dock is obtained. It is common ground that, at the time of the casualty in this case, the barrel perch was not in place. It is agreed, however, that the bush perch was there, though its precise location has been the subject of some dispute. Two leading beacons, situated on a waste piece of land called the shipbuilding yard, which lies ahead of a vessel proceeding up the entrance channel, are provided, and these when kept in line are supposed to afford a guide for vessels entering the port.

In 1931, in consequence of representations made to them by the defendants, the Admiralty agreed to publish, and did publish as an inset on chart No. 1346, a plan of Workington Harbour. This inset was expressed to be based on a plan supplied by the defendants and showed the entrance channel as having a width of 250 feet. Furthermore the line of the leading marks, which is stated to be 131 degrees true is shown as following substantially the middle of this 250 feet channel—if anything it is a little to the southward of the centre line. It is stated on the inset that in the approach channel and turning basin a depth of $4\frac{1}{2}$ feet at chart datum is maintained by dredging. This depth corresponds to seven feet below L.W.O.S.T., and is, in fact, the same as that over the Prince of Wales' Dock sill. In fact, the information given on the Admiralty chart inset is inaccurate and misleading. The advertised dredged depth has seldom, if ever, been maintained throughout the whole of the 250 feet channel. There is a bar abreast of the seaward end of the south jetty where silt tends to accumulate and where depths substantially less than that advertised are habitually to be found. Also on the south side of the channel along the south pier, and also along the northern side opposite to it, banks tend to form and have the effect of constricting the width of the navigable channel to something substantially less than the advertised width of 250 feet. The formation of these banks depends largely on the weather, the prevailing south-west wind having a tendency to cause a littoral drift of slag and rubble which sweeps along the coast and round the end of the south pier, to be deposited along the side of the channel. Floods in the River Derwent also tend to cause a deposit of silt in the channel, particularly on the north side. In consequence of these difficulties it appears that the defendants have never really succeeded in maintaining their advertised depth throughout the length and breadth of the entrance channel. Moreover, it is not the fact that the line of the leading beacons leads along the centre of the 250 feet channel, or to the south of it. On the contrary, it leads substantially to the north of the centre line. The reason for this, it appears, is that in 1927, when the Prince of Wales' Dock was opened, the entrance channel was originally constructed to a width of 150 feet only. The leading beacons were then erected to guide an incoming vessel down the centre of this 150 feet channel. In 1931 it was decided to widen the channel, by dredging a further width of one hundred feet along the south side. The leading beacons were, however, left in their original positions, so that, instead of providing a lead along the centre of the channel as it now is, they lead approximately fifty feet to the northward thereof. The inset was inaccurate in this respect when it was first published and was inaccurate in 1941 at the time of the casualty to the Towerfield. In addition to the leading beacons, dredging marks are provided to show the northern and southern limits within which dredging is to take place. These marks consist of two pairs of posts erected in the shipbuilding yard, close to the leading marks. The northern pair of posts, known as the north dredging marks, when in line, indicate the northern limit of dredging. The southern pair of posts, called the south dredging marks, similarly indicate the southern limit.

The Towerfield was a steel screw steamship of 4,241 tons gross register, 373 feet long and 52.4 feet beam, and at the time of her stranding was laden with a cargo of manganese ore. Her draft was twenty-three feet forward and twenty-four feet aft. On the morning of Oct. 19, 1941, she anchored outside the port where she was boarded by Trinity House pilot Craig. In her case pilotage into the harbour was compulsory. The weather was clear with a strong south-westerly breeze, and the tides were spring and making. High water was at 11.8 a.m. with a predicted rise of tide producing a depth of thirty feet one inch on the dock sill at high water, but the actual depth on the sill was thirty-one feet six inches. After Craig had come out to the Towerfield, he received a message from the harbour master that the defendants' harbour tug was not available to help to navigate the ship into the dock, owing to boiler trouble. Apparently he was not informed earlier because the harbour master did not know that the tug was out of action until after the pilot had started to go out to the ship. The evidence of Craig was that he then said to the master of the Towerfield: "There is no tug boat. What do you think about it?" The captain replied: "What do you think about it?" Craig replied: "Well, it is quite safe, I think. I think we can manage all right." He also asked the master whether the ship was handy, as she would have to be handy for the engines if they went in without a tug, and the master replied that she was. Captain Rowden, the master in question, said in his evidence that after they had got a message that the tug had broken down the pilot asked him whether he thought it was safe to go in, and the master replied: "Do you think it is safe?" The pilot said: "Yes," and (to quote from the master's evidence) "as the port was perfectly straight according to the chart I said I would go in; I could not see any danger." Substantially, therefore, their accounts agree.

The master had never entered Workington Harbour before and said that he relied on the pilot's local knowledge when accepting his decision to bring the ship in. There was nothing on the inset of Workington Harbour printed on the Admiralty chart No. 1346 to indicate that there would be any difficulty in navigating the ship up the channel. Neither Craig nor any agent of the defendants warned the master of any silting up in the channel which substantially reduced its width.

The steamship Ashbury, also inward bound to the Prince of Wales' Dock and in charge of Trinity House pilot Stevenson, entered the channel about half an hour before the Towerfield and was docked in safety. The Ashbury was loaded, had a beam of fifty feet and had a draft of twenty-two feet, one inch, but she had about eighteen inches less water when she entered the port than the Towerfield, and, therefore, the amount of water under her bottom in the dredged channel would be about the same as the Towerfield. The latter vessel crossed the bar at the seaward end of the south pier at 11.10 a.m., two minutes after high water, steamed up the channel at a speed of about three knots, and after going about four hundred yards took the ground on the north side of the channel about five hundred yards from the entrance to the Prince of Wales' Dock. Efforts to get her off failed and on the ebb tide she broke her back. After she had settled aground she was angled seven degrees to port of the line of the channel and when she came to rest her starboard bilge amidships was forty-two feet to the northward of the line of the leading marks. This put the ship's port side about ninety-four feet from the line of the leading marks and four feet on the channel side of the line of the north dredging marks at the place of stranding. There is no evidence how much of the lateral width of the ship was aground when she stranded. The evidence, however, is that the bottom at the place of grounding was silt, and this indicates that she was not held up by merely grounding with her port bilge. Mr. Deane, a consulting engineer called in on behalf of the respondents, took soundings round the ship when aground, and said that if the ship had passed five feet further away from the perch she would still have touched the ground. The fact that the ship listed about fourteen

degrees to starboard as the water fell indicates that she was aground on a sloping bank. The Ashbury passed safely by the bush perch with her port side about seventy feet from the line of the leading marks, from which it may be inferred that the Towerfield when she grounded had at least twenty-eight feet of her bottom with water under it, because her starboard bilge was only forty-two feet from the line of the leading marks. At the trial, there was an issue of fact whether the Towerfield took the ground whilst proceeding on a steady course up the channel or whether before she took the ground she had lost steerage way and was set to leeward by the south-west wind on her starboard beam. On this issue the learned judge decided that the ship was coming up substantially parallel with the line of the channel and roughly in the position, with reference to the line of the leading marks and the line of the north dredging marks, which was occupied by her midships section when she was aground. This finding agrees with the evidence from the ship that she quietly came to rest when she took the ground and was not set to leeward.

It follows, therefore, that the ship stranded because Craig was deliberately bringing her up the channel in a position in which, as it turned out, there was insufficient water for her, and the first question for your Lordships' decision is whether Craig in doing this showed a lack of such care and skill as may be reasonably expected of a licensed Trinity House pilot.

Craig did not suggest that he told the helmsman to keep the ship on a course with the leading marks in line, or that the helmsman disobeyed any of his orders. He chose to come up to the northward of those marks because, as he said, he wished to counteract the freshet, which was coming down the river and would press on the ship's port bow as soon as the tide started to ebb. He knew that there was a bank which obstructed a large area across the south side of the dredged channel, and thought that if the ship was steered on the line of the leading marks a freshet which impinged on the north bank and was thrown off from it would strike the ship on the port bow and tend to push her head to starboard with the result that she would be set over to starboard and be in danger of getting ashore on the south bank before she could recover herself under port wheel. He considered that the safest way to navigate her up the channel was to keep the leading marks slightly open to the northward. The bush perch is erected about five hundred feet on the seaward side of the end of the north jetty, and he gave as another reason for keeping to the northward of the line of the leading marks in its vicinity that the ship had to round the end of that jetty under port wheel in order to enter the Prince of Wales' Dock, that the more he got to the southward, the sharper his turn would be, and that he was anxious not to have then to make too sharp a turn. Moreover, if he had the flood tide under him he might have to reverse his engines before starting to round under port wheel and this again would tend to cant his head to starboard, especially if he had no tug to assist him in his turning manoeuvre. The result of all these difficulties of navigation was that Craig, when he got near the bush perch, ceased to keep the leading marks in line and passed as near to the bush perch as he thought he could safely go. As he himself said: "You had to hug the perch very close to get up in the basin." He, therefore, did not keep on a course with the leading marks in line, and relied on his local knowledge in judging at which places in the channel there would be sufficient depth of water for the Towerfield to navigate safely to the northward of that line. His estimate was that at high water on that tide if he was within forty feet of the bush perch the ship would be afloat, but he intended to pass the perch at a distance of fifty to sixty feet. When the ship took the ground and remained stationary, her port bilge amidships was forty feet from the base of the perch.

Why Craig thought it was safe to take the Towerfield forty feet from the bush perch is not clear and his explanations differed from time to time. In his report to the pilotage authorities six days after the stranding he stated that the vessel grounded on an unknown ridge with her port bilge, and that the

grounding could have been avoided if the perch marking the north side of the channel had been placed more towards the edge of the channel. He admitted that, so far as he knew, the perch had always been in the same position. He said that his attention was always on the perch, which he used as a "lead in." He did not agree that the perch was merely a dredging mark. He also said that he was not aware that the perch was as far as forty feet from the edge of the dredged channel and thought it was a bit misleading to have it so far away from the edge. In his deposition before the receiver of wrecks he stated that the stranding might have been avoided if the marking perch was placed more towards the channel. At the trial he suggested that the proper thing to do would be "to take the perch off the foreshore and put it on the river side—remove it about twenty to twenty-five feet or so further towards the channel."

This evidence, if it is accurate, shows that he was ignorant of the actual position of the perch with reference to the edge of the dredged channel. The chart inset shows the bush perch fifty feet from the north limit of the dredged channel so that if the chart was relied on it would clearly be unsafe to take the ship within forty feet of it. Even on his own evidence, there does not appear to be any justification for Craig's idea that the perch was a navigational mark, indicating with any degree of precision where the edge of the dredged channel was or that he might expect to navigate the Towerfield forty, fifty or sixty feet to the southward of it. It is, indeed, reasonably plain that he placed no reliance on, and made no use of, the north dredging marks as an aid to his navigation. He says he could not see them because of factory smoke. His course was determined by the distance which he estimated his ship's port side was from the bush perch, and he was content to judge it by this factor.

A good deal of discussion took place in all the tribunals which heard the case as to whether the dredging marks should have been relied on at all inasmuch as it was said (i) that they were merely an indication to the dredger of the limits to which the channel was to be dredged; (ii) that, in any case, they did not mark, or, at any rate, could not be depended on as marking, a line up to which the channel indicated on the chart had been dredged; (iii) that they might indicate either the top of the bank lining the channel from which the ground would slope down to a less extended dredged channel, or the actual limit to which the full depth of the dredging extended. I should, I think, myself infer that they were meant to indicate the line up to which the full depth of the channel would extend and that a stranger to the port might be expected so to regard them, but the true conclusion is not of much importance as they played no part in the course actually chosen. It is undisputed that there was a considerable encroachment into the dredged channel alongside the south pier. Various estimates of its extent were made by those who gave evidence at the trial, but it is, I think, enough to record the statement of the harbour master that on Oct. 20 there was only a distance of eighty-one feet from the line of the leading marks to the bank which had formed in the southern half of the channel.

I am content, therefore, to accept the view that Craig knew that there was a bank of considerable dimensions on the south shore which justified him in keeping towards the north side of the channel, but that does not mean that he should be excused for taking his ship so far to the northward as he did. The facts established in reference to the north shore were that a bank had been in existence there from the month of February, that at one time it had extended as much as fifty feet into the channel opposite the bush perch, but that it had been dredged and materially reduced at any rate up to Oct. 8, but, as was corroborated by the stranding of the Towerfield, continued to exist, was seen by one of the other two pilots and by the harbour master, and might have been seen by Craig on Oct. 6 or 7 from the shipyard on the south shore, and on Oct. 17 from the north shore, though it then was two feet under water and was not visible from either of the other two points. Craig disputed its visual existence on Oct. 6 and 7, had not visited the north shore on Oct. 17, and said

generally that it was formed of silt which a succeeding freshet washed away, but he had made no inspection to see whether it was still there or not.

A The necessary conclusion from these findings is that Craig thought that the line of dredging marks was less than forty feet from the bush perch, knew there was from time to time an encroachment on the north side of the channel opposite that perch, trusted to its being washed away by the freshet, but took no steps to make a close inspection of its constitution or extent from its immediate neighbourhood either on Oct. 6 or 7 or on Oct. 17, and in any case trusted himself to be able to judge his distance from the bush perch by eye alone though an estimate of distance from a given point is notoriously difficult more particularly in the case of a moving ship. The fact is that usage had made him overconfident. He had, no doubt, piloted smaller ships up in safety and failed to take sufficient precautions when dealing with a ship of the size of the Towerfield.

B The question, then, is: Was his action negligent or a mere error of judgment? It may be said in his favour that he knew and feared the southern encroachment, that the freshet impinged on and was turned southwards by the north bank, so that it tended to push to the southward the bow of a ship proceeding up the channel, that some hugging of the northern shore was, therefore, justified and that for some days there had been a considerable freshet which might tend to diminish the northern encroachment, that he was proceeding up the river when the ebb tide was beginning and that the supplement to the WEST COAST OF ENGLAND PILOT contained the warning that with an ebb tide care is necessary to prevent the freshet catching a vessel on the port bow if the turn into the turning basin is not made early. Nevertheless, our assessors says that a safe course, and, indeed, the only safe course, would have been to follow the line of the leading marks. The assessors in the Court of Appeal, on the other hand, thought that no course was absolutely safe, but that to proceed a little to the north of that line was the best course which he could pursue. Ultimately, the matter is one for your Lordships' decision, and I should myself be content to accept the view that there was no substantial danger in proceeding up the channel in the conditions obtaining provided a course on, or somewhat, but not too far, north, of the leading marks was followed. But I do not agree with the contention that so great a divergence as, in fact, was adopted was permissible, and, in particular, that so close an approach to the north bank was justified, inasmuch as at least the possible, and, indeed, the probable, inference from observed or observable fact was that an encroachment existed, and had existed there for a considerable time. Still less excusable, in my opinion, was the trust which the pilot placed in his power to judge by the eye alone the distance of the bush perch from the line of his approach up the channel.

E In this last view, your Lordships have the advantage of confirming your impression from an answer given to a question put to our assessors. When asked:

G "Was it good seamanship for the pilot to judge his distance from the edge of the dredged channel by reference solely to the bush perch (a) apart from the conditions obtaining, (b) in the conditions obtaining, *i.e.*, a strong south-west wind and with freshet,"

H they answered "No!" to both these questions. With these answers I myself agree. So far, therefore, as the pilot is concerned, I suggest to your Lordships that the inset chart, and for that matter the observations and warnings to be found in the WEST COAST OF ENGLAND PILOT, are irrelevant in his case. Craig neither made use of nor placed any reliance on them. He was guided solely by his own experience and prepared even to take a risk. One of his answers in cross-examination may be quoted as exemplifying his willingness to do so. He was asked, "Although you could not see the bank on the morning of Oct. 17, you knew there was a bank there?" and he replied, "Well, I did not think there was anything like that to break the ship up."

The learned judge found that he knew there was a shoal at the north bank opposite the bush perch, and further that, had he availed himself of the opportunity of observing that part of the channel at low water on Oct. 6 and 7, he could not have failed to see that it was unsafe for the navigation of a ship of the Towerfield's size, and I agree with BUCKNILL, L.J., that he had evidence on which he could so find. It is not of course suggested that Craig knew that the place over which he was navigating was too shallow; but he did know of an encroachment in that neighbourhood and did not take due care to avoid it. A Having regard to the established facts, the argument presented on behalf of the respondents that the Towerfield should have been able to be navigated anywhere in the dredged channel has little relevance. The pilot, it is true, meant to shape his course within it, but he meant to do so by estimating his distance from the bush perch and not by the dredging marks, and, even if he had been guided by the latter, he ought not to have taken a line so close to them B or failed to allow for the possibility of silting.

I have dealt with this portion of the case at some length because in spite of one's natural sympathy with the pilot I find myself in disagreement with the findings of the majority of the Court of Appeal, and of the same opinion as BUCKNILL, L.J., and WILLMER, J. The question of the negligence of the harbour authorities presents less difficulty. All four judges who have considered C the matter are in agreement on this point.

No doubt, the appellants' task of keeping the approach dredged to the depth shown on the inset was rendered less easy of accomplishment by war-time conditions, and if their only fault had consisted in a failure to do so, I do not think I should find them to blame. It is the failure to warn rather than the failure or inability to act to which exception can be taken. It was suggested D on their behalf that a sufficient indication of the dangers to be met with were to be found in the warning contained in the supplement to the WEST COAST OF ENGLAND PILOT. Originally that publication had contained the statement that depths of $4\frac{1}{2}$ ft. are maintained in the basin and in the channel in the approach to it, but this assurance is qualified in the supplement when it says: "less depth will be found in places; owing to the difficulty of dredging in the E outer bar, depths of about one foot are common there." This phraseology, however, is, to my mind, totally inadequate to convey the information that there were banks on each side of the channel rising considerably above that height and extending some way into the channel itself. In the circumstances, in my view, a much clearer statement of the condition of the approach should have been given. But it is said that the harbour authority were not responsible F for inviting the Towerfield to enter the port of Workington. In war-time vessels were directed by the Ministry of Transport through its officials, and by them might be directed or diverted to any port. The only duty of the port authorities, therefore, was to keep the official in charge of their district informed of the position of their port, of its capacities and of any dangers to be avoided.

My Lords, I doubt whether the appellants fulfilled their duty towards entering G ships by passing on such information as they had, or ought to have had, to the Ministry. But, even if they were under no direct obligation to the ship herself, I am of opinion that they did not comply even with the lesser duty which they accept. The Ministry's official in charge of the port of Workington was a Mr. Motley. His headquarters were, I think, in London, but he was in constant communication, mostly by telephone, with the various ports to which his H responsibility extended. In the case of Workington, he states that he was well posted, and that he was pretty definite that, if there was any encroachment, Mr. Monkhouse, the harbour-master, would have stated it, but it appeared in cross-examination that the information which he received was in the form of figures showing, as he says, the latest height of silt in the fairway and the greatest height of silt where the vessel would have to navigate to enter the port. Mr. Motley did not speak of any information which he received except in this

general way. He did not particularise the facts transmitted to him, and I should not myself regard his evidence as meaning more than that he was told the depth of water which might be expected over the bar and in the channel for a vessel keeping substantially on the line of the leading marks, but as making no reference to the serious encroachments which ate into both the north and south sides of the dredged channel. It was on this information that he directed the Towerfield to Workington and he may well have been justified in doing so, being ignorant of any peculiar difficulty in entering the port, and trusting the harbour authority to ensure that the master was fully informed of the course he would have to follow and the dangers to be avoided. However that may be, any information supplied to him did not, in my opinion, absolve the appellants from putting the condition of the channel fully before the master of a vessel entering the port so that he might consider the expediency of entering, and the dangers which might necessitate his intervention with the navigation of the ship by the compulsory pilot. To determine what he would have done had he been fully informed is a speculative inquiry when the event and its consequences are already known, and the inference to be drawn as to his conduct would not, in my view, have been resolved by asking him to give his reactions at the time of the trial of the case. Action on his part would only have been justified in a moment of crisis, nevertheless he might have refused to go in or have refused to allow the vessel to be navigated so far to the north of the channel, but I do not think it can be said that the accident would not have happened but for his ignorance. He was not to blame, but the pilot was and the pilot's fault was at least a cause of the disaster.

The appellants' negligence, however, was not confined to a failure to warn the respondents of facts within their knowledge. They also failed to use due diligence to ascertain the facts with which they should have been acquainted. The soundings, as the learned judge has found, were taken in a hasty and slipshod manner, but even so they showed the accretions on the north and south. Moreover, no soundings had been taken since Sept. 22, and no dredgings had been done on the north side after Oct. 9. On these facts, the learned judge, as BUCKNILL, L.J., points out, found the appellants to blame for failing to maintain the width and depth of the channel advertised (thereby rendering the published information misleading), in failing to ascertain by proper and regular soundings what obstructions existed in the channel and exactly where they were, and in failing adequately to warn the users of the port of dangers which the harbour authority knew or ought to have known. To these faults the lord justice adds the failure to warn the owners of the ship or their agents (including the pilot Craig) of the lack of sounding after Sept. 22, and of dredging after Oct. 9. In answer to these charges, the appellants rely on the contention that the pilot was intimately acquainted with the port and that he knew, or at any rate they were entitled to assume that he knew, its exact condition. I do not think that such an assumption was justified. It was not true in fact, and, even if he owed a duty to acquaint himself with its shortcomings, they, I think, owed a duty to warn any incoming ship whether that duty was imposed by contract or by invitation. It may well be that it is the duty of a pilot to acquaint himself with all the conditions of a port which are reasonably within his acquirement. In the present case, I doubt whether he was able himself to ascertain all the facts, but, even if he was and did not do so, I should hold the harbour authority in fault. They knew that, on the information which they had supplied, a ship of the Towerfield's draft might be directed to Workington by Mr. Motley. They had received notice that she had been so directed, and knew that by the regulations of the port she must be navigated by a compulsory pilot. In these circumstances, in my view, it was their duty to the ship, even if they owed none to the pilot or to Mr. Motley, to see that the pilot which she was compelled to take and the official whose duty it was to direct her to a particular port had full information of the conditions with which she would meet. For these

reasons, which but repeat those which influenced the minds of the judge of first instance and the Court of Appeal, I should hold that the harbour authority were guilty of negligence.

The learned judge, however, though he found both parties negligent, nevertheless was of opinion that the disaster was brought about by the fault of the pilot alone and not by that of the harbour authorities. If the appellants had taken steps to ensure that Craig was supplied with the full information at their disposal and had not assumed that he would find out the facts for himself this result might follow, but they did not do so. Their failure to warn him was always a factor contributing to the loss of the ship and continued to exert its influence until she went ashore. As in the case of *The Eurymedon* (1), and that of *The Boy Andrew (Owners), Ltd. v. St. Rognvald (Owners), Ltd.* (2), it had not ceased to play its part before the final *dénouement*. It is no answer to say that the pilot could have inquired and, therefore, had means of ascertaining what were the actual conditions of the channel. If the only duty owed by the harbour authorities was to the pilot, this fact might afford them some excuse, but, in my opinion, it was for them *vis-à-vis* the ship to ensure that the compulsory pilot who must be employed was furnished with the requisite information to enable him to bring her in safely. If he had been informed of the northern encroachment he would almost certainly have taken a safer course, and the Towerfield, like the Ashbury, have reached the dock in due course. It follows that, in my view, both the pilot and the appellants were negligent. The owners and their master, however, were not implicated, and the question then arises whether they are infected with the wrongdoing of Craig. Here, again, all the members of both courts who have heard the case are in agreement.

Under the rule of the common law as it stood in October, 1941, the owners and the harbour authority would alike have been precluded from recovering if the pilot is to be regarded as the servant or agent of the former. On the other hand, being a compulsory pilot he would not have been so regarded before Jan. 1, 1918. Up to that date, under the Merchant Shipping Act, 1894, s. 633, a shipowner was expressly excused from being affected by the fault of a compulsory pilot, but by the Pilotage Act, 1913, s. 15, which came into force on Jan. 1, 1918, it was enacted that:

“(1) Notwithstanding anything in any public or local Act, the owner or master of a vessel navigating under circumstances in which pilotage is compulsory shall be answerable for any loss or damage caused by the vessel or by any fault of the navigation of the vessel in the same manner as he would if pilotage were not compulsory.”

On this language it was urged on behalf of the owners that the only effect of the change in the law was that they would be liable for any loss or damage to other persons which was caused by the negligent navigation of their ship in a case where negligence was to be imputed to them, but that, on the other hand, the provisions of the section did not prevent them from recovering in respect of any damage from which they themselves had suffered. They were to be liable to the others because they were answerable to them, but, it was contended, to say that an owner was “answerable” presupposed a claim on him, and in no way prejudiced a claim by him. A claim on him he could not resist, but, if there was a claim by him, his remedy was not affected. The problem has been dealt with by BUCKNILL, L.J., in a careful and exact consideration of the Act itself and of its predecessors, from which he comes to the conclusion that both parties are affected by the terms of the Act. SCOTT, L.J., with whom ASQUITH, L.J., agreed, reached the same conclusion from his knowledge of the object which the Act was intended to bring about coupled with the consideration that, inasmuch as, in his view, its terms were ambiguous, the court was entitled to resolve that ambiguity by referring to the end aimed at.

My Lords, I arrive at the same result, but by a somewhat different method

of approach, and on what I believe to be the true construction of the Act itself. The section says that the owner or master shall be answerable for any loss or damage caused by the vessel or by any fault of the navigation of the vessel. In the present case, the damage to the Towerfield was, undoubtedly, caused by faulty navigation, but when the Act says that the owner shall be answerable for that faulty navigation, it has to be determined whether "answerable" means more than that the damage, whether done to or done by his ship, is his responsibility, or is confined to damage done by the ship. Either view, no doubt, is theoretically possible, but I do not think that, read in its context, the use of the word "answerable" would naturally convey the suggestion that, though the shipowner is liable for any damage done by the pilot's fault, yet he can recover for his own damage in full. "Answerable", as I think, simply means "responsible," and a shipowner, who through a compulsory pilot is responsible for faulty navigation, is responsible for damage to his own ship as well as for injury to the property of another. It follows that neither pays for the damage which has been done to the other, nor can recover his own damage from the other who is implicated.

In so far as the respondents' claim is said to fail by reason of a tortious act on the part of the pilot of the ship, the majority of the Court of Appeal accept this construction of the statute, but, in their opinion, the liability imposed on the shipowner for the negligence of a compulsory pilot has no application to an action in contract, and in this case they have held that, inasmuch as the inset chart was issued by the Admiralty at their instigation, the appellants offered to receive any ship entering or intending to enter the port of Workington on the terms that the channel was safely dredged to the extent indicated on the chart, and that that offer was accepted by the Towerfield by entering the port.

My Lords, for the purpose of this decision, and without staying to consider its accuracy, I am prepared to accept the suggestion that such a contract was so formed, but I do not find myself able to agree with the contention that the withdrawal of the protection given to ships employing a compulsory pilot affects only cases where a claim in tort is made. Taking the view which I do that on the true construction of the Act a shipowner is, after the beginning of 1918, to be responsible for the acts of a compulsory pilot, I do not find myself influenced by a consideration of the history of the negotiations leading to a change in the law. The provisions of the Act, as I think, themselves plainly attribute to shipowners liability for the fault of a compulsory pilot in all cases, and I can, therefore, see no reason for differentiating between contract and tort, more particularly as this appears to have been accepted as the correct view from the time when the Act came into force until the present day.

There remains, however, to be determined the contention put forward by the appellants that, though their negligence may be one of the causes of the disaster, yet they can recover by reason of the terms of the Harbours, Docks, and Piers Clauses Act, 1847, s. 74. Its material words run as follows:

"The owner of every vessel . . . shall be answerable to the undertakers for any damage done by such vessel . . . or by any person employed about the same, to the harbour, dock, or pier . . . and the master or person having the charge of such vessel . . . through whose wilful act or negligence any such damage is done shall also be liable to make good the same . . . Provided always, that nothing herein contained shall extend to impose any liability for any such damage upon the owner of any vessel, where such vessel shall at the time when such damage is caused be in charge of a duly licensed pilot whom such owner or master is bound by law to employ and put his vessel in charge of."

The section has, my Lords, been considered at least four times and has twice been fully discussed. Had I been left without guidance, I should myself have thought that one of two broad constructions might have been adopted. (i) It

might have been held that the shipowner was liable as an insurer whenever the damage inflicted on the harbour works was done by his vessel. At the time when the section was enacted and until the Pilotage Act, 1913, came into force, the harshness of such a result was mitigated by the fact that the owner was exempted from liability when the vessel was in charge of a compulsory pilot, but the fact that that limitation on his liability has now been withdrawn cannot affect the construction to be placed on it. (ii) It might have been decided that the Act was procedural and that liability was only imposed in case the navigation of the vessel was in fault. In the first reported case *Dennis v. Tovell* (3), a Divisional Court, in deciding a Case stated by justices, entertained no doubt that liability existed though the damage was the result of inevitable accident without any fault of those in charge. In the *River Wear Comrs. v. Adamson* (4), however, where the matter was fully discussed, LORD GORDON took the first view and LORD CAIRNS, L.C., the second. The other noble lords agreed with LORD CAIRNS in holding the shipowner not liable, but with considerable doubt and in the case of the majority, as I think, because that liability only attached where the ship was still in charge of and controlled by some person. This, at any rate, seems to have been the reasoning on which the Court of Appeal acted, and your Lordships' House approved their judgment.

The next case to reach your Lordships' House was *Great Western Ry. Co. v. The Mostyn (Owners), The Mostyn* (5), but before that case was considered ROCHE, J., in *Det Forenede Dampskibs Selskab v. Barry Ry. Co.* (6) followed the decision in the *River Wear* case (4) in holding a shipowner not absolutely liable, but excused in a case where the damage to the harbour works was, in part at least, caused by the fault of the harbour authority. As I read the decision in *The Mostyn* (5), however, the majority of their Lordships took the view that the shipowner was responsible for damage done to harbour works whether he was in fault or not, save in a case similar to that decided in the *River Wear* judgment (4). Accordingly, where the ship had been abandoned and was therefore out of the control of its owners, they agreed that no liability attached under the section. But save for that concession they decided in terms, as I think, that the only exception from liability was that afforded to an abandoned ship.

My Lords, until *The Mostyn* (5) decided the true effect of the wording of the section, a profound difference of view as to its construction was to be found among those who practised in that branch of the law which is devoted to shipping matters, but that dispute has now been decided on broad lines, and like VISCOUNT DUNEDIN, who, though he was of the other opinion, expressed his satisfaction that a clear rule for future cases had been laid down, I cannot think that fine distinctions should be introduced which would limit the generality of the decision which has been reached. I would only add that, like those of your Lordships who are of the same opinion, I would limit the damages to the damage directly caused to the harbour in which, as the respondents concede, is to be included the restoration of the channel to the condition in which it was before the stranding of the Towerfield, but I would not embrace among them anything for any loss of revenue to which the appellants have been put thereby. Save to this extent, I think the claim and counterclaim fail. I would, accordingly, allow the appeal, and dismiss both claim and counterclaim except in so far as direct damage as indicated above has been caused by the Towerfield to the appellants' harbour. Each party should I think pay his own costs throughout.

LORD NORMAND: My Lords, the appellants are a statutory body owning Workington harbour to which they invite shipowners to send their ships for loading and unloading on condition of paying harbour rates and dues. The invitees are entitled to assume that the appellants will exercise reasonable care to prevent the peril of damage to ships resorting to the harbour from any

unexpected danger of which the appellants knew or ought to have known. The duty of invitees and their servants or agents is to navigate the ship with care and skill in conformity with the standard of good seamanship: *Anchor Line v. Dundee Harbour Trustees, The Circassia* (7) (1922. S.C. (H.L.) 83).

A Whether there was a contract between the appellants and the respondents that the Towerfield should discharge in the appellants' dock is uncertain. The evidence for it is imprecise and vague, and it is difficult to discover how or by what agency privity of contract was established and impossible to discover what were the terms of the contract, if any, and whether it included any warranty as to the depth and width of the channel, by which vessels entering the harbour approached the dock. Mr. Motley, an official of the Ministry of War Transport, and Mr. Highton, the managing trustee of the appellants' board, gave evidence about the arrangements between the board and the Ministry, the charterers of the Towerfield. Mr. Motley said that he received daily from the manager of the board, Mr. Monkhouse, a berthing statement showing the vessels in the port, the dates of berthing and the dates when they expected to finish, with a note giving the amount of silt in the fairway of the channel. He appears to be referring to the depth of water at the bar and not to lateral encroachments further up channel which narrowed it without closing it. With that information before him, he recommended to the shipping diversion room that the port could accommodate a particular vessel. Mr. Highton said that if the channel was obstructed, the appellants advised the Ministry of War Transport and the Foreign Ore Control Department and said: "We have this obstruction or this lack of depth; we may not get it away for ten days, fifteen days or three weeks," and that was their guide to routing vessels to Workington. He undertook to produce evidence in writing that warning had been given of encroachment at the side of the channel, but nothing was produced. There is nothing material in the statement of Mr. Monkhouse. It is not proved that any communication was made to the owners of the Towerfield, except a direction from the Ministry to her master to proceed to Workington, and there is no evidence that any warranty about the condition of the channel was given by E the appellants to the owners or to any servant or agent of the owners.

The respondents attempted to build up a special contract with a warranty of depth on the inset plan on the Admiralty chart and the WEST COAST OF ENGLAND PILOT, 1933, and 1941 supplement, which were on board the Towerfield and which the master had studied before he decided to enter the channel. A note on the inset plan stated that F

"in the approach channel and turning basin, within the pecked lines, a depth of $4\frac{1}{2}$ ft. at chart datum is maintained by dredging (1933)."

A depth of $4\frac{1}{2}$ ft. at chart datum corresponds to seven feet below low water of spring tides and is the depth of the sill of the dock for which the Towerfield was destined. If that depth had been maintained there would have been G thirty-one feet, six inches, of water everywhere in the channel when the Towerfield entered it at high water on the morning of Oct. 19, 1941, and, with her draft of twenty-four feet aft, she would have had more than seven feet of water under her. The WEST COAST OF ENGLAND PILOT, 1933, and 1941 supplement, modified the note on the inset plan. It contained a note that a depth of $4\frac{1}{2}$ ft. was

H "maintained as far as possible by dredging in the turning basin and the channel in the approach to it; but less depth would be found in places owing to the difficulty of dredging in the outer bar; depths of about one foot are common there."

The information about the depth in the channel in these publications had been furnished by the appellants for the purpose of publication in them.

The uncertain effects of wind, weather, tide and unpredictable casualties

are adverse to the idea that Admiralty charts are intended to constitute a standing offer carrying a warranty that ships entering the charted ports will find the same conditions as those indicated by the symbols or printed directions on the chart. The charts are subject to modifications published in notices to mariners and in official publications, such as the WEST COAST OF ENGLAND PILOT, and in later prints or editions of the charts themselves, but it is not possible for publication to keep abreast of events, nor for all ships to have on arrival from a foreign port the latest publications. A depth which is maintained by dredging must vary from time to time, because dredging may be interrupted by conditions not within the harbour authority's control. The intention and purpose of notices like the notice of depth on the inset plan is to invite vessels of suitable draft to load or discharge in the harbour. There is a representation that the harbour authority is endeavouring, and will endeavour, to maintain the indicated depth by dredging, and it is no more than a representation without contractual intention or effect. In *Williams v. Swansea Harbour Trustees* (8) and *Bede S.S. Co. v. River Wear Comrs.* (9) advertisements of the depth of water at a dock sill had been published by the harbour authorities themselves and on their own responsibility. It was held that there was an implied warranty that there was a safe ingress and egress for vessels loaded up to the standard indicated by the advertised depth of the water on the dock sill. Commercial advertisements published by a harbour authority are not in *pari casu* with official charts and sailing directions, and the present case is not ruled by the cited decisions. I think that there was no contract, but that the appellants, knowing that the masters of ships would be led to expect, from their study of the chart and sailing directions, to find a fairway of about the width and depth indicated, were bound to give warning of dangerous obstructions of which they were or ought to have been aware. A

The main question is, therefore, whether the parties performed the duties incumbent on them as invitor and invitee respectively. WILLMER, J., held that the respondents had proved a want of reasonable care in three respects: failure to maintain the width and depth of the channel, failure to ascertain by properly carried out and regular soundings what obstructions existed in the channel and exactly where, and failure adequately to warn users of the port of the dangers of which, as harbour authority, they knew or ought to have known. To these three findings of negligence and failure of duty, BUCKNILL, L.J., added a fourth, that the appellants failed in their duty to warn the owners of the ship or their agents (including the pilot Craig) that they had taken no proper steps by sounding since Sept. 22 to ascertain what the state of the channel was and what obstructions, if any, were in it and that the dredgers had not been at work on the north side of the channel since Oct. 9, 1941. E

The facts relevant to these findings are not disputable. On Oct. 19, 1941, on the south side of the channel in the neighbourhood of the bush perch, a shoal extended about eighty feet into the channel and opposite it on the north side the shoal on which the Towerfield came to grief extended about twenty feet into the channel which was thus reduced to a width of about 155 ft. of navigable water. These shoals had long given trouble to the appellants, who had endeavoured to reduce them by dredging. On the south side, south-west winds cause a drift of slag and rubble which sweeps along the coast and round the end of the south pier and is deposited along the southern edge of the channel. On the north side, floods in the river Derwent cause a deposit of silt along the edge of the channel. Since February, 1941, the appellants had known that the shoal on the north side was a serious encroachment, and had from time to time reduced it both in extent and height by dredging. But dredging was, for reasons for which the appellants were not responsible, not regularly carried out, and the dredger was not employed on this shoal between Oct. 9 and Oct. 19. The obligation to remove obstructions is an alternative obligation; the harbour authority must either remove the obstructions or they must take reasonable G

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care to warn the owners of vessels which they invite to the port of any obstructions which are, or ought to be, known to themselves and which may create an unexpected danger. Soundings were necessary for the purpose of directing the dredgers, and for the purpose of discharging the duty of warning it was necessary that the soundings should be carefully taken so as to determine the height and extent of the obstructions. But the soundings were hurriedly and negligently taken. The means at the disposal of the appellants were poles about fifteen or twenty feet long, and they could only be used at low spring tides. Yet on frequent occasions spring tides were allowed to pass without taking soundings. The last soundings before the stranding of the Towerfield were taken on Sept. 22, 6 and 7 was neglected. No sufficient care was taken to fix the position of the soundings or to define the limits of the encroaching shoals. But, such as they were, the soundings showed that in wet weather, when the river was in flood, a considerable increase in the height and area of the shoal on the north side might take place unless dredging was regularly kept up.

The harbour master knew about an hour and a half before she entered that the Towerfield's draft was not less than twenty-four feet. He also knew that no tug would be available to assist in her navigation. Yet he made no attempt to warn her master of the gross obstructions in the fairway. The explanation offered is that he assumed that the pilot knew all that needed to be known about them, and that the pilot would inform the master. He was not entitled to make these assumptions, and the appellants must be held to have failed to perform the duty owed to the Towerfield's owners.

The pilot also is a user of the harbour, and the appellants were under a duty to warn him as well as the master of the Towerfield against any unexpected dangers affecting the navigation of the channel. But the pilot was not a stranger to the port and it was his business to make himself familiar with the conditions affecting safe navigation within it. The appellants were not bound to warn him of dangers of which any competent pilot ought to have known, for the measure of the duty to warn of unexpected dangers must depend on the qualifications and presumable knowledge of the person to whom the duty is owed. But there is one respect in which I think it is proved that the appellants failed in their duty to the pilot. It is not enough that a pilot should know of the existence of obstructing banks. He should know as accurately as is reasonably possible the limits of the navigable water in the channel. That knowledge was not available to him because the appellants, as has been shown, neglected their duty. The neglect can be brought to a precise date, for the learned judge has held that there was no reason why soundings were not taken on Oct. 6 and 7. I agree with the finding, and my conclusion is that there was here a breach of the duty owed to the pilot in failing to make available to him records of reasonably accurate soundings taken at the latest practicable date.

Next, did the pilot perform his duty of navigating the Towerfield with care and skill as a good seaman would? He was not misled by the inset plan on the Admiralty chart, and he relied on his own knowledge of the harbour and the channel and on his experience and skill. He entered the channel on the north side of the line of the leading marks at slack water of high tide. His speed was $2\frac{1}{2}$ to 3 knots. His intention was to pass the bush perch at a judged distance of fifty-five or sixty feet from the port side of the ship, and he says that he believed he could pass with safety at a distance of forty feet from the perch. He meant to turn to port at a short distance up channel from the perch. He says that he had often come up in this way, hugging the perch. The reason which he gives is that if the vessel were further to the southward the freshet from the river would tend to force her bow to starboard and to carry her towards the shoal to the south. When the Towerfield took the ground her port bilge keel was forty feet from the perch and was only four feet south of the line of the dredging marks, which approximately indicates the northern limit of the

channel. Craig professed less knowledge of the conditions of this small harbour than I think he must have had, but at least he knew that there was a shoal on the north side of the channel at the perch, and in one of his answers in cross-examination he said, "Well I did not think there was anything like that to break the ship up." The nautical assessors have advised us that it was not good seamanship for the pilot to trust to his ability to judge his distance from the edge of the channel solely by reference to the bush perch, and to take the ship as close as forty feet from it, if he knew of the tendency for a bank to form on the north shore. I agree with this advice. The fact that the pilot committed an error of thirty per cent. in judging his distance from the perch demonstrates how imprudent it was to trust to his judgment of distance from it. I think it is probable that he failed to allow for the effect on the ship of a strong south-west wind. The excuse given by him for keeping so close to the northern edge of the channel—that the freshet might have forced the ship to southward—raises a question of seamanship, and we are advised that he should have kept to the line of the leading marks. The experience of the pilot who safely brought in the Ashbury on a line only twenty feet north of the leading line may not altogether dispose of Craig's alleged fear of the effect of the freshet, because the tide was still making when the Ashbury came in, and the force of the freshet is greater at slack water. But a third pilot, Tennent, testified that he usually came in slightly to the south of the leading line until he was as far up as the bush perch and that, so long as the ship was on a course 130° true, which is the bearing of the leading line, she would have the freshet ahead till she reached the bush perch, and when she passed the bush perch she would have the freshet on her port bow. Craig also attempted to justify his navigation by saying that the harbour master had instructed the pilots to keep to the north, but this part of his evidence was not accepted by the learned judge. He further said that the freshets tended to clear away the north shoal. But if this had sometimes occurred in certain conditions of tide and weather, it is proved that in the period from February to October, 1941, the bank persisted and tended to increase with the freshets. The conclusion to which I have come is that the pilot was at fault, that he ought to have kept to the line of leading marks and that the excuses put forward by him for the course which he took are displaced by the evidence. A B C D E

WILLMER, J., held that the fault and negligence of the appellants did not contribute to the casualty because a careful and skilful pilot with Craig's knowledge of the harbour and channel could have avoided the accident. Whether a particular fault or negligence has contributed to the causation of an event is a question of fact, and the answer is in most cases an inference drawn from all the relevant circumstances. The appellants were in breach of a duty which they owed to the shipowners and to the master of the ship as representing them. It was a duty to warn against perils not to be expected by strangers to the port. It is necessary to bear in mind that before the ship entered the area of compulsory pilotage and before the navigation was handed over to the compulsory pilot a question arose whether it was prudent to enter the channel at all, and that even after the compulsory pilotage area was entered the ship's master was not deprived of all responsibility and of all power to act to prevent damage to his ship. The master is not merely entitled, but is bound, to point out to the compulsory pilot that he may be mistaken in an opinion he has formed: *The Tactician* (10). He is also entitled, in order to avoid immediate peril to take the navigation out of the hands of the pilot, but, if he does so, he must be prepared to shew justification: *The Prinses Juliana, Esbjerg Owners v. Prinses Juliana Owners* (11). Unfortunately, these considerations were not dealt with in the judgment of WILLMER, J., when he was assessing the part played by the appellants' negligence in bringing about the stranding. F G H

If the master had known about the shoals near the perch which encroached

on the channel, the question whether to enter the port would have been much more difficult for him than it seemed on the evidence before him on the morning of Oct. 19. It was said that he ought to have been asked what he would have done if he had been told of the existence and extent of the obstructing shoals. Such a question, though not, in my opinion, incompetent, would have been of little value to the court. Being a hypothetical question it would not have elicited a fact as imprinted on his memory, but an expression of opinion coloured by the event which has led to this litigation. The court must proceed on the probabilities; and if the case had been free from the complications brought about by war, the question what the master would have done would have admitted of an easy solution. The advice which we have received from our assessors is that a skilled master would not have agreed as a good seaman to bring the ship up at all if he had been told of the existence of a bank on the south shore extending about eighty feet into the channel, and the existence of a bank on the north shore extending about twenty feet into the channel in the position shown on the plan. I agree with that advice, and I consider that the master of the Towerfield is entitled to be treated as a skilled master and a good seaman. But the issue is complicated by circumstances not within the realm of seamanship. The master had to weigh the risk of damage to his ship and cargo by mine or torpedo if he stayed outside and he had to bear in mind that delivery of the cargo was urgent and important for the production of munitions. It is not easy to estimate what the master would probably have done. The harbour master, who had fuller knowledge of all the circumstances and whose statement seems honestly made, expressed the opinion that in the conditions of tide and weather he should not have attempted to enter without a tug. It is legitimate to take account of that evidence, and of the evidence that there would have been no delay in unloading the Towerfield's cargo if she had entered port the next day. The harbour master naturally emphasised the importance of the tide and weather conditions and the absence of a tug, but these in themselves could not, I think, have presented great difficulty to the passage of the ship through an unobstructed deep channel 250 feet wide. It was the existence of the obstructions in combination with the conditions of weather and tide and with the absence of a tug that made the navigation of the channel hazardous. On the whole it is fair to conclude that a prudent master would have refused to go in on the morning of Oct. 19. But I am convinced that, if he had consented to go in knowing the position and extent of the obstructions, he would not have allowed his ship to be steered along the northern edge of the channel and close to the bush perch, and the Towerfield would not have been stranded. I am, therefore, of opinion that the appellants' breach of the duty of reasonable care which they owed to the owners and the master of the Towerfield contributed to the stranding.

The pilot's negligence also contributed. Even with the knowledge which he had, his navigation was negligent and it brought the Towerfield to disaster on a bank, the existence of which was known to him, though he did not know how far it encroached into the channel. It is not necessary to decide whether the pilot was negligent in failing to take more accurate observations of this bank at low water, particularly on Oct. 6 or 7. If the appellants had done their duty on these dates, precise information would have been available to him about the then limits of the bank and observations by him would have been unnecessary. The truth is that with the knowledge which he had the pilot's navigation of the ship was negligent, but with the knowledge which ought to have been available to him if the appellants had done their duty, no man in his senses would have brought the ship so close to the bush perch. The appellants' default of duty towards the owners of the Towerfield and their default of duty towards the pilot and the pilot's negligence in navigation are so closely interwoven that it is not possible to single out one of them as the real cause of the casualty, and all must be held to have contributed.

The respondents have posed a question on the construction of the Pilotage Act, 1913, s. 15, which has not hitherto been decided. The section enacts :

"(1) Notwithstanding anything in any public or local Act, the owner or master of a vessel navigating under circumstances in which pilotage is compulsory shall be answerable for any loss or damage caused by the vessel or by any fault of the navigation of the vessel in the same manner as he would if pilotage were not compulsory. (2) This section shall not take effect until Jan. 1, 1918, or such earlier date as His Majesty may fix by Order in Council, certifying that it is necessary to bring the section into operation in order to enable His Majesty to comply with an international convention. (3) As from the date of the coming into operation of this section, s. 633 of the Merchant Shipping Act, 1894, shall cease to have effect."

The respondents admit that a shipowner is "answerable" in a claim against him by a harbour authority for damage caused by the negligence of a compulsory pilot in navigating the ship, but they deny that s. 15 applies in a claim by a shipowner against a harbour authority. In that claim they say that the common-law prevails and that the shipowner is not "answerable" for the contributory negligence of a compulsory pilot.

Article 5 of the International Convention for the Unification of Certain Rules of Law Respecting Collisions which was signed at Brussels in 1910 ((1911) Cmd. 5558) provided that:

"The liability imposed by the preceding articles attaches in cases where the collision is caused by the fault of a pilot, even when the pilot is carried by compulsion of law."

Although the Maritime Conventions Act, 1911, amended the law so as to bring into operation the rules for division of loss in collisions and some other changes of the law agreed on at Brussels, it did not abolish the defence of compulsory pilotage. That was not done till the Pilotage Act, 1913, s. 15, came into operation on Jan. 1, 1918. But s. 15 is not limited in its scope to collision actions, and the Merchant Shipping Act, 1894, s. 633, which, under s. 15 (3), ceased to have effect on Jan. 1, 1918, was also a section of general scope and not limited to collision actions. Section 633 enacted that:

"An owner or master of a ship shall not be answerable to any person whatever for any loss or damage occasioned by the fault or incapacity of any qualified pilot acting in charge of that ship within any district where the employment of a qualified pilot is compulsory by law."

The wording of s. 15 is not happy. The word "answerable" is not the cause of the difficulty, and it is merely the equivalent of "responsible." But the words "answerable for any loss or damage caused by the vessel," though apt when the claim is against the owner of a ship, are incapable of applying when the claim is by the owner for damage done to his ship. The words "answerable for any loss or damage caused by any fault of the navigation of the vessel" are ill chosen and clumsy, but they are capable of applying to the shipowner's claim. No logical reason was put forward by the respondents for a construction which leaves compulsory pilotage still available as an answer to the plea of contributory negligence, and in collision actions since 1918 the compulsory pilot has been treated in all questions of fault as if he were the servant of the owners of the vessel under his charge. In *Thom v. Hutchinson (J. & P.), Ltd.* (12) the representatives of a ship's engineer, who was drowned in consequence of negligent navigation by a pilot within a compulsory pilotage area, claimed damages from the owners. The owners pleaded, *inter alia*, that the engineer and the compulsory pilot were fellow servants. The First Division of the Court of Session dismissed the action as irrelevant. LORD CLYDE (Lord President) founded his judgment on s. 15, and he held (1925. S.C. 393) that it

created the relation of master and servant between the shipowner and the pilot, "with all the legal qualifications attaching to it." LORD CULLEN said (*ibid.*) that the effect of the section "is that the liability of the owner is to be the same as if the pilot on board had been voluntarily employed," and that "the compulsory pilot is to be regarded under this enactment as the servant of the owner." I respectfully agree with the decision and with the reasoning of these learned judges. The judgment of SIR FRANCIS JEUNE, P., in *The Adam W. Spies* (13), construing s. 633 of the Merchant Shipping Act, 1894, also supports the view that the words "answerable for damage caused by the fault" of a compulsory pilot are broad enough to cover both a defence to an action brought against the ship and an answer to a defence of contributory negligence.

I, therefore, respectfully agree with the judgment of BUCKNILL, L.J., on this question and I am unable to take the view which commended itself to SCOTT and ASQUITH, L.JJ., that the Pilotage Act, 1913, s. 15, does not apply when a shipowner is suing or being sued in contract.

The appellants' claim, as founded on the Harbours, Docks, and Piers Clauses Act, 1847, s. 74, remains for consideration. The material words of this section are:

"The owner of every vessel . . . shall be answerable to the undertakers for any damage done by such vessel . . . or by any person employed about the same, to the harbour, dock, or pier, or the quays or works connected therewith, and the master or person having the charge of such vessel . . . through whose wilful act or negligence any such damage is done shall also be liable to make good the same . . . Provided always, that nothing herein contained shall extend to impose any liability for any such damage upon the owner of any vessel, where such vessel shall at the time when such damage is caused be in charge of a duly licensed pilot whom such owner or master is bound by law to employ and put his vessel in charge of."

The proviso has been impliedly revoked by the Pilotage Act, 1913, s. 15 (1). Section 76 of the Act of 1847, *inter alia*, gives a remedy over to the owner who has had to make satisfaction for any such damage wilfully or negligently done by the master or person in charge. Section 74 was considered by this House in *River Wear Comrs. v. Adamson* (4). The decision was that the commissioners were not entitled to recover the cost of damage done to a pier when a wreck from which the crew had been removed was driven against it by the wind. The speeches of the noble and learned lords who decided the case left considerable doubt both about the *ratio* of the decision and about the construction of the section.

In *The Mostyn* (5), this House had again to construe the section and to consider the speeches delivered in *Adamson's* case (4). The House was not unanimous, but the majority held that the owner of a vessel doing damage to a harbour, dock or pier is responsible to the undertakers for the damage whether occasioned by negligence or not, and explained that in *Adamson's* case (4), the ground of decision was that the section did not extend to damage by a derelict ship which was no longer under the control of any human agency. VISCOUNT HALDANE said ([1928] A.C. 63):

"The words, taken by themselves, are unambiguous. The owner is to be liable for any damage done to the undertaking. My Lords, if the language of this section could legitimately be construed by us who sit here without regard to authority, I should find difficulty in saying that the appellants were not entitled to claim that it applied . . . But we cannot proceed here on this simple view. It has been established by a decision which is binding on us by this House that the language must be interpreted as subject to some qualification which is implicit in the words,

and the question which alone we are free and bound to examine, is what this qualification is, and how far it extends."

Towards the end of his speech he states the qualification thus (*ibid.*, 71):

"We appear to me to be bound by the authority of the *Adamson* case (4) to hold that the section in question is not to be read literally, but as applying when the damage complained of has been brought about by a vessel under the direction of the owner or his agents, whether negligent or not. The decision further exempts the owner when the vessel is not under such control but is for instance derelict."

LORD SHAW OF DUNFERMLINE said (*ibid.*, 87):

". . . I must in duty declare that this statute seems to me still to abide in its full and comprehensive application of liability to owners, but that, in deference to *Adamson* (4), the sole exception, plus the statutory exception of pilotage, is the derelict or abandoned ship case. Respect must be had alike (1) to the statute in its express and general effect and (2) to the decision of this House of an implied and particular exception. Such an exception ought not to be extended or expanded. This House and courts of law should resist that."

LORD BLANESBURGH said (*ibid.*, 106):

"The result, in my view, is that the owner of a vessel has, under this section, been made answerable to the undertakers for the damage referred to in the section, with no obligation on the part of the undertakers to prove more against him than that the damage was done by his vessel and that he was her owner at the time. To such a claim when so far proved only two defences are open to the owner: (a) the pilotage exception; (b) that the damage was in fact attributable to the agency of what, in the language of a simpler age, is known to the law as an act of God."

My Lords, it may be that the description "act of God" was used in this last sentence with less than LORD BLANESBURGH'S usual accuracy, but it is sufficiently clear that the majority of the House were laying down as matter of general construction that the section imposed on the shipowner a statutory obligation from which he can only escape, since the Pilotage Act, 1913, came into effect, by bringing himself within the decision of *Adamson's* case (4). VISCOUNT DUNEDIN ended his speech by saying (*ibid.*, 77):

"Although I am not in agreement with the majority of your Lordships . . . I am glad that there will at least be a clear rule for future cases—namely, that the action which led to the damage must be action attributable to human agency, but, that being found, that the words of the section remain absolute."

VISCOUNT DUNEDIN'S view that the judgment of the House had finally cleared away all doubt about the meaning of the section by construing it as imposing an absolute liability, subject only to the restriction created by the decision in *Adamson's* case (4), is the more significant because he was dissenting. There is no room left for a construction which would introduce a new exception. It cannot be said that the House may have overlooked the case in which the cause of the damage done by the ship was the negligence of the harbour authority or its servants, for a case was cited in which the authority's claim under this section had been held to fail on that very ground: *Det Forenede Dampskibs Selskab v. Barry Ry. Co.* (6). That case had moreover been referred to with approval by SARGANT, L.J., in the Court of Appeal. VISCOUNT HALDANE certainly had in mind the case where the damage had been caused by the negligence of the harbour authority, for he mentions the opinion which SIR GEORGE JESSEL, M.R., had expressed on it in *Adamson's* case (4). The ratio on which ROCHE, J., decided *Det Forenede Dampskibs Selskab v. Barry Ry. Co.* (6),

that nobody can take advantage or avail himself of the wrong for which he is himself responsible, is not consistent with the judgment of this House in *The Mostyn* (5), which forbids a construction of s. 74 which would qualify its terms by exceptions imported from the common law. But if the shipowner might have recovered as damages in an action of negligence the sum paid by him to the harbour authority under s. 74, a supposition which need not be considered here, the decision would be saved: *frustra petis quod mox es restitutus*.

A It follows that the respondents are liable for any damage done to the harbour by the Towerfield. The Towerfield when she took the ground caused a depression to form in the obstructing bank, she blocked the channel and silt was deposited round her hull. I should have been prepared to say that no damage was done to the harbour within the meaning of this section. "Damage . . .
B to the harbour, dock or pier or the quays or works connected therewith" means, in my opinion, physical damage to the *opera manufacta* of the undertaking. The respondents have, however, conceded that the appellants are entitled to the extra expense necessary to restore the channel to the condition in which it was before the Towerfield stranded, but not to damages for loss of the use of the harbour while the channel was blocked. I would allow what was expressly
C conceded and no more. For these reasons I agree that the appeal should be disposed of in the way proposed by my noble and learned friend on the Woolsack.

LORD OAKSEY (read by LORD NORMAND): My Lords, I agree with the judgment of the Court of Appeal, though for somewhat different reasons.

It has not been suggested by anyone that the respondents were themselves in any way negligent or to blame for the stranding of the s.s. Towerfield, but it
D is argued that on the true construction of the Pilotage Act, 1913, s. 15 (1), owners of a vessel are answerable for damage caused by any fault of the navigation of the vessel by a compulsory pilot. On the other hand, it is contended for the respondents that the word "answerable" in the section only refers to actions brought against the owners, and they are not answerable in the sense that the compulsory pilot's fault disentitles them to sue. My Lords, I agree
E that the words "answerable for any loss . . . caused . . . by any fault of the navigation of the vessel in the same manner . . . as if pilotage were not compulsory" mean that owners of ships with compulsory pilotage are affected by a compulsory pilot's lack of ordinary skill or care in all ordinary cases, but, in my opinion, this is not such a case, for not only was the pilot's faulty navigation due in part to the appellants' breach of their duty to him, but if the appellants
F had fulfilled their duty to the respondents the respondents would have had the opportunity, and would, as I find, have taken the opportunity, of preventing the stranding by taking the navigation out of the hands of the pilot.

The majority of the Court of Appeal have decided in favour of the respondents on the view that a contract was entered into between the appellants and the respondents by which the appellants warranted that a certain depth would be
G maintained in their harbour and in the channel thereto unless they notified the shipowners and their pilots that this depth was not maintained, and that the appellants had broken their warranty, and that, therefore, even if the pilot's negligence contributed to the accident, it had been induced by the failure of the appellants to warn the pilot and in any event did not affect the warranty. I agree with the majority of the Court of Appeal that a contract must be implied
H between the appellants and the respondents, but the question on which I am unable to agree with them is the terms which ought to be implied in the circumstances. In my opinion, no such warranty can be implied. I entirely agree that the appellants did not fulfil their obligations: they did not carry out proper soundings: they did not take proper steps to ensure that the pilots knew what dredging they had done: they issued a totally misleading plan of the entrance channel: they took no steps to warn the master of the s.s. Towerfield of the dangers of entering the harbour without a tug in all the circumstances;

but on the other hand I do not think they can be held to have warranted any absolute depth in the channel in view of the amendments to the WEST COAST OF ENGLAND PILOT stating that the channel was maintained at $4\frac{1}{2}$ ft. as far as possible by dredging, and that a less depth would be found in places. I am also of opinion that an obligation must be implied that the ship would be navigated by the compulsory pilot, for whose navigation the owners were answerable, with due care and skill.

Although I consider that the breach of their obligations on the part of the appellants was far more serious than that of the pilot, yet I cannot hold that the pilot navigated the vessel with due care or skill. I sympathise with him in the difficult task which he had to undertake, but, in view of his own evidence and the opinions of your Lordships' assessors and of the assessors who assisted the Court of Appeal, I cannot hold that his navigation was a mere error of judgment. The channel appears to have been about 155 feet wide at the point of stranding and there is no evidence (except perhaps the statement of the harbour-master) which suggests that it was not feasible to bring her in either on the leading marks or just north of them. It is difficult to refrain from the conclusion that the pilot must have misjudged his distance from the bush perch, and have disregarded the existence of the northern sand bank because of his view that freshets would have washed it away, a view unsupported, I think, by any other evidence.

It has been argued that the principle of *Davies (Davis) v. Mann* (14) is applicable, and that the respondent shipowners, being answerable for the pilot's navigation, could have avoided the result of the appellants' negligence by careful navigation and that, in any event, the pilot's negligence contributed to cause the stranding. This, however, appears to me to be an over-simplification of the position, since the respondents were deprived of the opportunity which I find they would have taken of assuming control of the navigation by the breach of duty on the part of the appellants, that is to say, if the true facts had been communicated by the appellants to the respondents as they ought to have been at any time up to the moment of stranding, the respondents could, and as I find would, have avoided the disaster. The harbour-master thought, as he said, that the ship should not have come in without a tug, but, relying on the pilot, without taking any steps to assure himself that the pilot knew as much as he himself knew, and without himself knowing the facts he ought to have known, he trusted to luck, and deprived the respondents of the opportunity of preventing the stranding. In my opinion, in such circumstances the true cause of the stranding was the breach of duty of the appellants, and to hold that the shipowners are answerable for the pilot's faulty navigation which they would have been entitled to prevent and would have prevented if the appellants had performed their duty seems to me a construction of the Pilotage Act, 1913, s. 15, which cannot be justified.

On the appellants' counterclaim I am also of opinion that the judgment of the Court of Appeal was right. It is, in my opinion, a fundamental principle of justice and not merely a rule of the common law, that no one can take advantage of his own wrong: COKE ON LITTLETON 148b; BROOM'S LEGAL MAXIMS, 10th ed., p. 191; and this principle is just as much applicable to the construction of statutes as it is to any other branch of law: see *Davenport v. R.* (15) (3 App. Cas. 129). The appellants cannot, therefore, claim for damage to their harbour caused in part by their own failure to fulfil their obligations. It is not, in my opinion, necessary to depart in any way from what was decided by your Lordships' House in *The Mostyn* (5), since the construction there put on the Harbours, Docks and Piers Clauses Act, 1847, s. 74, was that a ship navigated by her master or pilot and crew was liable for any damage which she caused to the harbour works, whether by negligence or not, but not that the owners were liable for damage caused or contributed to by the harbour authorities themselves. With the greatest respect to those of your

Lordships who take a different view, I think it is scarcely conceivable that your Lordships' House would have laid down such a principle of interpretation without adverting in any way to the fundamental principle that no one can take advantage of his own wrong. The statement of VISCOUNT HALDANE in *The Mostyn* (5) ([1928] A.C. 64) could not, in my opinion, have been expressed as it was if the noble lord had intended to lay down that a harbour authority could recover for damage caused to their own works by their own acts. It is

A one thing to say that the owners of a vessel may be liable for damage caused by their vessel to harbour works without negligence on the part of the owners or their servants—it is a totally different thing, in my opinion, to say that if the harbour authority by its own negligence, or the negligence of its servants, damages its own works by driving the vessel against them, they can recover such damages from the owners of the vessel. The previous decision of your

B Lordships' House in *River Wear Comrs. v. Adamson* (4) in not holding the owners liable for their ship when not under human direction indicates that the damage to which the section refers is not damage done by the ship as an inanimate object. Moreover, if the legislature had intended that harbour authorities should be indemnified for any damage, however caused, to their works, no exception would have been made for the case of compulsory pilotage. The presence

C of this exception in the section appears to me to indicate that the legislature was considering damage caused by those in charge of the vessel, and not damage caused by the harbour authorities or anyone else for whom the shipowners were not fully responsible.

It is true that the result is not so startling when the harbour authority's negligence is only a contributory cause of the damage, but the underlying

D principle appears to me to be the same. If "damage" in the section means damage caused physically by the vessel when human beings are on board of her and nothing more, then, even if the damage is entirely due to the negligence of the harbour authority, the harbour authority can still recover. To suggest that the injustice of this result can be obviated by an action by the owners of the vessel against the harbour authority for causing them the damages which

E they have been compelled to pay to the harbour authority in the action by the harbour authority offends against the rule to prevent circuity of action and would, in my view, justify the interpretation I put on the section. For these reasons I am of opinion that the appellants' counterclaim should be dismissed.

LORD MORTON OF HENRYTON: My Lords, this is an unusual case in that no fewer than six questions of real difficulty arise for your Lordships' decision. I shall start by stating four of these questions and indicating the answer which I would give to each of them. It will be convenient to refer to the appellants as "the board" and to the respondents as "the owners."

Q. 1. Was there any negligence on the part of the compulsory pilot who brought in the Towerfield? A. Yes. Q. 2. Was the negligence of the pilot the sole cause or a cause of the stranding of the Towerfield? A. It was not the

G sole cause, but it was a cause. Q. 3. Was the board guilty of a breach of any duty which it owed to the owners? A. Yes. Q. 4. Was that breach of duty a cause of the stranding of the Towerfield? A. Yes. It will be observed that on each of these four questions I have arrived at the same conclusion as BUCKNILL, L.J., and, as my reasons correspond closely with his, I can state them quite shortly.

H As to question 1, I have felt great doubt whether the pilot could fairly be held to have been negligent, or whether he was merely guilty of an error of judgment, not amounting to negligence in all the circumstances. In the end, however, I see no reason to disturb the finding of WILLMER, J. (with which BUCKNILL, L.J., concurred), that the former is the correct view. In addition to the matters on which the learned judge and the lord justice based their judgments, I am influenced by the answers of our assessors, which I accept, to the first two questions put to them.

As to question 2, if the pilot was negligent, I see no reason to doubt that his negligence continued up to the moment of the stranding and was a cause thereof. I shall shortly give my reasons for thinking that there was another cause which contributed to that result.

As to question 3, I think that the board cannot fairly be held liable for failing to keep the channel properly dredged, having regard to war-time difficulties and to the other surrounding circumstances. I am, however, of opinion that it was the duty of the board to ascertain by proper and regular soundings the approximate position, shape and extent of the banks which encroached on the north and south sides of the channel, and to communicate this information to the master of the vessel before he entered the channel, together with the information that the dredger had not been at work on the north bank since Oct. 9. The duty to give this information was one which arose as between invitor and invitee. It may well be that the board was also under certain contractual duties, but, for reasons which will appear later, I do not find it necessary to determine whether any contract came into existence between the board and the owners, and, if so, what were the terms of such contract. The duty just stated was clearly not performed by the board's employees. Apart from the fact that the method of taking soundings was unsatisfactory, the board's employees took no steps to give any information to the master of the Towerfield. They were not, in my view, entitled to suppose that the pilot was armed with full knowledge of all the conditions, to rely on this supposed knowledge, and to leave the master without any information.

As to question 4, it is, I think, possible that the master would have decided to enter the channel even if he had been properly informed as to the position, shape and extent of the banks on the north and south sides thereof. He would have had to weigh the possible risks of entering against the war risks to which he would be exposed if he remained outside. I feel no doubt, however, that if he had entered the channel he would have intervened to prevent the pilot from taking the course which stranded the vessel. If the master had had the information just mentioned, he would have realised that such a course would land the ship on the north bank, and, however reluctant he might have been to interfere with the pilot, I cannot believe that he would have remained passive in these circumstances. Thus, the breach of duty which I have found in answer to question 3 was a breach which continued to have an effect on the navigation of the vessel right up to the moment when she stranded, and this breach of duty combined with the negligence of the pilot to cause the stranding. This is, in my judgment, the result of applying to the facts of the present case the principles stated by VISCOUNT BIRKENHEAD, L.-C., in *The Volute* (16) ([1922] 1 A.C. 144, 145). The present case falls exactly within the fourth class described by GREER, L.J., in *The Eurymedon* (1) ([1938] P. 50), as follows:

"But if the negligence of both parties to the litigation continues right up to the moment of collision, whether on land or on sea, each party is to blame for the collision and for the damage which is the result of the continued negligence of both."

The case is thus one in which each of two parties—the pilot and the board—was guilty of negligence which contributed to the disaster. As it is not alleged that the master or any other employee of the owners was guilty of any negligence, it follows that the owners' claim for damages must succeed, unless it is defeated by the Pilotage Act, 1913, s. 15 (1), and that the board's counterclaim for damages must fail, unless it is assisted by the Harbours, Docks, and Piers Clauses Act, 1847, s. 74. This leads me to questions 5 and 6, which may be stated as follows:

Q. 5. Does the Pilotage Act, 1913, s. 15 (1), debar the owners from recovering any damages for negligence against the board, because the pilot of the Tower-

field was guilty of negligence contributing to the mishap? Q. 6. Does the Harbours, Docks, and Piers Clauses Act, 1847, s. 74, enable the board to recover in respect of any damage done to the harbour by the Towerfield notwithstanding that the negligence of the board was one of the causes for the stranding of the vessel?

- As to question 5, s. 15 (1) of the Act of 1913 has already been read and BUCKNILL, L.J., has given a very full and careful account of the earlier statutes
- A dealing with the position of the owner or master of a ship in charge of a compulsory pilot. He has also reviewed the authorities bearing on this matter. My Lords, my first impression on reading s. 15 (1) was that it dealt only with cases in which some third party, who has suffered loss or damage caused either (a) by the vessel or (b) by a fault in the navigation of the vessel, is seeking to recover such loss or damage from the owner or master. The section provides
- B that in such a case the owner or master is to be "answerable" although the vessel was navigating under compulsory pilotage. I still think that this is the most natural meaning of the words used, and I find grave difficulty in reading them as applying also to a case in which the owner or master of a vessel is claiming that a third party is answerable for some loss or damage caused to the vessel. However, your Lordships are of opinion that the words do apply to such a
- C case and I can see no logical reason why the legislature should have limited the application of the section to cases in which the owner or master was defendant. Accordingly, I shall not dissent from the view which your Lordships have formed in common with BUCKNILL, L.J., and (so far as actions in tort are concerned) with SCOTT and ASQUITH, L.J.J. I agree with your Lordships in thinking that the wording of the section affords no ground for drawing a distinction between
- D actions in tort and actions in contract. For this reason, I have not found it necessary to form a concluded view as to whether the board has or has not been guilty of a breach of any contract.

- As to question 6, I have not formed any view on the question whether damage can be said to be "done by" a vessel to a harbour within the meaning of s. 74 of the Act of 1847 in cases where the sole cause of the damage is negligence
- E on the part of the harbour authority. This point does not arise, on the views which I have expressed in answer to questions 2 and 4 and it was not fully argued in this House, owing to a concession made at an early stage by counsel for the board. I am, however, of opinion that contributory negligence on the part of the harbour authority is no defence to a claim by the harbour authority under the section. This is, I think, the inevitable result of the views expressed
- F by the majority of your Lordships' House in *The Mostyn* (5). I would add, with reference to a passage in the judgment of BUCKNILL, L.J., in the present case, that when VISCOUNT HALDANE, in *The Mostyn* (5), used the words ([1928] A.C. 64): "It would have been equally difficult to hold that there was liability if the damage had been caused by the actions of the undertakers themselves," he was, in my view, summarising the opinion expressed by SIR GEORGE JESSEL,
- G M.R., in the Court of Appeal, and was not expressing a view which he, VISCOUNT HALDANE, himself held. Further, I do not think that the *dictum* of SARGANT, L.J. ([1927] P. 47), on which also BUCKNILL, L.J., relied in the present case, can be reconciled with the views expressed by the majority of this House in *The Mostyn* (5). I have thought it right to add these observations out of respect to the judgment of BUCKNILL, L.J., with which I am in agreement on all points
- H except the point now under discussion.

I agree with the view expressed by my noble and learned friend, LORD NORMAND, that the "damage" mentioned in the section means only physical damage to the *opera manufacta* of the undertaking. If this is so, I think that the damage in the present case is *nil*, since it could hardly be said that any damage was done to the harbour by the mere fact that the vessel's bottom disturbed a bank of stones and sand or silt which should never have been in the channel at all. I would allow by way of damages only what was expressly conceded by

the respondents. I agree with the motion proposed by my noble and learned friend on the Woolsack.

LORD RADCLIFFE: My Lords, I too think that neither party should recover on its claim for negligence. Having regard to what he must have known, I can see no way of describing the pilot's navigation of this vessel as other than negligent, and think that the Pilotage Act, 1913, s. 15 (1), must be construed so as to impute his negligence to the owners, even when they appear as plaintiffs seeking to recover damages for injury to their vessel. If so, their claim must fail, for their negligence was no inevitable consequence of any breach of duty that can be attributed to the harbour authority. It may be quite true to say that this accident would never have happened but for some such breach, though even that conclusion must depend on speculations as to the probable course of conduct of the master or the pilot on receiving information which they did not get in circumstances that we can only imperfectly reconstruct, but so much as that might be said by any disappointed defendant who is made to compensate a negligent plaintiff in a case of the type of *Davies v. Mann* (14), and I do not think that in principle that consideration can be sufficient to "purge" the plaintiffs' own negligence in the navigation of their vessel.

I have had more difficulty in satisfying myself that the harbour authority committed any breach of duty that can fairly be described as a cause of this accident, for I think that the judgments below have charged them with breaches of duty in matters where no such duty was imposed on them either by statute or by the common law, but I agree that in the special circumstances of this case, which include the nature of the information conveyed by the Admiralty chart and the WEST COAST OF ENGLAND PILOT, as well as the complication inherent in the relationship of master and pilot, there was a duty on them to give a warning to the master which they failed to give, and that breach is so much connected with the decision that the vessel should dock on the tide on which she entered, and with the course which she followed, that it may fairly be regarded as a contributory cause of the accident.

But that conclusion leaves outstanding the appellants' claim under the Harbours, Docks, and Piers Clauses Act, 1847, s. 74. This is the third occasion on which that section has visited your Lordships' House, and it is perhaps unfortunate that so much should still remain to be said about it. Nevertheless the section itself is an important one, since it appears in a general Act that has been widely adopted, and its application involves a question of some moment as to the relationship between a court of law and an Act of Parliament. It is for that reason that I ask leave to deal with the matter at greater length than I should otherwise have thought necessary. My Lords, there is no escape from the view that s. 74 is an arbitrary provision. Once it was decided by this House in *The Mostyn* (5) that the shipowner's liability under it did not depend on any imputation of default to him or to others who might be in charge of the ship, it was plain that the section was conceived in the interests of the dock or harbour authority and was calculated to produce on occasions what might be very rough justice indeed. But I do not know that I should deduce from that that a court of law would be entitled to give to its language any meaning other than that which the words will fairly admit. It is not always easy to see the whole picture when one is scrutinising a particular detail of a general code. After all, undertakers of a dock or harbour are providing an important public utility, which the law requires them both to conserve in reasonable condition and to keep open for the service of the shipping public without discrimination. No doubt, their enterprise must have its customers, but, if the works of the undertakers get damaged, someone must find the money to restore them to proper condition in the public interest, and I do not think it unfair to recall that it is the shipowner's property that has been the instrument of

harm and it is the shipowner's adventure that brings the vessel to the dock or harbour where the damage occurs.

- These considerations, however, are not of any determining importance today, since any construction which your Lordships place on the words of the section must somehow contrive to be consonant with that placed on it by our predecessors in *River Wear Comrs. v. Adamson* (4) and *The Mostyn* (5). And those decisions have not left the door very wide open. I do not propose to essay the delicate task of discovering what was the *ratio decidendi* of the *Adamson* case (4). For all practical purposes the decision in that appeal must be taken with the decision in *The Mostyn* (5) as together providing a single authoritative interpretation of the meaning of the section. I am content with the certainty that in the later case the majority of your Lordships' House did arrive at a conclusion as to what the *Adamson* case (4) had decided, and then passed to the, perhaps, smaller achievement of themselves elucidating the construction of the section. The facts in *The Mostyn* (5) have no particular bearing on the problem which is now before your Lordships. A vessel had damaged certain installations forming part of Swansea Docks and the damage was done in circumstances that involved no negligence or breach of duty on the part of those in charge of the vessel. The question was whether s. 74 obliged the shipowners none the less to make good to the undertakers the cost of repairing the damage. To answer this problem it was necessary to resolve the long-standing uncertainty as to what the *Adamson* case (4) had really decided. The solution was not arrived at without difficulty, for, whereas LORD MERRIVALE at the trial and the three members of the Court of Appeal thought that the *Adamson* decision (4) was an authority that protected the shipowners, a majority of the members of this House who heard the appeal held not only that it was not such an authority, but also that the shipowners were in fact liable under the section. In expressing their decision they placed a construction on the section. Indeed, how were they to pronounce on its scope and application without fully considering what construction to give to its words? For my part, I cannot entertain any doubt what construction it was that they adopted. If there are ambiguities (and I think that there are) in some of the expressions that they used to define their meaning, I think that those ambiguities were the tribute that their piety paid to the somewhat Delphic responses of their predecessors in this House. Such ambiguities as there may be do not matter for our purpose. For the construction that must be taken as authoritatively adopted in *The Mostyn* (5) was that the section imposed an absolute liability on a shipowner whose vessel had done damage to the undertakers' works, and that this liability was qualified only (i) by the proviso as to compulsory pilotage, which is not now effective, and (ii) by the requirement that the damage must be "attributable to human agency" or not attributable to the "act of God." This requirement the House regarded as the necessary import of the *Adamson* decision (4). What matters is that the damage in the case before us cannot possibly be said to be attributable to act of God or not to be attributable to human agency. What is said is that it is wholly or partly attributable to negligent omissions of the harbour authority.

- So s. 74 is again before this House. The appellants' harbour has suffered damage and the damage has been done (so it is said) by the respondents' vessel. Your Lordships are invited to read the section as if it contained a qualification to the effect that shipowners are not to be answerable if the harbour authority making the claim can itself be convicted of contributory negligence in the matter of the damage. I think that there are two commanding reasons why the section must not be so read, and I do not know which reason to put before the other. First, we are bound by the interpretation which the House placed on the section in *The Mostyn* (5) and that interpretation leaves no room for a defence of contributory negligence. I might regret that conclusion if I thought that the possibility of a harbour authority causing or contributing to the damage

done to its works could have escaped the attention of the noble Lords who formed the majority in *The Mostyn* (5). But the facts do not allow me so to suppose. Such a contingency had been referred to by SIR GEORGE JESSEL, M.R., in the *Adamson* case (4) (1 Q.B.D. 549) as one of the reasons that justified the introduction of "reasonable" exceptions, and VISCOUNT HALDANE even referred to that observation in his speech in the House, although he expressed no approval of the reasoning of SIR GEORGE JESSEL, M.R. ROCHE, J., had decided in *Det Forenede Dampskibs Selskab v. Barry Ry. Co.* (6) that negligence in the harbour authority did in fact let the shipowners out, and we were informed during the hearing of this appeal that that decision was much canvassed in the arguments of counsel before this House in *The Mostyn* (5). Lastly, the judgment of SARGANT, L.J. ([1927] P. 47), in the Court of Appeal (which was, of course, overruled by the decision of this House) had explicitly referred to and approved of that case. It would do altogether too little justice to the reflective powers of VISCOUNT HALDANE, and LORDS SHAW and BLANESBURGH if I were to suppose that in arriving at their interpretation of the section they had ignored the possibility of a harbour authority contributing to the damage of which it complained.

The second reason is that there is nothing in the wording of the section that would justify us in reading into it such a qualification. If we did, we should be amending the section, whereas our function is limited to construing it. To treat it as implied would be to do even more than our predecessors did by their judgments in the *Adamson* case (4), for, whereas they could point to such words as "the master or person having charge of such vessel" as supporting a construction that limited the range of the section to damage done through human agency, there is nothing that your Lordships can lay hold of that even bears on the contingency of negligence on the part of the harbour authority. After all, there are not many words before your Lordships on which the art of interpretation can be employed: "any damage done by such vessel . . . or by any person employed about the same, to the harbour, dock, or pier." Where damage done by a vessel under human control is in question, it is the vessel itself that is treated by the section as the instrument of causation, and it is the damage that it does that has to be paid for. The vessel has not done the damage any the less because those in charge of it may have been acting in compliance with some ill-judged or even careless direction given by a servant of the undertakers, or because some omission on the part of the undertakers may have been responsible, or in some measure responsible, for what took place. So to construe the section seems to me to import legal conceptions of responsibility (which is not the same thing as causation) in tort into simple words which, as has already been held in *The Mostyn* (5), are not directed to any considerations of tortious liability.

My Lords, I cannot part with this case without some reference to the *Barry Ry.* case (6). Much as I respect any opinion of LORD ROCHE, I cannot agree with the reported reasons for his decision. As I have said, I do not think that the section can in any way be construed so as to except damage for which the harbour authority would be held responsible in an action for negligence, and I can see no warrant for applying in the face of the statute the general rule of the common law which may be expressed by saying that a man cannot take advantage of his own wrong. It would be plausible to invoke it in a case where the damage done was solely the result of the claimants' negligence, and I am by no means clear that in such a case a counterclaim in negligence might not ultimately deprive the claimant of all his advantage under the section. Even so, it is not the construction of the section that is different, but other remedies would cancel out its advantage. If, however, his negligence is no more than a contributory cause, I cannot see why the provisions of the statute should not govern from first to last. There is certainly no turpitude involved in a failure to observe that standard of care which, after full inquiry,

a court of law may find to have been the appropriate measure. Those standards are not absolute: they vary with the parties and the circumstances. Nor are the rules that determine them exactly graven on tables of stone. Indeed, the whole significance of contributory negligence at common law has been altered by statute within recent years. Responsibility on the ground of negligence is not evident as a physical fact is evident, although lawyers sometimes speak as if it were, and for my part I cannot at all suppose that the simple statutory remedy afforded by s. 74, which, if damage is under £50, is to be exigible before two justices, was ever intended by Parliament to be subordinated to a legal trial of what too often proves to be the complicated issue of negligence at common law.

The measure of damage was not an issue before your Lordships, and the respondents' counsel informed us that he did not dispute that, if the ship-owners could be made liable under s. 74, they ought to pay whatever extra expense had to be met by the harbour authority in returning the harbour to the condition it was in before the ship grounded. So be it. I only wish to make it plain that, in my view, the section is confined to damage, not damages. I think that it covers no more than the actual physical damage which a vessel may do to the works which constitute the harbour, dock or pier. I do not think that it has any relation to consequential damage, such, for instance, as a loss of business at the dock or harbour attributable to the presence of the stranded vessel or to the physical deterioration of the approach channel.

Appeal allowed. Claim dismissed, and counterclaim dismissed except in so far as damage was caused by the Towerfield to the appellants' harbour. Each party to pay his own costs here and below.

Solicitors: *Thomas Cooper & Co.* (for the appellants); *Constant & Constant* (for the respondents).

[Reported by J. D. PENNINGTON, ESQ., Barrister-at-Law.]

E

PORTMAN BUILDING SOCIETY v. YOUNG.

F [CHANCERY DIVISION (Danckwerts, J.), June 30, 1950.]

Mortgage—Attornment clause—Creation of relationship of landlord and tenant—Application of Rent Restrictions Acts.

Rent Restriction—Mortgage—Attornment clause—Creation of relationship of landlord and tenant—Application of Rent Restrictions Acts.

G

A mortgage of a dwelling-house provided: "The mortgagor hereby attorns tenant to the [mortgagee] of such parts of the property as may at any time be in the occupation of the mortgagor at the monthly rent of £9 16s. 0d. to be paid on the days hereinbefore appointed for payment of monthly instalments and such rent is to be applied in or towards satisfaction of such instalments. Provided always that the [mortgagee] may at any time without giving previous notice in that behalf determine the tenancy created by such attornment." The monthly payments fell into arrear, and in order to ascertain the appropriate procedure to obtain possession it became necessary to decide whether the Rent Restrictions Acts applied to the relationship of the mortgagee and mortgagor.

H

HELD: on the true construction of the mortgage the relationship of landlord and tenant had been created between the mortgagee and mortgagor, and, the rent being more than two-thirds of the rateable value of the house, the mortgagor was entitled to the protection of the Acts.

[AS TO RELATIONSHIP EFFECTED BY ATTORNMENT CLAUSE, see HALSBURY, Hailsham Edn., Vol. 23, pp. 325, 326, para. 489; and FOR CASES, see DIGEST, Vol. 35, pp. 327-331, Nos. 712-737.]

ADJOURNED SUMMONS.

The plaintiffs, the Portman Building Society, issued an originating summons under R.S.C., Ord. 55, r. 5 (a), claiming possession as mortgagees from the mortgagor. The mortgagor did not appear, but the master took the point that the mortgagor was protected by the Rent Restrictions Acts.

L. A. Blundell for the plaintiffs.

The mortgagor was not represented.

DANCKWERTS, J.: The question which arises in the present case is whether there has been a tenancy created by the terms of a mortgage so as to bring the case within the provisions of the Rent Restrictions Acts. The plaintiffs are the Portman Building Society, and, by a mortgage dated Feb. 17, 1948, the property in question (a house known as 122, Merewood Road, Crayford, Kent) was mortgaged to the plaintiffs by the mortgagor with the added security of a policy for £1,600 on his life to secure repayment of a principal sum of £1,600 and interest at four per cent. per annum. Clause 10 of that mortgage was what is commonly called an attornment clause and was in these terms:

"The mortgagor hereby attorns tenant to the society of such part of the mortgaged property as now is or shall be at any time during the continuance of this security in the occupation of the mortgagor at the yearly rent of 1s. 0d. if demanded, provided that at any time after the power of entry into possession or into receipt of the rents and profits of the mortgaged property herein before conferred upon the society has become exercisable the society may by giving to the mortgagor either personally or by post or leaving upon the property at least three days' notice in writing of the intention of the society so to do determine the tenancy hereby created and enter upon the property."

This clause would not have given rise to any difficulty because by the provisions of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 12 (7), it is provided:

"Where the rent payable in respect of any tenancy of any dwelling-house is less than two-thirds of the rateable value thereof, this Act shall not apply to that rent or tenancy nor to any mortgage by the landlord from whom the tenancy is held of his interest in the dwelling-house, and this Act shall apply in respect of such dwelling-house as if no such tenancy existed or ever had existed."

Obviously a rent of 1s. 0d. is less than two-thirds of the rateable value. Therefore, if nothing further had been done, no difficulty such as the one which has now been discussed could have arisen, but, on Apr. 30, 1949, a deed of variation was entered into between the parties, whereby the mortgage was converted into the more usual form of building society mortgage in that the amount borrowed became repayable by monthly instalments of £9 16s. 0d. In this deed a new attornment clause was inserted in the following terms:

"The mortgagor hereby attorns tenant to the society of such parts of the property as may at any time be in the occupation of the mortgagor at the monthly rent of £9 16s. 0d. to be paid on the days hereinbefore appointed for payment of monthly instalments and such rent is to be applied in or towards satisfaction of such instalments. Provided always that the society may at any time without giving previous notice in that behalf determine the tenancy created by such attornment."

It is a little difficult to see what the precise object of inserting such a clause was, because, though formerly a clause of this kind was commonly inserted to enable a specially endorsed writ to be issued under R.S.C., Ord. 3, r. 6, and

Ord. 14 proceedings to be taken for summary possession, owing to the amendment by R.S.C., 1933, No. 1, of Ord. 3, r. 6, there ceased to be any point whatever in inserting such a clause. It seems to me that possibly an old practice was followed without appreciating the reason which gave rise to it. The point, however, is taken, though the mortgagor has entered no appearance, that the Rent Restrictions Acts apply to the present case. Although, as the rent in question is in arrear, the mortgagor is in a difficulty under those Acts, this may affect the questions of what court the proceedings should have been brought in and whether there is not a different discretion to be exercised, namely, that conferred on the county courts by the Rent Acts. Accordingly, I have to consider whether or not the Rent Acts apply.

It has been argued by counsel for the society, first, that the Rent Acts do not apply because they contemplate, on the one hand, mortgages as being within the Act and provide specifically for their case, and that the provisions dealing with tenants are entirely different and have no application whatever to a case which is purely between mortgagor and mortgagee. Secondly, it is said that, so far as the Rent Acts do apply to tenancies, they are not relevant in the present case because they are intended to apply to real tenancies in the practical sense. The words in those Acts, it is pointed out, are used in their popular sense, and, therefore, the Acts have no application in the case of an attornment clause, which is purely a technicality, inserted in a mortgage for a particular purpose, and not intended to create a relationship of landlord and tenant in the ordinary sense. It has been argued that the mortgagor was a mortgaging owner and not a tenant.

I have been referred to the relevant provisions of the Acts and the definitions of "landlord" and "tenant" which, I think, do not assist counsel very much. He has also referred me to certain authorities from which it appears that the court has treated payments differently according to whether, in the proper sense of the word, they were rent or not. I am afraid that does not get rid of the difficulties which have arisen. Whatever the reason—wise or unwise—may have been for the society inserting this clause in the deed of variation, they have chosen for their own good purposes, whatever they may be, to create the relationship of landlord and tenant between themselves, as landlords, and the mortgagor, as the tenant. They have used the words "tenancy" and "rent."

"The mortgagor hereby attorns tenant to the society of such parts of the property . . . at the monthly rent of £9 16s. 0d. . . . Provided . . . that the society may at any time . . . determine the tenancy created by such attornment. Provided also that neither receipt of the said rent nor the said tenancy shall render the society liable to account as mortgagees in possession."

It seems to me that they have repeatedly used expressions which show that a tenancy is created and a rent is to be paid. In those circumstances, as the rent is one of more than two-thirds of the rateable value, the tenancy is not excluded by s. 12 (7) of the Act of 1920, but it falls within the provisions of the Rent Acts, and, therefore, recovery of possession as between landlord and tenant is restricted by those provisions. Accordingly, it seems to me that the objection raised by the master is a proper objection, and I must give effect to it.

In view of the arrears of rent his Lordship granted an order for possession within twenty-one days. His Lordship held that in the circumstances he had no power to award costs to the plaintiffs, and he, therefore, made no order as to costs.

Solicitors: *Hewlett & Co.* (for the plaintiffs).

[*Reported by R. D. H. OSBORNE, Esq., Barrister-at-Law.*]

Re TAYLOR (deceased).

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Willmer, J.), June 28, 1950.]

Administration—Administrator—Appointment in “special circumstances”—Discretion of court—Sole beneficiary under will entitled to absolute interest—Beneficiary of full age, but of immature development—Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 162 (1) (as amended by the Administration of Justice Act, 1928 (c. 26), s. 9).

A

The respondent, who attained the age of twenty-one on Oct. 26, 1949, was the sole beneficiary under the will of the testatrix, her mother, who died on Aug. 18, 1949. An application was made under the Supreme Court of Judicature (Consolidation) Act, 1925, s. 162 (1), as amended by the Administration of Justice Act, 1928, s. 9, by certain members of the testatrix's family for a grant of administration *ad colligenda bona* in respect of the estate of the testatrix, with certain special powers to provide for the maintenance and welfare of the respondent. The applicants alleged that the respondent was immaturity developed, and, therefore, unfitted at present not only for the enjoyment of the large fortune to which she had become entitled under the will of the testatrix but also for the task of administration, and stated that they were moving the court with a view to the respondent's interests being protected until she had gained sufficient experience of affairs to justify the court in giving her a full grant of administration.

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HELD: the court had no power under s. 162 (1) of the Act of 1925, as amended, to interfere with the respondent's enjoyment of an estate to which she was by law entitled, and the application would, therefore, be dismissed.

D

Per curiam: I am much attracted to the contention that proviso (b) of s. 162 (1) of the Act of 1925, as amended, in referring to “special circumstances” relates only to special circumstances in connection with the estate itself or the administration of the estate.

[AS TO GRANTS AD COLLIGENDA BONA, see HALSBURY, Hailsham Edn., Vol. 14, p. 274, para. 484; and FOR CASES, see DIGEST, Vol. 23, pp. 207-209, Nos. 2446-2483.]

E

Cases referred to:

- (1) *In the Estate of Sanpietro, In the Estate of Van Tuyll Van Serooskerken*, [1940] 4 All E.R. 482; [1941] P. 16; 110 L.J.P. 23; 2nd Digest Supp.
- (2) *In the Goods of Farrands*, (1876), 1 P.D. 439; 23 Digest 171, 1880.

F

MOTION for a grant of administration *ad colligenda bona*.

By her will, dated Oct. 24, 1928, the testatrix, who died on Aug. 18, 1949, appointed her parents executors, and, subject to certain gifts of jewellery and wearing apparel to her sisters, she left her estate, amounting to some £19,000, to the respondent, her only daughter. The executors pre-deceased the testatrix. On Oct. 26, 1949, the respondent attained full age, and, as the sole beneficiary under the will of the testatrix, took steps to apply for a grant of letters of administration with the will annexed. An application was made under the Supreme Court of Judicature (Consolidation) Act, 1925, s. 162 (1), as amended by the Administration of Justice Act, 1928, s. 9, by the two sisters of the testatrix and by a trustee under the will of the testatrix's father for a grant of administration *ad colligenda bona* on the ground that the respondent was immaturity developed both physically and mentally, and was, therefore, at present unfitted for the enjoyment of the estate and the task of administration. Accordingly, the court was moved for a grant of administration *ad colligenda bona*, with the will of the testatrix annexed, of the estate of the testatrix, together with a grant of certain special powers, including a power to make an adequate allowance out of the estate to the respondent. The respondent, in her affidavit, stated that she opposed the making of any order which in any way restricted her complete

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control of the property to or in which she had any interest consequent on the death of the testatrix.

Russell, K.C., and Latey, K.C., for the applicants.

Manningham-Buller, K.C., and R. T. Barnard for the respondent, the sole beneficiary under the will of the testatrix.

A WILLMER, J.: This motion is brought before the court because it is said that, owing to a background of ill-health during her childhood, the respondent is immaturely developed both physically and mentally, and, consequently, is quite unfitted, not only for the enjoyment of the large sum of money which she will inherit under this will, but also for the task of administration. What is contemplated is that for a year or two, during which time it is hoped that the respondent will mature, the Midland Bank Executor and Trustee Co. should be appointed administrator *ad colligenda bona*, with special powers, *inter alia*, to pay an allowance to the respondent for her maintenance. It is, perhaps, not without significance that the respondent's own solicitor and the psychiatrist, who have sworn affidavits on her behalf, both take the view that it would probably be wise for a young woman in the position of the respondent to consent to some sort of machinery whereby this large estate would be subjected to some form of control until she has matured and developed a little further. The respondent herself, however, denies that she is in any way unfitted for the enjoyment of this estate or for the task of administration, and I think there is no doubt that she has every wish to bring this large sum of money under her own hands and to exercise her own power over its disposition at the earliest possible date. I say nothing at the present stage as to the wisdom of that point of view, nor do I

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D feel it is for me to comment on the merits of the application.

As I indicated in argument, I think my decision to-day must be based on the hypothesis that the merits are in accordance with what has been said on behalf of the applicants, *i.e.*, I am prepared to assume that it would be wise and in the best interests of the respondent that her fortune should be tied up under someone else's control for the time being. On that assumption the questions, to my mind,

E are (i) whether the court has power to make an order of the type asked for by the applicants, and (ii) if it has the power, whether there is any precedent for the exercise of such power in the manner suggested.

The application is made under the Supreme Court of Judicature (Consolidation) Act, 1925, s. 162 (1), which has been amended by the Administration of Justice Act, 1928, s. 9, whereby a new proviso has been added to the original

F section. It is helpful to study the words of para. (b) of the new proviso, which is in these words:

"if, by reason of the insolvency of the estate of the deceased or of any other special circumstances, it appears to the court to be necessary or expedient to appoint as administrator some person other than the person who, but for this provision, would by law have been entitled to the grant of administration, the court may in its discretion, notwithstanding anything in this Act, appoint as administrator such person as it thinks expedient, and any administration granted under this provision may be limited in any way the court thinks fit."

G

That proviso, it is claimed, gives the court a discretion to make an order of the type sought by the applicants. It has been frankly conceded by counsel for the applicants that he has found it impossible to put his finger on any case in which a similar order has been made in circumstances such as those of the present case. I have been referred by him to two cases where special orders were made for the administration of estates, in one of which, *In the Estate of Sanpietro*, *In the Estate of Van Tuyll Van Serooskerken* (1), the interests of enemy aliens were concerned, while in the other, *In the Goods of Farrands* (2), the person who, but for the provision, would have been entitled to a grant of administration was a

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person who was quite unfitted to handle the task of administration. No case, however, has been cited to me in which the court has made an order designed merely to protect the beneficiary from himself or herself.

I am much attracted to the view put forward in argument by counsel for the respondent that the terms of this proviso, where it mentions "insolvency of the estate ... or ... any other special circumstances," relate only to special circumstances in connection with the estate itself or the administration of the estate. It is complained on behalf of the respondent that what is sought to be done in this case is to use the machinery of this section, which is designed solely to deal with the question of administration, for the ulterior purpose of controlling the disposition of the respondent's estate and inhibiting her from enjoying it or from dealing with her own property in the way in which she wishes to deal with it. As put by counsel for the respondent, the position is really the same as though the respondent had been left a legacy of an equivalent sum of money under the will of some person. It was argued, as I thought with considerable force, that, in such circumstances, provided that the beneficiary were *sui juris*, this court could have no possible right to interfere so as to inhibit the full enjoyment of any such legacy. It seems to me that very similar considerations apply when I am asked to use the machinery of this section to achieve the ulterior object of preventing the respondent from exercising to the full her enjoyment of the estate left to her by the testatrix. I say nothing, as I have already indicated, as to the wisdom or otherwise of controlling the activities of the respondent. It seems to me, regardless of the merits of the application, that, if the court were to accede to this application, it would be setting a new precedent and using the section of the Act for an entirely new purpose, and it might very well be found hereafter that it was taking the first blow towards driving in the thin end of a very large wedge. It is difficult to see where the end might be if it were once admitted that this section could be used for the ulterior purpose of interfering, by order of the court, with a beneficiary's enjoyment of an estate to which he or she was by law entitled.

In those circumstances it seems to me that, notwithstanding the assumption which I make that this application is made with the best intentions, and that it is in the interests of the respondent herself that the management of the estate should in some way be controlled for her own benefit, I must, in my discretion, decline to make the order asked for in this case. None of the matters alleged, as has been pointed out, goes to the question of administration. Those matters go rather to the wisdom or otherwise of allowing the respondent to enjoy the estate. In my judgment, it would be a bad precedent to use this section for the ulterior purpose for which it is sought to be used, and in those circumstances I conceive it to be my duty to dismiss this motion.

Motion dismissed with costs.

Solicitors: *Gibson & Weldon*, agents for *Clough & Son*, Cleckheaton (for the applicants); *Janson, Cobb, Pearson & Co.* (for the respondent).

[Reported by R. HENDRY WHITE, Esq., Barrister-at-Law.]

JEFFREY v. JEFFREY.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Pearce, J.), July 5, 1950.]

Divorce—Judicial separation—Substitution of decree for decree nisi of divorce—Motive of financial advantage—Exercise of discretion of court—Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 183 (3) (added by Matrimonial Causes Act, 1937 (c. 57), s. 9).

A After obtaining a decree *nisi* for the dissolution of her marriage on the ground of her husband's adultery the wife applied to the court for a decree of judicial separation to be substituted for it. The husband applied for the decree *nisi* to be made absolute.

B HELD: there might be circumstances where justice would be better served by altering a decree *nisi* of dissolution to a decree of judicial separation, but it was undesirable to allow a petitioner wife to use delay in applying for a decree *nisi* of divorce to be made absolute, or to accede to her application for an alteration in the form of decree, and thereby enable her to put pressure on her husband to secure a financial advantage; in the present case, although the wife alleged that she had conscientious scruples against divorce, it was clear that that was not the sole motive for her application and that she was also considering the possible financial gain which might follow if she remained a wife; under the Supreme Court of Judicature (Consolidation) Act, 1925, s. 183 (3) (added by the Matrimonial Causes Act, 1937, s. 9), the court had a full discretion to deal with the case as it thought just; and, in the exercise of that discretion, the wife's application would be refused and the decree *nisi* would be made absolute.

D [AS TO DISCRETION OF COURT IN GRANTING A DECREE, see HALSBURY, Hailsham Edn., Vol. 10, pp. 686-690, paras. 1018-1025; and FOR CASES, see DIGEST, Vol. 27, pp. 359-367, Nos. 3446-3538 and Digest Supp. and 2nd Digest Supp.]

Cases referred to:

- E (1) *Parsons v. Parsons*, [1907] P. 331; 76 L.J.P. 159; 27 Digest 382, 3735.
 (2) *Griffiths v. Griffiths*, (1912), 106 L.T. 646; 27 Digest 551, 6042.
 (3) *Daglish v. Daglish*, [1936] P. 49; 105 L.J.P. 19; 154 L.T. 246; Digest Supp.
 (4) *Blunt v. Blunt*, [1943] 2 All E.R. 76; [1943] A.C. 517; 112 L.J.P. 58; 169 L.T. 33; 2nd Digest Supp.

F APPLICATION by a wife to rescind a decree *nisi* for dissolution of marriage and to substitute for it a decree of judicial separation, and a CROSS-APPLICATION by the husband to make the decree *nisi* absolute.

G After the decree *nisi* had been pronounced on Jan. 10, 1950, unsuccessful negotiations took place between the parties regarding maintenance, and in May the husband applied to the court to vary a deed of separation, entered into in 1936, by extinguishing his liability under it. In June he applied that the decree *nisi* should be made absolute. In asking that the decree *nisi* be rescinded and a decree of judicial separation substituted, the wife said that she had brought the petition for divorce against her conscience and had now reverted to her previous objection to divorce.

H *Herd* for the wife.
Petrie for the husband.

PEARCE, J.: This is an application by a wife to rescind a decree *nisi* for the dissolution of her marriage, pronounced on Jan. 9, 1950, on the ground of the husband's adultery, and to substitute for it a decree of judicial separation. There is also before me an application by the husband for the decree *nisi* to be made absolute.

The parties were married in 1916. In 1935 the wife left the husband, and in

April, 1936, she petitioned for judicial separation on the ground of cruelty. That petition was settled by a deed of separation under which the husband agreed to pay certain sums by way of maintenance to the wife. Those payments have been maintained ever since. In October, 1949, the wife petitioned for divorce against the husband on the ground of his adultery. In December, 1949, she made an application in that suit for maintenance. After the decree *nisi* there were unsuccessful negotiations about maintenance. On May 25, 1950, the husband put in an application to vary the deed of separation by extinguishing his liability under it, and on June 6 he applied to make the decree absolute, the wife not having done so. The husband has filed an affidavit of means in answer to his wife's claim for maintenance, in which he says that he wishes to marry the woman with whom he committed adultery. He discloses the fact that his means are not large and says that the payments of the wife's maintenance under the deed have been made largely out of capital and cannot be continued.

Counsel for the wife asks me to rescind the decree *nisi* of dissolution. He referred me to *Parsons v. Parsons* (1), where the substitution of a decree of judicial separation for one of dissolution was allowed. Apparently, in that case the wife's desire for the alteration arose mainly from financial motives. In *Griffiths v. Griffiths* (2) a similar alteration was allowed, as it was in *Daglish v. Daglish* (3). In the latter case financial considerations were taken into account, though they were connected with the position of the children and not with that of the wife herself.

Since those cases the position has been altered by the Matrimonial Causes Act, 1937, s. (9), which has added to s. 183 of the Supreme Court of Judicature (Consolidation) Act, 1925, the following sub-s. (3):

"Where a decree *nisi* has been obtained, whether before or after the passing of this Act, and no application for the decree to be made absolute has been made by the party who obtained the decree, then, at any time after the expiration of three months from the earliest date on which that party could have made such an application, the party against whom the decree *nisi* has been granted shall be at liberty to apply to the court and the court shall, on such application, have power to make the decree absolute, reverse the decree *nisi*, require further inquiry or otherwise deal with the case as the court thinks fit."

Before the passing of that Act in 1937 a respondent had no rights in the matter, but now he or she has a right to apply to the court and the court has a full discretion to deal with the case as it thinks just.

It is obviously undesirable to allow a petitioner wife to use delay in applying for a decree *nisi* of divorce to be made absolute, or to accede to her application for an alteration in the form of decree, to enable her to put pressure on a respondent husband and to secure from him a financial advantage. There might be circumstances where justice is served by altering a decree *nisi* of dissolution to a decree of judicial separation. The judge has a complete discretion under the new sub-section. How that discretion should be exercised must depend entirely on the circumstances of the case. In the present case the wife says that she brought a petition for divorce against her conscience, that she has now reverted to her original feeling that it was wrong to have a divorce, and that she wants a judicial separation. It is clear from the rest of her affidavit that that was not the sole ground that moved her, and her arguments have been mainly directed to the financial position. I think that the wife's underlying motive is that she was disappointed at the husband's financial state as revealed in the maintenance proceedings, and that she thinks it would pay her better to remain his wife and thus to keep her chance of making in the future (if she survives him), an application under the Inheritance (Family Provision) Act, 1938. The question of the maintenance of the wife is at the moment *sub judice* in proceedings for maintenance initiated by herself in this suit.

After considering all the facts of the case and bearing in mind the observations of VISCOUNT SIMON, L.C., in *Blunt v. Blunt* (4), I have come to the conclusion that the wife's application to rescind the decree *nisi* of divorce should be refused and that the decree should be made absolute. There will, therefore, be no order on the wife's application to rescind the decree *nisi*.

Decree nisi made absolute.

A Solicitors: *Alfred Cox & Son*, agents for *Clarke and Nash*, High Wycombe (for the wife); *Gregory, Roucliffe & Co.*, agents for *Neal, Scolah, Siddons & Co.*, Sheffield (for the husband).

[Reported by R. HENDRY WHITE, ESQ., Barrister-at-Law.]

B

KORNER v. H. KORNER & CO., LTD. AND OTHERS.

[COURT OF APPEAL (Singleton and Jenkins, L.J.J.), June 28, July 5, 1950.]

C *Costs—Taxation—Eight defendants jointly represented and seven successful—Two distinct issues—Main issue against one defendant only—Separate defences—Plaintiff successful on main issue—Action against other defendants dismissed with costs—Claim by successful defendants to be paid seven-eighths of fee for instructions for brief and counsel's fees.*

D In an action brought by the plaintiff against a company and seven individual defendants, the plaintiff alleged that in 1946 an agreement had been made between him and the second defendant for the formation of a private limited company and for the shares of the company to be allotted equally between him and the second defendant, and that the second defendant had caused the company to be incorporated while the plaintiff was abroad and had had the shares allotted to himself and the other individual defendants to the exclusion of the plaintiff. The plaintiff claimed specific performance of the agreement and damages, and also certain declarations, the main claims, *i.e.*, the claims for specific performance and damages, being against the second defendant alone, and the claims for the declarations being against all the defendants. The eight defendants were represented by the same solicitors and only one brief was delivered on their behalf, but they delivered three separate defences. It was clear from the pleadings that, for the defence of the defendants other than the second defendant, it was unnecessary that the plaintiff should fail on his main claim. The plaintiff obtained judgment against the second defendant on the main claim (in which the second defendant only was involved), but failed in his claims against the company and the other individual defendants. He was awarded the costs of the action against the second defendant, and the action against the other defendants was dismissed with costs. The greater part of the costs of the action were attributable to the issues between the plaintiff and the second defendant. On the taxation of costs, the successful defendants claimed that they should have seven-eighths of the total costs of the defendants, including seven-eighths of the fee for instructions for brief and counsel's fees.

H HELD: (i) the rule that, where a number of defendants were jointly represented and some of them were successful, each successful defendant was entitled to an aliquot proportion of the costs of the defence was merely a convenient rule to apply in an ordinary and straightforward case, and there was no authority which compelled the court to follow it in every class of case even if injustice would thereby result, and the rule should not be

extended to a case such as the present where different defences were delivered and where the plaintiff succeeded on the main issue in which one defendant only was involved.

Ellingsen v. Det Skandinaviske Compani ([1919] 2 K.B. 567), considered.

(ii) the order of the trial judge as to costs was of itself sufficient to render inapplicable the general rule as to the costs of successful defendants who were jointly represented; the order first provided that the second defendant was to pay to the plaintiff the costs of the action against the second defendant and then provided for the costs of the successful defendants; and, therefore, the latter part of the order was limited by what had gone before and the successful defendants were not entitled to seven-eighths of the fee for instructions for brief and counsel's fees, but should receive (a) seven-eighths of the general costs of the action, *i.e.*, the costs incurred in relation to matters done on behalf of the defendants generally, (b) any costs solely appertaining to their defences, and (c) such part of the fee for instructions for brief and counsel's fees on the brief as might be attributable to their defences.

Per SINGLETON, L.J.: When one is dealing with an order as to costs, great trouble and expense would be saved if either party were able to go back to the judge, even after the order had been drawn up, if there appeared to be ambiguity or uncertainty in the terms of the order . . . An alteration to bring about such a means of solving a question of this kind would remove what appears to me to be a burden on litigants, and it would simplify the task of taxing masters and of judges.

[AS TO TAXATION OF COSTS, see HALSBURY, Hailsham Edn., Vol. 26, p. 102, para. 192; and FOR CASES, see DIGEST, Practice, pp. 947-949, Nos. 4872-4899, and pp. 877-880, Nos. 4176-4197.]

Cases referred to:

- (1) *Ellingsen v. Det Skandinaviske Compani*, [1919] 2 K.B. 567; 121 L.T. 367; *sub nom.*, *Ellingsen v. Det Skandinaviske Co. and Harsem & Co., Ltd.*, 88 L.J.K.B. 956; Digest, Practice, 877, 4177.
- (2) *Burridge v. Bellew*, (1875), 32 L.T. 807; 42 Digest 253, 2841.
- (3) *Kelly's Directories, Ltd. v. Gavin & Lloyds*, [1901] 2 Ch. 763; 70 L.J.Ch. 786; 85 L.T. 399; Digest, Practice, 880, 4196.

APPEAL by six of the seven successful defendants, in an action brought against eight defendants, from an order of WYNN-PARRY, J., dated June 8, 1950, dismissing their application for a review of taxation.

By an agreement, dated Feb. 7, 1946, and made between the plaintiff, Henry Korner, and his brother, Emil Korner, the second defendant, for the formation of a private limited company under the name of Henry Korner & Co., Ltd. (and by subsequent oral variations to the agreement) it was agreed *inter alia* (a) that the memorandum and articles of the company should be agreed between the parties, (b) that the parties or their nominees should be the subscribers thereto, and (c) that the capital of the company should be divided into ten thousand ordinary shares of £1 each, and that the plaintiff or his wife should subscribe for five thousand and the second defendant or his wife or daughters should subscribe for five thousand. The company was formed on Mar. 30, 1946, while the plaintiff was abroad, the original subscribers being two persons employed by the solicitors who were acting for the second defendant. No shares were allotted to the plaintiff or his wife.

In an action by the plaintiff against the company, as first defendant, the second defendant, and six other persons to whom the shares (other than the two subscription shares) had been allotted, the plaintiff claimed, by the prayer in the statement of claim: (i) specific performance of the agreement of Feb. 7, 1946; (ii) damages in addition to, or, alternatively, in lieu of, specific performance; (iii) damages in any event for delay in performing or for failure to perform the

A agreement; (iv) a declaration that the purported issue and allotment of shares in the company to the personal defendants were invalid; (v) a declaration that a resolution of the company, dated Sept. 20, 1946, purporting to remove the plaintiff from his position as a director of the company was invalid and in-operative; (vi) a declaration that the plaintiff was a director of the company, and an injunction to restrain the defendants from excluding him from meetings of the directors of the company and from otherwise preventing him from acting as a director of the company; (vii) a declaration that a special resolution of the company, purporting to have been passed on Sept. 20, 1946, and to have altered the company's articles, was invalid; and (viii) an order that the second defendant should concur with the plaintiff in the allotment to the plaintiff of five thousand shares in the company.

B Only one brief was delivered on behalf of all the defendants, but three separate defences were delivered: (i) on behalf of the defendant company; (ii) on behalf of the second defendant; and (iii) on behalf of the remaining defendants. By their defences the defendant company and the individual defendants other than the second defendant denied knowledge of the agreement between the plaintiff and the second defendant.

C The action came before ROMER, J., who found that, although paras. (i), (ii) and (iii) of the prayer in the statement of claim were couched in general terms, they concerned only the second defendant, as none of the other defendants was a party to the agreement. By his judgment, dated May 5, 1948, the learned judge found for the plaintiff on paras. (i), (ii), (iii), and (viii) of the prayer in the statement of claim and decreed specific performance of the agreement. In regard D to paras. (iv), (v), (vi) and (vii), he found that the plaintiff had no *locus standi*, as he never became a shareholder of the company, and, accordingly, he held that the action failed against the company and the individual defendants other than the second defendant. He ordered the second defendant to pay the plaintiff's costs of the action against the second defendant and dismissed the action against the other defendants with costs.

E On construing the learned judge's order as to costs, the taxing master ruled that the successful defendants were to receive (a) seven-eighths of the general costs of the action, (b) any costs solely appertaining to their defences, (c) such part of the fee for instructions for brief and counsel's fees on the brief as might be attributable to their defences. The successful defendants objected to the principle on which the taxing master proposed to apply the learned judge's order and contended that they were entitled to receive seven-eighths of the fee F for instructions for brief and counsel's fees on the brief. On the summons to review taxation, WYNN-PARRY, J., upheld the ruling of the learned taxing master, and the successful individual defendants now appealed from his decision.

Gallop, K.C., and *Dare* for the successful individual defendants.

Montgomery White, K.C., and *J. V. Nesbitt* for the plaintiff.

G *Cur. adv. vult.*

H July 5. SINGLETON, L.J.: This is an appeal from an order of WYNN-PARRY, J., dealing with a question of the taxation of costs. There were eight defendants in the action, which was brought by Mr. Henry Korner. The first defendant was a company, H. Korner & Co., Ltd.; the second defendant, Emil Korner, was a brother of the plaintiff; the next four defendants were the wife and members of the family of the second defendant; and the other two defendants, Mr. Dub and Mrs. Dub, were friends of the second defendant; and they and the members of the family of the second defendant had been allotted shares in the company, the first defendant on the record. In the action the plaintiff alleged that in 1946 an agreement had been made between him and the second defendant for the formation of a private limited company in which the two brothers (*i.e.*, the plaintiff and the second defendant) were to be allotted shares equally. Later, at a time when the plaintiff was away from this country,

he and the second defendant had some difference of opinion, and it was alleged that the second defendant caused the company to be incorporated and had the shares allotted to himself and to the other individual defendants to the exclusion of the plaintiff. The plaintiff claimed (a) specific performance of the agreement, as varied, (b) damages, and (c) certain declarations, including (a) a declaration that the purported issue and allotment of shares in the company to the personal defendants were invalid, and (b) a declaration that he was a director of the company. The claims for specific performance and damages were against the second defendant alone, while declarations were claimed against all the defendants.

The action was heard by ROMER, J., who gave judgment on May 5, 1948. The judgment of the learned judge was wholly in favour of the plaintiff against the second defendant. He found that the plaintiff had established the agreement which he set out to prove and that the submissions made on behalf of the second defendant and pleaded by him in his defence failed. The second defendant, in his defence, had denied that the agreement was made in the terms which the plaintiff set up, and had alleged that by various causes or for various reasons the plaintiff had waived his right to sue under the agreement, and, furthermore, that he was estopped from doing so. On all those issues the judgment of ROMER, J., was in favour of the plaintiff. The learned judge then proceeded to give his judgment in regard to the action as against the company and the other individual defendants, and he found that the plaintiff was not entitled to the relief claimed against those defendants. In the first place, he had never validly been appointed a director, and, furthermore, as ROMER, J., said:

"Not only is the plaintiff not a director, but he is not a shareholder and has never paid for any shares. In these circumstances it appears to me that he has no *locus standi* to sue the company in respect of the acts of the company which are matters of internal management. The fact, if it be a fact, that one of the two original subscribers is his nominee does not give him the right to sue. To acquire the right to complain of matters of the internal management of the company he requires a legal title and this he has not got. As against the company, therefore, his action fails."

For the same or similar reasons the action failed against the other individual defendants.

The order of ROMER, J., after decreeing specific performance against the second defendant, ran in this way, in regard to costs:

"And it is ordered that the defendant Emil Korner do pay to the plaintiff his costs of the action against such defendant (other than the costs of the motion heard on June 13, 1947) such costs to be taxed by the taxing master."

After providing for the costs of the motion, the order goes on:

"... and it is ordered that this action against the defendants other than the defendant Emil Korner do stand dismissed out of this court with costs other than their costs of the said motion to be taxed by the taxing master and paid by the plaintiff to the said defendants."

Questions arose as to the precise mode in which the costs of the successful defendants should be taxed. Points were raised by all the successful defendants. The taxing master, having been asked for his observations and ruling, said this in his written observations:

"The cause of action against the defendant, Emil Korner, was quite different from those against the other defendants. The defendants, who were represented by the same firm of solicitors, delivered three separate defences. The plaintiff succeeded against the defendant, Emil Korner, only. The learned judge made the following order for taxation."

After reading the order of ROMER, J., the taxing master said:

A "I construe the order to mean: (1) The plaintiff recovers all necessary costs of obtaining his relief against the defendant, Emil Korner. In practice under the present order, I am of opinion that the plaintiff should get: (a) his general costs of action, such as summons for directions, term fees, etc.; (b) all costs solely appertaining to his claim against Emil Korner; (c) such part of the fee for instructions for brief and counsel's fees on the brief as may be attributable to the plaintiff's claim against Emil Korner, as if Emil Korner had been the sole defendant. A taxation on these principles will, of course, entail a somewhat difficult question of apportionment for the taxing master. (2) If I am right in my construction of the order as regards the costs payable by the defendant, Emil Korner, it follows that the [successful] defendants will get (a) seven-eighths general costs of action, (b) any costs solely appertaining to their defences, (c) such part of the fee for instructions for brief and counsel's fees on the brief as may be attributable to their defences. This, of course, as in the case of the plaintiff's costs, will cause a difficult question of apportionment."

C In his answers to the objections lodged by the successful defendants, the taxing master said:

D "I can see no justification in the claim of these defendants to receive seven-eighths of the 'instructions for brief' and 'counsel's fees.' Although all the defendants, including Emil Korner, were represented in the action by the same solicitors, the [successful] defendants delivered separate defences. The main relief was sought and obtained by the plaintiff against Emil Korner. The relief sought against the other defendants was merely ancillary to the claim against Emil Korner."

In his judgment on a summons by the successful defendants for a review of taxation, WYNN-PARRY, J., was of opinion that the view of the taxing master was right. He said:

E "Without going so far as the learned taxing master in describing the relief sought against the other defendants as merely ancillary to the claim against the defendant, Emil Korner, I am of the opinion that the cause of action on which the plaintiff succeeded against Emil Korner was a different cause of action from that on which the plaintiff failed not only against Emil Korner but against the other defendants. It is clear from a perusal of the statement of claim and of the separate defences of the successful defendants (i.e., the defence of the first defendant, the company, on the one hand, and that of the remaining six defendants, on the other), that it was unnecessary for their defence that the plaintiff should fail in his main claim, the claim against the [second] defendant, for their defences proceeded on the basis that they knew nothing, at any material time, of the transactions between the plaintiff and the [second] defendant which were material to that part of the case on which the plaintiff succeeded."

H Six of the defendants, i.e., all the defendants except the company and Emil Korner, appealed against the order of WYNN-PARRY, J., and the appeal came before this court. As I have said, all the defendants were represented by the same firm of solicitors, though three separate defences were delivered. The claim of the successful defendants is that they are entitled to a taxation on the basis that they shall have seven-eighths, i.e., one-eighth each, of the items, "instructions for brief" and "counsel's fees," which form the most substantial items in the bill of costs. They base this claim (a) on that part of the judgment of ROMER, J., which reads:

"... and it is ordered that this action against the defendants other than the defendant Emil Korner do stand dismissed out of this court with costs other

than their costs of the said motion to be taxed by the taxing master and paid by the plaintiff to the said defendants,"

and (b) on that which is described as a rule that, where a number of different defendants are represented by the same solicitors and some of them are successful, each defendant who is successful is entitled to an aliquot proportion of the costs of the defence.

This rule has been the subject of discussion in a number of cases since the year 1835, and in *Ellingsen v. Det Skandinaviske Compani* (1) this court said ([1919] 2 K.B. 570) that "it appears to be too well established to be disturbed by decisions of this court." The judgment of the court in that case was prepared by SCRUTTON, L.J., and delivered by ATKIN, L.J., and it contains this passage ([1919] 2 K.B. 569):

"KELLY, C.B., in *Burridge v. Bellew* (2) states that there is no difference between the practice in Chancery and at common law. If there has been a joint contract between the solicitor and his clients, each client is liable for the whole costs; and if there were separate contracts, each will be liable for his own portion of them; and as pointed out by AMPHLETT, B., in the same case, the fact that after separate retainers the defence is conducted jointly does not make the liability joint. As the principle of allowance of costs is that the successful party is to be recompensed the liability he has reasonably incurred in defending himself, if he is only liable to his solicitor for half of certain joint items he cannot be allowed the whole of them, even though by some separate agreement he has made himself liable for the other half, primarily the liability of another and unsuccessful defendant."

This rule, a rule of thumb, is, no doubt, convenient in an ordinary case, but I do not think it can be said that it must be applied in every case. Regard must be had to the nature of the case and to the nature of the defences raised to the claim. In the present case, there were three separate defences on the file, though at the trial the defendants were represented by the same solicitors and counsel. The main contest was between the plaintiff and the second defendant. That entailed a lengthy inquiry as to what was the agreement, and in regard to the questions raised by paras. 9 to 14 of the defence of the second defendant, in which defences of estoppel, waiver and the like were raised. Neither the defendant company nor any of the other successful defendants raised these matters. Their defences were, as counsel put it, more of a stone-wall in character. Yet, if the claim of the successful defendants is right, they will be each entitled to one-eighth of the fee allowed for instructions for brief and one-eighth of counsel's fees, though they did not raise the matters I have mentioned and though the plaintiff succeeded on them against the defendant who did raise them. This cannot be right. It is not disputed that it would result in injustice against the plaintiff. I do not know of any authority which compels the court to follow the rule in every class of case, even if to follow it would result in injustice. To do so would be to fly in the teeth of the generally accepted principle, as stated ([1919] 2 K.B. 569) in *Ellingsen's* case (1), "that the successful party is to be recompensed the liability he has reasonably incurred in defending himself." WYNN-PARRY, J., thought that the authorities in which the rule had been applied were all cases in which the plaintiff was pursuing the same action against all the defendants. That may be a somewhat narrow view. At the same time, I agree with him that the rule ought not to be extended. I regard it as something convenient to be applied in an ordinary or straightforward case. I do not think it apt in any degree for application to this case, having regard to the different defences which were raised and to the fact that the plaintiff succeeded on the main issue, an issue in which only one of the defendants was involved.

There is, however, another, and, perhaps, more compelling, reason for adopting this view, and that arises from the wording of the order itself. It is not right to

look only at that part of the order which deals with the costs of the successful defendants. The order as a whole must be considered. When that is done, it becomes quite clear that ROMER, J., treated this case really as though there were two actions in one. I observe from the transcript of his judgment that sixteen and a half pages were occupied by the statement of facts and the learned judge's reasons for his judgment against the second defendant, and one page suffices to show why the other defendants are entitled to judgment against the plaintiff. The judgment itself decrees specific performance of the agreement by the second defendant, Emil Korner, and the order states:

"And it is ordered that the defendant Emil Korner do pay to the plaintiff his costs of the action against such defendant . . ."

That is intended to dispose of all the costs in the action between the plaintiff and the second defendant. It is not merely a case of judgment for the plaintiff against one defendant with costs, and judgment for the other defendants against the plaintiff with costs. The judge, having made the order that the second defendant pay to the plaintiff his costs of the action against such defendant, proceeded to provide for the costs of the successful defendants, and that part of the order must be read as limited by what has gone before. To my mind, the order, as drawn, is of itself sufficient to render inapplicable the rule relied on by the successful defendants. For these reasons, I am of opinion that this appeal should be dismissed.

I would add a word. It is said that when the order has been drawn up there can be no further reference to the judge who made it, and this appears to be the position as stated by BYRNE, J., in *Kelly's Directories, Ltd. v. Gavin and Lloyds* (3). BYRNE, J., said ([1901] 2 Ch. 767):

"In the present case I have an order clearly directing the defendant Gavin to pay the plaintiffs their costs of this action, and I cannot mould or re-frame that order now; the proper time to ask for the insertion of some words distinguishing these extra costs, or to object to the form of the proposed order, was at the trial, or later, at the actual drawing up of the order, when the defendant, as I understand, attended; it is too late for any alteration now. In my opinion the taxing master has taken a correct view of what this order means, and I cannot interfere, and I therefore dismiss this summons with costs."

I cannot help feeling that, when one is dealing with an order as to costs, great trouble and expense would be saved if either party were able to go back to the judge, even after the order had been drawn up, if there appeared to be ambiguity or uncertainty in the terms of the order. It is not possible to have every eventuality in mind all the time and, after all, costs are, in general, in the discretion of the judge. It is more than two years since judgment was given in this case and the parties are still fighting as to the interpretation of the order as to costs and as to the basis on which those costs should be taxed. If it had been possible to refer the matter back to ROMER, J., the whole dispute might have been settled within ten minutes, and I have no doubt as to what the decision would have been. An alteration to bring about such a means of solving a question of this kind would remove what appears to me to be a burden on litigants, and it would simplify the task of taxing masters and of judges. In my opinion, this appeal should be dismissed.

JENKINS, L.J.: I agree.

Appeal dismissed with costs.

Solicitors: *Rubinstein, Nash & Co.* (for the successful defendants); *Fairchild, Greig & Co.* (for the plaintiff).

[*Reported by F. GUTTMAN, Esq., Barrister-at-Law.*]

BATER v. BATER.

[COURT OF APPEAL (Bucknill, Somervell and Denning, L.J.J.), June 28, 29, 1950.]

Divorce—Cruelty—Standard of proof—“Beyond reasonable doubt.”

In dismissing a divorce petition brought by the wife on the ground of cruelty, the commissioner said that she must “prove her case beyond reasonable doubt.”

HELD: this was a correct statement of the law and the commissioner had not misdirected himself. A

Davis v. Davis ([1950] 1 All E.R. 40), and *Gower v. Gower* ([1950] 1 All E.R. 804), followed.

[AS TO CRUELTY, see HALSBURY, Hailsham Edn., Vol. 10, pp. 649-654, paras. 954-962; and FOR CASES, see DIGEST, Vol. 27, pp. 281-293, Nos. 2513-2694, and Digest Supp. B

AS TO REVIVAL OF CONDONED OFFENCE, see HALSBURY, Hailsham Edn., Vol. 10, pp. 680-682, paras. 1006-1009; and FOR CASES, see DIGEST, Vol. 27, pp. 343-347, Nos. 3236-3283, and Digest Supp.]

Cases referred to :

- (1) *Gower v. Gower*, [1950] 1 All E.R. 804; 114 J.P. 221. C
- (2) *Davis v. Davis*, [1950] 1 All E.R. 40; [1950] P. 125; 114 J.P. 56.
- (3) *Loveden v. Loveden*, (1810), 2 Hag. Con. 1; 161 E.R. 648; 27 Digest 296, 2730.
- (4) *Briginshaw v. Briginshaw*, (1938), 60 C.L.R. 336; 12 A.L.J. 100; 44 A.L.R. 334.

APPEAL by the wife from a judgment of Mr. Commissioner GRAZEBROOK, K.C., dated Mar. 13, 1950, dismissing her petition for divorce on the ground that the charges of cruelty made by her were not proved beyond reasonable doubt. The appellant contended that in so holding the learned commissioner misdirected himself in law as it meant that the standard of proof required was the same as in a criminal case. D

Tolstoy for the wife.

The husband appeared in person. E

BUCKNILL, L.J., referred to the evidence, said that the husband's conduct shortly before the wife left him was not such as to revive any acts of cruelty by him which had been condoned by the wife, and continued: On the point on which misdirection is alleged, the learned commissioner, in his judgment, said: F

“That is the evidence and in order to succeed the wife has to satisfy me that there has been injury to life, limb, or health, bodily or mentally, or reasonable apprehension of it, and she has to prove her case beyond reasonable doubt.”

In my opinion, that was a correct statement of law, and I adhere to what I said in *Gower v. Gower* (1) and in *Davis v. Davis* (2). In *Gower v. Gower* (1) I should, perhaps, have said: G

“The standard of proof required in a criminal case is higher than required in some civil actions.”

Subject to that, I stand by what I said then. I do not understand how a court can be satisfied that a charge has been proved—and the statute requires that the court shall be satisfied before pronouncing a decree—if at the end of the case the court has a reasonable doubt whether the case has been proved. To be satisfied and at the same time to have a reasonable doubt seems to me to be an impossible state of mind. I will add this. I regard proceedings for divorce as proceedings of very great importance, not only to the parties, but also to the State. If a wife is divorced, she not only has that stigma resting on her for the rest H

of her life, but it may mean she will lose the maintenance to which she is entitled from her husband and the custody of her children. It may, indeed, mean ruin to her. If a high standard of proof is to be required because of the importance of a particular case to the parties and also to the community, divorce proceedings require that high standard. I think that this appeal fails.

SOMERVELL, L.J.: I agree. With regard to the suggested misdirection,

A I do not think that the commissioner in the sentences quoted by BUCKNILL, L.J., misdirected himself, and I desire to express my agreement with what has been said on that matter by BUCKNILL, L.J., today and what was said by him in *Davis v. Davis* (2). I agree that the appeal must be dismissed.

DENNING, L.J.: The difference of opinion which has been evoked about

B the standard of proof in these cases may well turn out to be more a matter of words than anything else. It is true that by our law there is a higher standard of proof in criminal cases than in civil cases, but this is subject to the qualification that there is no absolute standard in either case. In criminal cases the charge must be proved beyond reasonable doubt, but there may be degrees of proof within that standard. Many great judges have said that, in proportion as the crime is enormous, so ought the proof to be clear. So also in civil cases.

C The case may be proved by a preponderance of probability, but there may be degrees of probability within that standard. The degree depends on the subject-matter. A civil court, when considering a charge of fraud, will naturally require a higher degree of probability than that which it would require if considering whether negligence were established. It does not adopt so high a degree as a criminal court, even when it is considering a charge of a criminal nature, but

D still it does require a degree of probability which is commensurate with the occasion. Likewise, a divorce court should require a degree of probability which is proportionate to the subject-matter. I do not think the matter can be better put than SIR WILLIAM SCOTT put it in *Loveden v. Loveden* (3) (2 Hag. Con. 3):

E “The only general rule that can be laid down upon the subject is that the circumstances must be such as would lead the guarded discretion of a reasonable and just man to the conclusion . . .”

The degree of probability which a reasonable and just man would require to come to a conclusion—and likewise the degree of doubt which would prevent him from coming to it—depends on the conclusion to which he is required to come.

F It would depend on whether it was a criminal case or a civil case, what the charge was, and what the consequences might be, and if he was left in real and substantial doubt on the particular matter, he would hold the charge not to be established. He would not be satisfied about it.

What is a real and substantial doubt? It is only another way of saying a reasonable doubt, and a “reasonable doubt” is simply that degree of doubt

G which would prevent a reasonable and just man from coming to a conclusion. So the phrase “reasonable doubt” gets one no further. It does not say that the degree of probability must be as high as ninety-nine per cent. or as low as fifty-one per cent. The degree required must depend on the mind of the reasonable and just man who is considering the particular subject-matter.

H In some cases fifty-one per cent. would be enough, but not in others. When this is realised, the phrase “reasonable doubt” can be used just as aptly in a civil case or a divorce case as in a criminal case, and, indeed, it was so used by BUCKNILL, L.J., in *Davis v. Davis* (2) and *Gower v. Gower* (1). The only difference is that, because of our high regard for the liberty of the individual, a doubt may be regarded as reasonable in the criminal courts which would not be so in the civil courts. I agree, therefore, with my brothers that the use of the phrase “reasonable doubt” by the commissioner was not a misdirection, any more than it was in *Briginshaw v. Briginshaw* (4).

If the commissioner had, however, put the case higher and said that the case had to be proved with the same strictness as a crime is proved in a criminal court, then he would, I think, have misdirected himself because that would be the very error which this court corrected in *Davis v. Davis* (2). It would be adopting too high a standard. The divorce court is a civil court, not a criminal court, and it should not adopt the rules and standards of a criminal court. I agree that the appeal should be dismissed.

Appeal dismissed. A

Solicitors: *Neave & Neave*, agents for *Broad, Riggall, and Godman*, Watford, for the wife.

[Reported by F. GUTTMAN, ESQ., Barrister-at-Law.]

DALE v. DE SOISSONS.

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Bucknill and Jenkins, L.J.J.), July 3, 1950.]

Income Tax—Compensation for loss of office—Term in service agreement for payment on termination of service agreement—Income Tax Act, 1918 (c. 40), sched. E, r. 1. C

By the terms of a service agreement the taxpayer, who was employed by a company as assistant to the managing director, was entitled to a salary and commission. The agreement provided that the company should be entitled to terminate the taxpayer's appointment at the end of the first or second year of the three years covered by the agreement by three months' notice, whereupon a lump sum would become payable to the taxpayer by way of compensation for loss of office. The company exercised the option to terminate the agreement at the end of the first year of the taxpayer's employment, and paid the agreed sum of compensation to him. On the question whether the sum was assessable to income tax in the hands of the taxpayer as a profit from his contract of employment, D

HELD: since the taxpayer was entitled, under the terms of the service agreement, to receive a payment of compensation in the event, which happened, of the company electing to terminate the agreement, the compensation was a profit arising from his employment, and therefore, taxable under sched. E, r. 1. E

Henry v. Foster (A), *Henry v. Foster* (J), *Hunter v. Dewhurst* (1932) (145 L.T. 225), applied. F

Decision of ROXBURGH, J. ([1950] 1 All E.R. 912), affirmed. G

[AS TO LIABILITY TO TAX OF COMPENSATION FOR LOSS OF OFFICE, see HALSBURY, Hailsham Edn., Vol. 17, p. 217, para. 438; and FOR CASES, see Digest Supp.]

Cases referred to:

- (1) *Henry v. Foster* (A), *Henry v. Foster* (J), *Hunter v. Dewhurst*, (1932), 145 L.T. 225; 16 Tax Cas. 605; *sub nom.*, *Dewhurst v. Hunter*, 146 L.T. 510; Digest Supp.
- (2) *Henley v. Murray*, [1950] 1 All E.R. 908. H

APPEAL by the taxpayer from an order of ROXBURGH, J., dated Apr. 3, 1950, and reported [1950] 1 All E.R. 912, whereby he held that a payment of compensation for loss of office, made to the taxpayer by the company by whom he had been employed, was assessable to income tax under sched. E, r. 1. The facts appear in the judgment of SIR RAYMOND EVERSLED, M.R.

Grant, K.C., and *Senter* for the taxpayer.

Donovan, K.C., and *R. P. Hills* for the Crown.

SIR RAYMOND EVERSHED, M.R.: This is an appeal by the taxpayer, Colonel de Soissons, against a judgment of ROXBURGH, J., given on Apr. 3, 1950, whereby he held that a sum of £10,000 paid to the taxpayer by the company by whom he had been employed fell within the terms of r. 1 of the Rules Applicable to sched. E to the Income Tax Act, 1918. The rule reads as follows:

- A “Tax under this schedule shall be annually charged on every person having or exercising an office or employment of profit mentioned in this schedule . . . in respect of all salaries, fees, wages, perquisites or profits whatsoever therefrom . . .”

The question, therefore, is whether the £10,000 can be said to be “salaries, fees, wages, perquisites or profits” from the contract of employment between the taxpayer and his employers.

- B Cases of this character are never easy, and the line between those in which the taxpayer has succeeded and those in which he has failed may be described as “a little wobbly,” but, in my judgment, the learned judge rightly held that this case fell on that side of the line which has been illustrated by, among other cases, *Henry v. Foster (A)*, *Henry v. Foster (J)*, *Hunter v. Dewhurst (1)*, and not on the side of the line on which fell *Henley v. Murray (2)*, recently decided in this court.

C The taxpayer, who had been engaged in an important and responsible capacity by Messrs. Gallaher, Ltd., for some years, in July, 1944, made with his employers a new agreement, which is the only relevant contract for present purposes. The contract provided first:

- D “The company (Gallaher Ltd.) hereby continues the appointment of Mr. de Soissons as assistant to the managing director of the company and Mr. de Soissons agrees to continue in such office for the period of three years from Jan. 1, 1945.”

There then followed provisions for payment, by way of remuneration for those services, of a salary plus a commission. There was then a provision relating to what should happen if the taxpayer was prevented by ill-health from performing his services. The vital clause is cl. 5, which provides:

- E “If in the opinion of the board of directors of the company it is desirable for the better or more economical working of the company and conducive to the interests of the company so to do the company shall be entitled to terminate Mr. de Soissons’ appointment hereunder as assistant to the managing director on Dec. 31, 1945, or on Dec. 31, 1946, on giving to him three months’ previous notice in writing and on such termination of the said appointment becoming effective Mr. de Soissons’ appointment hereunder shall be forthwith terminated and in the event of Mr. de Soissons’ appointment hereunder being so terminated there shall be paid to Mr. de Soissons
- F by way of compensation for loss of office the amounts following . . .”

G Then there is a table showing that if the agreement is terminated at the end of the first year, Dec. 31, 1945, the amount of £10,000 shall be paid, and if at the end of the second year, £6,000. If the term of three years ran its course then, by silence, it is clear that nothing would be payable by way of, to use the words of the clause, “compensation for loss of office.”

- H It is conceded that the formula “by way of compensation for loss of office,” though it is not to be deprived of significance, is not, in a case of this kind, conclusive. The burden of the argument of counsel for the taxpayer is that, according to its proper construction, one cannot say that the £10,000, which in the event became payable when the option was exercised to terminate at Dec. 31, 1945, was a payment or remuneration for rendering the services which the taxpayer undertook to render under this agreement. Counsel accordingly says that it really represents, as a matter of principle as in *Henley v. Murray (2)*, in effect a

sum paid in consideration for the cancellation of the rights under the agreement which the taxpayer would otherwise have had. As I have already indicated, to my mind the correct answer is that given by ROXBURGH, J., namely, that this £10,000 was part of the remuneration which the taxpayer was entitled to get under, and received from, his contract of service. The contract provided that he should serve either for three years at an annual sum or, if the company so elected, for a shorter period of two years or of one year at the annual sum in respect of the two years or the one year, as the case might be, plus a further sum, that is to say, the £10,000 was something to which he became entitled as part of the terms on which he promised to serve, something which he was entitled to receive in the particular event specified, namely, the term not running the three years but being earlier determined. I agree with the learned judge that there is a true analogy between this case and the case to which I have referred, *Henry v. Foster* (A), *Henry v. Foster* (J) (1), where the taxpayer received sums by virtue of the articles of association which were treated, for that purpose, as being a part of the contract of service.

From the very full Case Stated it is apparent that there was a difficult question to be resolved when the war ended, namely, for how long would it be right to engage the taxpayer in the circumstances then affecting the tobacco trade. The Case sets out the evidence, which indicates that the arrangement came to and incorporated in the agreement to which I have alluded was a compromise, one side desiring a longer and a securer term, and the other preferring an annual contract of service. That evidence is clearly consistent with, and reflected by, the terms of the agreement itself. As I have indicated, the effect of it was that the taxpayer engaged himself, if called on, to serve for three years at a remuneration which was specified, but the right was given to the company to make his term a shorter one. In that event, as it seems to me, the remuneration for the services took the form in part of a remuneration plus a commission for the period he in fact served, plus a further sum to which he was contractually entitled under the terms of his agreement and as part of the bargain which he made.

Cases of this kind turn in the last resort on the short question whether, following the language of r. 1 of the Rules Applicable to sched. E, a sum can be said to arise from the contract of employment. I am satisfied to accept the last few words of ROXBURGH, J.'s, judgment as giving expression entirely to my own conclusion. He says ([1950] 1 All E.R. 915):

"In the present case the taxpayer surrendered no rights. He got exactly what he was entitled to get under his contract of employment. Accordingly, the payment, in my judgment, falls within the taxable class . . ."

For those reasons I think the learned judge was right, and the appeal should be dismissed.

BUCKNILL, L.J.: I agree.

JENKINS, L.J.: I also agree.

Appeal dismissed with costs.

Solicitors: *Herbert Smith & Co.* (for the taxpayer); *Solicitor of Inland Revenue* (for the Crown).

[Reported by C. N. BEATTIE, Esq., Barrister-at-Law.]

SHARER v. WALLACE.

[CHANCERY DIVISION (Wynn-Parry, J.), July 5, 1950.]

Practice—Particulars—Action for an account—Particulars sought by defendant of sums paid to him by plaintiff—R.S.C., Ord. 19, r. 7 (b).

A In an action for an account and an order for the payment of the sum found due, the plaintiff alleged that between certain dates he paid money for certain purposes to the defendant who, he alleged, was his solicitor and/or owed him a fiduciary duty. After delivering his defence, which was a denial of the plaintiff's allegations, the defendant claimed further and better particulars of the money alleged to have been paid by the plaintiff with dates and amounts, and the method by which and the purposes for which each payment was made.

B HELD: the addition, in 1919, of r. 7 (b) to R.S.C., Ord. 19, r. 7, did not effect any change in the then existing practice, and, as the plaintiff's claim was for an account and not for a specific sum, the purposes for which the sums were alleged to have been paid did not become relevant until it had been established that the defendant was an accounting party, and, therefore, particulars would not be ordered.

C *Augustinus v. Nerinckx*, (1880) (16 Ch.D. 13); *Blackie v. Osmaston*, (1884) (28 Ch.D. 119); and *Carr v. Anderson* (1901) (18 T.L.R. 206), *applied*.

[AS TO WHEN PARTICULARS ARE ORDERED, see HALSBURY, Hailsham Edn., Vol. 25, pp. 275-282, paras. 465-467; and FOR CASES, see DIGEST, Pleading, pp. 193-205, Nos. 1634-1710.]

D Cases referred to:

- (1) *Augustinus v. Nerinckx*, (1880), 16 Ch.D. 13; 43 L.T. 458; 18 Digest 189, 1381.
- (2) *Blackie v. Osmaston*, (1884), 28 Ch.D. 119; 54 L.J.Ch. 473; 52 L.T. 6; 26 Digest 148, 1115.
- (3) *Carr v. Anderson*, (1901), 18 T.L.R. 206; Digest, Pleading, 194, 1641.

E PROCEDURE SUMMONS.

In his statement of claim the plaintiff in an action for an account and an order for the sum found due alleged that the defendant was acting as solicitor for K., who was engaged in an action or proceedings against various persons, and also for the plaintiff to whom he was, in connection with the matters thereafter set out, under a fiduciary duty. In para. 3, the plaintiff alleged that between

F June, 1943, and July, 1948, he paid to the defendant:

G " . . . as solicitor aforesaid sums of money for the purposes of the said action or proceedings and for the purposes of being advanced by way of loan to the said [K.], and the defendant failed and refused to account to the plaintiff for the moneys so received by him or of the payments made by him out of the moneys so received by him, or to repay to the plaintiff any balance remaining in his hands."

H Succeeding paragraphs in the statement of claim alleged that the plaintiff had paid to the defendant various sums in respect of counsel's fees and costs and also certain sums to be paid to or to the use of K. In the prayer to the statement of claim the plaintiff claimed under para. 3 and also, separately, under the succeeding paragraphs "an account and an order for the payment of the sum found due from the defendant to the plaintiff, and interest thereon." By his defence the defendant denied that he ever acted as solicitor for the plaintiff and that he ever owed the plaintiff a fiduciary duty. He did not admit the allegations with regard to his relationship with K. He denied that he was, or ever had been, liable to account to the plaintiff for the alleged or any moneys as alleged or at all, and otherwise made no admissions with regard to para. 3 and the succeeding paragraphs above mentioned.

The defendant claimed the following further and better particulars under para. 3:

"(1) Of the sums of money alleged to have been paid by the plaintiff to the defendant giving dates and amounts and the method by which each payment was made. (2) Which of the said sums was or were for the purposes of the said action or proceedings. (3) Which of the said sums was or were for the purpose of being advanced by way of loan to the said [K.]. (4) In each of the above cases whether the alleged purpose was communicated to the defendant and if so how and when; if orally the substance of what was said; if in writing, identifying the document."

Vester for the plaintiff.

J. F. Bowyer for the defendant.

WYNN-PARRY, J., stated the facts and continued: The question arises whether it is necessary, to enable the defendant to know what case he has to meet, for him to be furnished at this stage with any details of the sums of money alleged to have been paid by the plaintiff to the defendant between June, 1943, and July, 1948. Apart from any question of the effect of the authorities, I should myself have thought that it was unnecessary for the defendant to be furnished with particulars of the sums so alleged to have been paid to him by the plaintiff over the period in question. The issue which will fall to be tried before the court when the action comes for trial is simply, as regards this part of the matter: Is the defendant an accounting party to the plaintiff or not? The answer to that will depend on evidence, of which figures, as it seems to me, will form no relevant part. If the plaintiff fails to establish that the defendant is an accounting party, then *cadit quaestio*. If, on the other hand, he succeeds in establishing that the defendant is an accounting party, the whole matter will be referred to chambers for the account to be taken. Then the defendant will have to account to the plaintiff, and, for the first time figures will become relevant.

In *Augustinus v. Nerinckx* (1), where the relevant claim was for an account, JESSEL, M.R., said (16 Ch.D. 17):

"It appears to me that the attention of the learned judge was not sufficiently directed to the nature of the action. It is not an action for a definite sum of money, but is an action by a legal personal representative in respect of advances alleged to have been made by her intestate under an agreement in the nature of a partnership agreement, and seeks to establish a lien upon a certain fund for what shall be found due. No specified sum is claimed, but an account is asked for, and in order to enable the defendant to put in a defence to such an action, it is not necessary that she should know the particulars of the sums advanced and the times when they were advanced."

It is to be observed that the Master of the Rolls grounded his decision on the circumstance that it was unnecessary for the defendant to have particulars in order to put in a defence. R.S.C., Ord. 19, r. 7, of course, has since been changed by the addition (by R.S.C., February, 1919) of r. 7 (b); but it appears to me that the reasoning equally applies, and that, generally speaking, it is unnecessary, in the case of a claim for an account, that the defendant should know the particulars of the sums alleged to have been paid to him so that he may be able to contest the issue: Aye or no, is he an accounting party.

In the later case of *Blackie v. Osmaston* (2), which also was decided before the rule was altered, the claim was not for an account simply, but was also for payment of a specified balance. BAGGALLAY, L.J., in the course of his judgment, said (28 Ch.D. 122):

A “If the action had been merely for an account of what the plaintiffs and their testator had paid, I should have been of opinion that an order for particulars ought not to be made. But that is not the case. . . . Now it is true that it is not the practice of the court to order the plaintiff to give particulars where he only asks a general account, but the rule is otherwise where he asks for payment of a definite sum . . . If the statement of claim had merely asked for an account of what had been advanced by the plaintiffs or their testator, and payment by the defendant of his share of what should be found to have been advanced, I think that particulars would properly have been refused as unnecessary—but under a statement of claim in the present form I think that particulars would be very useful for enabling the defendant to frame his defence.”

B BOWEN, L.J., at the end of his very short judgment, said (*ibid.*, 123):

“I agree with what BAGGALLAY, L.J., has said as to the distinction between cases where the plaintiff asks for an account and cases where he asks for a specified sum.”

C FRY, L.J., said:

“The rule is that where the plaintiff is claiming a specific sum he must give particulars of demand, and I see nothing in this case to induce the court to depart from that rule.”

D In *Carr v. Anderson* (3), a claim for an account in which there was an application by the defendant for particulars, VAUGHAN WILLIAMS, L.J., said (18 T.L.R. 206) that, in his opinion, a sufficient answer to the demand for particulars was that the action was brought for an account and the object of the particulars was that the plaintiff should first account to the defendants. That statement by VAUGHAN WILLIAMS, L.J., appears to me to support the view which I have formed—that the *ratio decidendi* of the earlier cases applies even since the rule has been altered and particulars are not now ordered except in very special cases before the delivery of the defence.

E It is argued that, at least, the plaintiff should give to the defendant particulars as regards the purposes for which the various sums were advanced. Here, again, I can see no embarrassment whatever to the defendant in defending this action at the trial in the absence of any such particulars, which appear to me not to become relevant unless and until it has been established that the plaintiff is an accounting party. In my view, therefore, I ought not to order any of the particulars asked for under para. 3.

F Order accordingly. Costs to be costs in the cause.

Solicitors: *Kingsley, Napley & Co.* (for the plaintiff); *Fairchild, Greig & Co.* (for the defendant).

[Reported by H. McL. MORRISON, ESQ., Barrister-at-Law.]

Re BLAND-SUTTON'S WILL TRUSTS. NATIONAL
PROVINCIAL BANK, LTD. *v.* COUNCIL OF THE MIDDLESEX
HOSPITAL MEDICAL SCHOOL AND OTHERS.

[CHANCERY DIVISION (Danckwerts, J.), June 21, 23, July 7, 1950.]

Charity—Charitable purpose—Gift to the Royal College of Surgeons—Subsidiary or incidental object of college not charitable. A

Will—Gift to medical school of hospital—Gift over if hospital nationalised or passes into public ownership—Whether gift over takes effect consequent on National Health Service Act—National Health Service Act, 1946 (c. 81), s. 8 (1), s. 15 (1).

By her will, dated Jan. 13, 1943, a testatrix, who died on Feb. 10, 1943, gave her residuary real and personal estate on the usual trusts for conversion and directed that the resulting "endowment fund" should be held on "the following charitable trusts" which were, *inter alia*, "to pay the residue of the income of the endowment fund in each year to the treasurer . . . of the Middlesex Hospital for the maintenance and benefit of the Bland-Sutton Institute of Pathology now carried on in connection with the said hospital . . . Provided always that should the . . . Middlesex Hospital become nationalised or by any means pass into public ownership or should the [trustees] at any time become unable lawfully to apply the income of the endowment fund for the purposes aforesaid then and in any of the said events the bank shall thereupon pay and transfer the endowment fund . . . to the Royal College of Surgeons . . ." The Bland-Sutton Institute was a department of the medical school of Middlesex Hospital, and until 1948 the school was a department of the hospital. On July 5, 1948, under the National Health Service Act, 1946, the hospital was designated a teaching hospital, but the school became a separate legal entity with a governing body constituted under s. 15 (1) of the Act. The Royal College of Surgeons claimed that, by reason of the changes brought about by the Act, the gift over took effect. B

Held: the effect of s. 8 (1) of the Act of 1946 was to take the property held for the purposes of the medical school out of the provisions of ss. 6 and 7 (by which land and other property of hospitals were vested in the Minister of Health, and endowments of teaching hospitals were vested in boards of governors appointed by the Minister), and the property of the school was now vested in an incorporated governing body set up pursuant to a scheme prepared by the former council of the medical school under s. 15 (1) of the Act; that corporate body was not nationalised and the property of the school had not passed into public ownership; and, therefore, for the purposes of the defeasance clause the Middlesex Hospital had not "become nationalised or passed into public ownership," and the trustee was able lawfully to apply the income for the purposes mentioned in the will. C

Per curiam: on the facts, the real object of the Royal College of Surgeons was the promotion and encouragement of the study and practice of surgery and not of the interests of surgical practitioners, and, therefore, the college was a charity. D

Dictum of ROMER, L.J., in *Institution of Civil Engineers v. Inland Revenue Comrs.* ([1932] 1 K.B. 172), applied. E

Re Royal College of Surgeons of England ([1899] 1 Q.B. 871), distinguished. F

[AS TO GIFTS FOR EDUCATIONAL PURPOSES, see HALSBURY, Hailsham Edn., Vol. 4, pp. 116-118, paras. 153, 154; and FOR CASES, see DIGEST, Vol. 8, pp. 245-248, Nos. 51-73.] G

Cases referred to:

- (1) *Re Bowen*, [1893] 2 Ch. 491; 62 L.J.Ch. 681; 68 L.T. 789; 8 Digest 327, 1102. H

- (2) *Re Hummeltenberg*, [1923] 1 Ch. 237; 92 L.J.Ch. 326; 129 L.T. 124; Digest Supp.
- (3) *Brighton College v. Marriott*, [1926] A.C. 192; 134 L.T. 417; 28 Digest 24, 127.
- (4) *Re Royal College of Surgeons of England*, [1899] 1 Q.B. 871; 68 L.J.Q.B. 613; 80 L.T. 611; *sub nom.*, *Royal College of Surgeons of England v. Inland Revenue Comrs.*, 4 Tax Cas. 344; 39 Digest 299, 781.
- (5) *Inland Revenue Comrs. v. Scott, Re Bootham Ward Strays, York*, [1892] 2 Q.B. 152; 61 L.J.Q.B. 432; 67 L.T. 173; 56 J.P. 580, 632; 3 Tax Cas. 134; 39 Digest 298, 774.
- (6) *Society of Writers to the Signet v. Inland Revenue Comrs.*, (1886), 14 R. (Ct. of Sess.) 34; 2 Tax Cas. 257; 28 Digest 13, 65m.
- (7) *Miley v. A.-G.*, [1918] 1 I.R. 455.
- (8) *Bowman v. Secular Society, Ltd.*, [1917] A.C. 406; 86 L.J.Ch. 568; 117 L.T. 161; 8 Digest 265, 270.
- (9) *Pharmaceutical Society of Ireland v. Revenue Comrs.*, [1938] I.R. 202.
- (10) *Pig Marketing Board (Northern Ireland) v. Inland Revenue Comrs.*, [1945] N.I. 155; 26 Tax Cas. 319; 2nd Digest Supp.
- (11) *General Medical Council v. Inland Revenue Comrs., English Branch Council of General Medical Council v. Inland Revenue Comrs.*, (1928), 97 L.J.K.B. 578; 139 L.T. 225; 13 Tax Cas. 819; Digest Supp.
- (12) *Smith v. Kerr*, [1902] 1 Ch. 774; 71 L.J.Ch. 369; 86 L.T. 477; 8 Digest 247, 69.
- (13) *Income Tax Special Purposes Comrs. v. Pemsel*, [1891] A.C. 531; 61 L.J.Q.B. 265; 65 L.T. 621; 55 J.P. 805; 3 Tax Cas. 53; 28 Digest 10, 51.
- (14) *Institution of Civil Engineers v. Inland Revenue Comrs.*, [1932] 1 K.B. 149; 100 L.J.K.B. 705; 145 L.T. 553; 16 Tax Cas. 158; Digest Supp.
- (15) *Savoy Overseers v. Art Union of London*, [1896] A.C. 296; 65 L.J.M.C. 161; 74 L.T. 497; 60 J.P. 660; 38 Digest 498, 525.
- (16) *Inland Revenue Comrs. v. Forrest*, (1890), 15 App. Cas. 334; 60 L.J.Q.B. 281; 63 L.T. 36; 54 J.P. 772; 3 Tax Cas. 117; 39 Digest 299, 780.
- (17) *Christ's Hospital v. Grainger*, (1849), 1 Mac. & G. 460; 19 L.J.Ch. 33; 15 L.T.O.S. 497; 13 J.P. 778; 41 E.R. 1343; 8 Digest 324, 1060.

ADJOURNED SUMMONS to determine whether a provision in the will of Lady Edith Goff Bland-Sutton, deceased, making (by way of defeasance of an earlier gift in certain events) a gift to the Royal College of Surgeons, was valid, or void for uncertainty, perpetuity or otherwise. It was further asked that, if the gift were declared to be valid, all necessary directions might be given to the trustees of the will whether any event had occurred to cause the said gift to become payable, and, if so, on what date.

N. S. S. Warren for the plaintiffs, the executors and trustees of the will.

Pascoe Hayward, K.C., and *R. W. Goff* for the first defendants, the Council of the Middlesex Hospital Medical School.

Sir Andrew Clark, K.C., and *L. J. M. Smith* for the second defendants, the Royal College of Surgeons of England.

Denys B. Buckley for the third and fourth defendants, the Treasury Solicitor and the Attorney-General.

Cur. adv. vult.

July 7. **DANCKWERTS, J.**, read the following judgment. By her will, dated Jan. 13, 1943, which was confirmed by a codicil dated Jan. 21, 1943, the testatrix, who was the widow of Sir John Bland-Sutton, the famous surgeon, appointed the plaintiff bank to be her executor and the trustee of her will, and after certain annuities and other bequests (by cl. 10) gave her residuary real and personal estate on the usual trusts for conversion and described the resulting fund as "the endowment fund." She directed the endowment fund to be

held on "the following charitable trusts for so long as the law shall permit." The trusts which then followed were (i) out of the income of the endowment fund to pay the clear annual sum of £300 free of all duties and deductions and free from income tax at the current rate for the time being to the Royal College of Surgeons for the purpose of maintaining a Bland-Sutton Research Scholarship in the Bernard Baron Laboratories of the said college on certain terms and conditions set out in the will, and (ii)

"to pay the residue of the income of the endowment fund in each year to the treasurer or other proper officer of the Middlesex Hospital for the maintenance and benefit of the Bland-Sutton Institute of Pathology now carried on in connection with the said hospital."

Clause 11 of the will contains a proviso in the following terms:

"Provided always that should the Bland-Sutton Institute for Pathology cease to be carried on as a pathological research institution or should its name be changed or should the Middlesex Hospital become nationalised or by any means pass into public ownership or should the bank at any time become unable lawfully to apply the income of the endowment fund for the purposes aforesaid then and in any of the said events the bank shall thereupon pay and transfer the endowment fund (both as to capital and the income thereof) to the Royal College of Surgeons absolutely for the general purposes of the said College and the receipt of the treasurer or other proper officer thereof shall be a full and sufficient discharge to the bank therefor."

The testatrix died on Feb. 10, 1943, and her will and codicil were duly proved by the bank. Investments were appropriated to the annuities and a fund answering the description of "the endowment fund" of some £23,000 was left. Down to July 5, 1948, when the National Health Service Act, 1946, came into force, no difficulty arose as to the application of the income of the fund, but doubts have been felt as to the effect of the Act, and since that date the income (other than that required for the scholarship) has been accumulated.

It is necessary to consider the history of the Middlesex Hospital and the Bland-Sutton Institute of Pathology. Teaching in the wards of the Middlesex Hospital began in or about 1745 in the earliest days of the hospital's existence, but the medical school was not founded until 1835 when the school was opened in buildings erected on part of the hospital gardens, but by means of special subscriptions raised for the purpose and not the funds of the hospital. The school remained an unincorporated body having a separate existence, though working with the hospital, until 1896 when the school was amalgamated with and became part of the hospital under a scheme adopted by the Weekly Board of governors of the hospital. The Middlesex Hospital had been incorporated by an Act of 1836 (6 Wm. 4, c. vii). Under the scheme, which appears to have been in the nature of an agreement between the two bodies, the hospital took over the property and liabilities of the school and the school became and remained until 1948 a department of the hospital, though under the scheme a separate council was constituted as the governing body of the medical school. Theoretically, this council was under the control of the board of governors of the hospital, but in practice the government of the school was left to the council, and the accounts of the school were kept separate from the accounts of the hospital. In 1900, on the re-constitution of the University of London, the Middlesex Hospital Medical School became a school of the university, where university students of medicine might take their training, and the university became the examining body of the school and made grants to the school, but the legal position of the school was not otherwise affected. Until 1914 the school possessed no pathological department, but in 1913 Sir John Bland-Sutton (who had been associated with the hospital or the school since 1886) provided a sum

of money to build an institute of pathology. Extensive alterations were made in the school buildings, and the institute was opened in 1914 under the name of the Bland-Sutton Institute of Pathology. Under the National Health Service Act, 1946, the Middlesex Hospital was designated as a teaching hospital, but the medical school became a separate legal entity with a governing body constituted under the provisions of s. 15 of the Act, which thereby became a body corporate. The Bland-Sutton Institute of Pathology is carried on under this

A name as part of the medical school regulated by this scheme, and the medical school retains the school buildings, part of which are appropriated to the Bland-Sutton Institute.

It is claimed by the Royal College of Surgeons that by reason of the changes brought about on July 5, 1948, by the National Health Service Act, 1946, one or other of the events mentioned in cl. 11 of the will has occurred, and

B the gift over to the Royal College of Surgeons has taken effect. Against this claim it is said that the Royal College of Surgeons is not a charity, and, therefore, the gift over fails on the principle of *Re Bowen* (1). I propose to deal with this question first.

The testatrix describes the trusts of the endowment fund as "charitable trusts." It is not clear that this description includes the executory gift to the

C Royal College of Surgeons absolutely for the general purposes of the college, but in any case the view that may have been taken by the testatrix does not conclude the matter: *Re Hummeltenberg* (2). It is necessary, therefore, to inquire into the nature of the Royal College of Surgeons. The Royal College of Surgeons is a corporation formed under a number of royal charters. The first of these, a charter of 1800, incorporated the college on the dissolution

D of the former statutory corporation formed in 1745 on the separation of the barbers and the surgeons of London. This charter appears to re-incorporate the members of the late statutory corporation under the name of "the Royal College of Surgeons in London," and recites that "it is of great consequence to the common-weal of this Kingdom, that the art and science of surgery should be duly promoted" and that "the establishment of a college of surgeons will

be expedient to the due promotion and encouragement of the study and practice of the said art and science." There are seven further charters of 1822, 1843, 1852, 1859, 1888, 1899 and 1926, which regulate the college, and some of these contain recitals of a similar character. Except in these recitals, the charters do not contain any statement of the objects or purposes of the corporation. The charter of 1843 changed the name to "the Royal College of Surgeons of

E England." Counsel for the medical school raised the point (so that it might be available, if the matter should proceed further) that a corporation formed by royal charter is able to deal with its property as freely as an individual and was, therefore, unfettered by any trust, charitable or otherwise, but, in view of certain observations or assumptions to the contrary in the cases to which

I shall have to refer, he did not argue the point at length. Evidence as to the

G activities of the college is contained in an affidavit by Lord Webb-Johnson, a former president of the college. From this, it appears that the college has (i) a biological museum, which is open to all medical men and medical students and to members of the public in certain circumstances, (ii) a library which is used by those engaged in surgical research and by post-graduate students attending courses of instruction in the college, (iii) laboratories for surgical

research in the college and a research farm at Downe in Kent, and (iv) scientific

H departments of anatomy, pathology and physiology and experimental research, each with a professor at its head. The college arranges statutory and commemorative lectures in respect of various aspects of surgery. Prizes are awarded by the college in connection with various surgical subjects in order to stimulate the advancement of knowledge in selected aspects of surgery. The college also conducts post-graduate teaching by means of lectures or classes which are attended by some one thousand students a year. The college provides residential

accommodation for some twenty-four post-graduate students and research workers. The college also provides accommodation for a joint secretariat for a number of surgical and medical societies, and carries out the administrative work of the Imperial Cancer Research Fund. It seems to me that all of the above-mentioned activities fall within the ambit of charity in the ordinary legal sense of that term.

Examinations are conducted by the Conjoint Board of the Royal College of Physicians in London and the Royal College of Surgeons of England, which was set up shortly after the Medical Act, 1886, came into operation, for the qualifications of L.R.C.P., M.R.C.S., and for diplomas in specialised subjects. In addition, the college conducts examinations through the administrative machinery of the conjoint board for its own fellowship, and for its own fellowship in dental surgery and its licentiate in dental surgery. These examinations are not conducted primarily as a source of revenue, but do, in fact, produce revenue so as to make the examinations self-supporting and produce surpluses which are devoted to scientific activities. But the mere making of a profit is not inconsistent with the existence of a charity if the profits are employed for the charitable purposes of a charity, even though such profits may be liable to income tax: *Brighton College v. Marriott* (3) ([1926] A.C. 199 *et seq.*). It is admitted by Lord Webb-Johnson that the college endeavours to secure competence and high standards of honour in surgical practitioners and, as a corollary, feels bound to take and retain powers to defend and protect its fellows, members and licentiates, but it appears that discipline in practice is maintained by the General Medical Council established by the Medical Acts, and the registration of practitioners is a matter for the registrar of the General Medical Council. In practice, since the Medical Act, 1886, came into force no person has been entitled to be registered unless he has passed a qualifying examination in medicine, surgery and midwifery, which includes the examinations held by the conjoint board as well as those held by the medical faculties of universities. The college, however, has no monopoly rights in the licensing of surgical practitioners and the law does not in general terms prohibit any person from practising medicine or surgery, though it is an offence to pretend to be registered under the Medical Acts.

The position of the college has been considered by the Court of Appeal in *Re Royal College of Surgeons of England* (4). This was a case in respect of a claim by the college to be exempt from the tax imposed on corporate and unincorporate bodies by the Customs and Inland Revenue Act, 1885, s. 11. The exemption in question is:

"... property which or the income or profits whereof, shall be legally appropriated and applied for any purpose connected with any religious persuasion, or for any charitable purpose, or for the promotion of education, literature, science, or the fine arts."

The court, apparently, had less extensive evidence before it as to the objects, purposes, and activities of the college than that provided by Lord Webb-Johnson's affidavit in the present case. The argument before the court proceeded entirely on the question whether the property or income of the college was appropriated and applied for the promotion of science, and the judgment of the court (delivered by ROMER, L.J.) is entirely devoted to the consideration of this aspect, except that ROMER, L.J., observes ([1899] 1 Q.B. 882) that

"... such property would not come within any of the exemptions from duty mentioned in s. 11 of the Customs and Inland Revenue Act, 1885."

It is to be observed, however, that the words "any charitable purpose" in this section, have, it seems, a narrower meaning than "charitable purposes" in the ordinary legal sense, though I am unable to ascertain in what respect or degree the difference is to be found: see *Inland Revenue Comrs. v. Scott*,

Re Bootham Ward Strays, York (5) ([1892] 2 Q.B. 165, 166). The court held that the property of the Royal College of Surgeons did not come within the exemption from duty, and the real basis for the decision is to be found in the construction put on the objects of the college by ROMER, L.J., where he says ([1899] 1 Q.B. 877):

A “The college has two main objects, each of great importance, in fact, it would be difficult to say which of the two main functions imposed on and discharged by the college is the more important. Neither can be considered as merely subsidiary to the other. The one may be shortly described as the promotion of the science of surgery. The other is the promotion and encouragement of the practice of surgery, including the promotion of the interests of those practising, or about to practice, surgery as a profession, and also including the examination of students and others to qualify for practice or honours in surgery or kindred subjects.”

B It seems that it was the inclusion in the second of the objects of the college of the promotion of the interests of practitioners that was fatal to the claim to exemption, in the same way that the promotion of the interests of the members
C of the Society of Writers to the Signet in the exercise of their profession was fatal in the Scottish case of *Society of Writers to the Signet v. Inland Revenue Comrs.* (6). *Re Royal College of Surgeons of England* (4) has been followed and applied by the Court of Appeal in Ireland, which, in *Miley v. A.-G.* (7), had to consider the claim of the Royal College of Surgeons in Ireland to be a charity. The question arose in regard to the validity of a legacy partly payable out of real estate, and apparently
D the only evidence before the court as to the nature of the Royal College of Surgeons in Ireland was that contained in its charters which were in somewhat similar terms to those regulating the Royal College of Surgeons of England. The bequest was held not to be for charitable uses, as the promotion of the interests of those practising the profession of surgery (which was treated as being one of the main objects of the college) was not a charitable purpose.
E RONAN, L.J., held further that, as the college was a common law corporation regulated by charter, a gift simply to the college was, on the principle of *Bowman v. Secular Society, Ltd.* (8), simply a question of property and not of a trust at all. The result was that the legacy to the college was held to be valid. The principle that the advancement of those practising a profession or calling is not a charitable purpose has been applied to bodies which also had charitable purposes in other Irish cases: *Pharmaceutical Society of Ireland v. Revenue Comrs.* (9) and *Pig Marketing Board (Northern Ireland) v. Inland Revenue Comrs.* (10). In *General Medical Council v. Inland Revenue Comrs.*, *English Branch Council of General Medical Council v. Inland Revenue Comrs.* (11), the General Medical Council was refused exemption from income tax by the English Court of Appeal as being
F “a society formed for professional purposes.” No doubt this principle might
G be applied to the four Inns of Court or the Law Society. But, apparently, the ancient Inns of Chancery were purely places of learning, and, therefore, charities, as was held in regard to Cliffords Inn in *Smith v. Kerr* (12).

The terms of the Customs and Inland Revenue Act, 1885, which was the subject of the decision of the Court of Appeal in *Re Royal College of Surgeons of England* (4), require the property or income to be both appropriated and applied
H for “any charitable purpose,” just as the exemptions in the Income Tax Act, 1918, s. 37, only apply so far as the income in question is applied to charitable purposes only. I am far from suggesting that there is any difference in the legal meaning of “charity,” whether the question is on a will or for revenue purposes, and, of course, the leading case on the meaning of “charity,” *Income Tax Special Purposes Comrs. v. Pemsel* (13), is a revenue case. But, in considering whether a particular society is a charity for the purposes of a gift in a will, at least, it would appear that the test is whether the objects of the society

are really charitable, notwithstanding that the carrying out of the objects of the society may incidentally produce benefits to the members of the society. Nor does it appear to be material what are the motives of the members of the society in joining it. Indeed, an impossible investigation into the inner thoughts of the members would seem to be involved in any such consideration, and such a process was rejected (in a revenue case) where the purpose of a society is defined by charter or statute by LORD HANWORTH, M.R., in *Institution of Civil Engineers v. Inland Revenue Comrs.* (14) ([1932] 1 K.B. 166), citing the observations of LORD MACNAGHTEN in *Savoy Overseers v. Art Union of London* (15) ([1896] A.C. 313). A

In the present case, the purposes of the Royal College of Surgeons appear to be defined by the charters of the college as "the due promotion and encouragement of the study and practice of the said art and science." It has been urged by counsel for the college, supported by the expert evidence of Lord Webb-Johnson, that the art and science of surgery is essentially a practical art and science, and that this art and science cannot be promoted without actual practice and experience, which can only be carried out by means of a competent body of practitioners, whose labours are intrinsically directed towards the cure or alleviation of the ills of mankind. This argument seems to me to have very great force. It seems to me to be supported by two decisions in regard to another practical science, that of civil engineering: *Inland Revenue Comrs. v. Forrest* (16), and *Institution of Civil Engineers v. Inland Revenue Comrs.* (14). In the latter of these cases the object of the Institution of Civil Engineers (which was founded in 1818 and was incorporated in 1928) was stated to be B

"... the general advancement of mechanical science and more particularly for promoting the acquisition of the species of knowledge which constitutes the profession of a civil engineer." D

Among the activities of the institution was the holding of examinations for persons desirous of being admitted as students or elected as members or associate members, the awarding of medals, premiums, prizes and scholarships, the provision of a library, the provision of rooms for lectures on subjects connected with the objects of the institution and the production of certain publications. The byelaws of the institution laid down rules as to professional conduct to be observed by members of the institution. Membership of the institution carried a certain amount of prestige, but was not necessary to enable a person to practise as a civil engineer. It was held by the Court of Appeal that the institution was a body of persons established for charitable purposes only, and was exempt from income tax under the provisions of the Income Tax Act, 1918, s. 37 (1) (b), and that any benefit which enured to the institution's members was merely incidental and subsidiary, and the activities above-mentioned did not represent a collateral or independent purpose. ROMER, L.J., said ([1932] 1 K.B. 172): E

"Where a society is instituted for a charitable purpose, it is obvious that the membership of the society may confer upon its holder personal advantages of considerable value to him in his profession or in his social standing. He may, for instance, have an exclusive right to affix to his name a certain designation, and will be known to the public as a person belonging to the society. He may have to observe disciplinary rules laid down with a view to ensuring that he does not bring discredit upon other members of the society. But in such cases, although the securing of such advantages to the members may in a sense be regarded as one of the objects of the society, such object is merely concomitant or incidental to the real objects of the society; and if that real object be charitable, the society is established for charitable purposes only." G H

It seems to me that those observations apply to the present case, and that, unless I am constrained by the decision of the Court of Appeal in *Re Royal*

College of Surgeons of England (4) to hold otherwise, the real object of the college is the promotion and encouragement of the study and practice of the art and science of surgery, and not the interests of surgical practitioners. As has been already observed, that decision of the Court of Appeal was on a particular statute and was directed to different considerations, and I think I am at liberty to hold, for the purposes of the present case, that the Royal College of Surgeons is a charity, and I do so hold.

A The executory gift over, therefore, in accordance with the principle of *Christ's Hospital v. Grainger* (17), does not offend against the rule against perpetuities, but the question which remains to be considered is whether any of the events on which that gift is to take effect has happened. If the answer is in the negative, the Royal College of Surgeons has not at present become entitled to the endowment fund. The events mentioned in cl. 11 of the testatrix's will are as follows:

B "Should the Bland-Sutton Institute of Pathology cease to be carried on as a pathological research institution or should its name be changed . . ."

It appears that the Bland-Sutton Institute of Pathology is still carried on as a pathological research institution, though through the medium of a new body incorporated under the scheme pursuant to the provisions of the National

C Health Service Act, 1946, and its name has not been changed.

" . . . should the Middlesex Hospital become nationalised or by any means pass into public ownership or should the bank at any time become unable lawfully to apply the income of the endowment fund for the purposes aforesaid . . ."

D I think I should say, at once, that, as regards the last alternative event, I take the view that "the purposes aforesaid" are the maintenance and benefit of the Bland-Sutton Institution of Pathology and not necessarily payment of the residue of the income of the endowment fund to the treasurer or other proper officer of the Middlesex Hospital for that purpose.

E Now, in view of the considerable general and possibly uninformed discussion which accompanied the passing of the National Health Service Act, 1946, the popular view may be that the Middlesex Hospital has been nationalised and has passed into public ownership, but this is a clause providing for a defeasance, and, therefore, it is necessary to see that the terms of the clause are satisfied, and it will be necessary to examine the terms of the National Health Service Act 1946, with some care. For this purpose it is necessary to bear in mind that the Middlesex Hospital is "a teaching hospital" for the purposes of the Act, and that the Bland-Sutton Institute of Pathology was part of a medical school when the Act came into operation on July 5, 1948. Section 1 of the Act provides for the promotion by the Minister of a "comprehensive health service." By s. 3 the Minister has to provide certain services. By s. 6 of the Act all the premises (that is, land and buildings) of the hospital and all its equipment, furniture, or other moveable property used in connection with such premises were transferred to and vested in the Minister of Health free of any trust. By s. 7 all endowments of a teaching hospital were transferred to and vested in the board of governors constituted under s. 11 (8) and Part III of sched. III, i.e., in a new corporate body, the chairman and members of which are appointed by the Minister, while endowments of other hospitals were transferred to and vested in the Minister. Section 7 (10) contains a very difficult and puzzling definition of endowment, and s. 79 provides:

H " (2) References in this Act to the purposes of a hospital shall be construed as referring both to the general purposes of the hospital and to any specific purpose of the hospital."

But s. 8 (1) provides that where a medical or dental school is associated with any hospital to which s. 6 of the Act applies, nothing in that section or the last foregoing section (that is, s. 7) shall be taken as affecting any property

or liabilities held or incurred solely for the purposes of that school, and those purposes shall not be deemed to be purposes of the hospital. That provision, as it seems to me, plainly takes the property held for the purposes of the medical school of Middlesex Hospital (including the Bland-Sutton Institute of Pathology) out of the provisions of ss. 6 and 7 of the Act and the provisions of s. 79 (2) of the Act, and also keeps such property outside the provisions of s. 60 of the Act (which deals with trusts authorising or requiring the trustees to apply capital or income of trust property for the purposes of any hospital to which s. 6 of the Act applies).

Section 8 (2) then proceeds to state what is to happen to the property of a medical school. It is to be transferred by virtue of the Act:

"(a) in the case of a general medical school of the University of London or any school in the faculty of medicine of that university which is recognised for dentistry only, to the governing body of that school,"

and is to vest in the said governing body by virtue of the Act. Section 15 (1) provides for the governing body, and requires the governing body of any such school, which is not incorporated at the passing of the Act, within a period of six months from the Act, to prepare and submit to the governing body of the university a scheme, to take effect on the appointed day (*i.e.*, July 5, 1948), for constituting a new governing body of the school which is to be a body corporate with power to hold land without licence in mortmain. The old council of the medical school (which was the governing body of the school and was not incorporated, though it was associated with the Middlesex Hospital) accordingly prepared and submitted a scheme to the governing body of London University, by which scheme the government of the school is now vested in the council of the school. This council is, therefore, a body corporate, and the property of the school is vested in it. So far as this body and this property is concerned, it seems to me that it has neither been nationalised nor passed into public ownership. It may be that the new board of governors of the Middlesex Hospital are to be regarded as so much the creature of the Minister of Health that in substance it is nationalised, and the property of the hospital (other than that held for the medical school) has become nationalised or has passed into public ownership, but it seems to me that the old Middlesex Hospital has not as a whole been nationalised or passed into public ownership. Part of its property, and the most relevant part for the purposes of the trusts of the will of the testatrix, that of the medical school, has been transferred to and is in a corporate body, which is not nationalised and is not in public ownership. For the purposes, therefore, of this clause of defeasance (and my decision goes no further than that) I hold that the Middlesex Hospital has not become nationalised and has not passed into public ownership.

Has then the bank become unable lawfully to apply the income of the endowment fund for "the purposes aforesaid," that is, the maintenance and benefit of the Bland-Sutton Institute of Pathology? It seems to me that this event also has not occurred. The Bland-Sutton Institute of Pathology and its work continue in existence, though it may be administered by a differently constituted body, and I cannot see anything to prevent the bank lawfully applying the income of the endowment fund for its purposes. Accordingly, it seems to me that none of the events on which the executory gift over to the Royal College of Surgeons is to take effect has occurred at present.

Order accordingly. Costs of all parties as between solicitor and client to be paid out of the estate in due course of administration.

Solicitors: *Withers & Co.* (for the plaintiffs); *Peake & Co.* (for the first defendants); *Wilde, Sapte & Co.* (for the second defendants); *Treasury Solicitor.*

[Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.]

CARDY v. CITY OF LONDON CORPORATION.

[KING'S BENCH DIVISION (Sellers, J.), June 21, 30, 1950.]

Local Government—Superannuation—"Continuous temporary service"—Period of rendering services broken by employee's participation in strike—City of London (Various Powers) Act, 1944 (c. iv), s. 9 (2).

A The plaintiff entered the employment of the City of London Corporation in a temporary capacity on June 27, 1925, and had continued in that employment, at a weekly wage, until July 10, 1948, except for a period from Apr. 27, 1947, until May 8, 1947, when he took part in an unofficial and illegal strike by some of the corporation's employees. The corporation did not, however, terminate his contract of employment when he refused to work, and, when he returned to work on May 9, 1947, they treated his original contract as subsisting. The strikers had returned to work unconditionally, but, on June 3, 1947, after a discussion with representatives of the employees, the corporation's special labour committee passed a resolution that there should be "no victimisation." On July 10, 1948, the plaintiff was placed on the establishment staff of the corporation, and became entitled, under the City of London (Various Powers) Act, 1944, s. 9 (2), to the option to contribute to the corporation's superannuation fund in respect of his continuous temporary service immediately prior to the date of his being placed on the establishment staff. He claimed that he was entitled to contribute for the whole period from the commencement of his employment in 1925 until July 10, 1948, but the corporation contended that his temporary service had been broken by the strike period in 1947 and that his continuous temporary service ran only from May 9, 1947.

D HELD: (i) section 9 (2) of the Act of 1944 required a continuous contract of employment, and not continuous work or services, to entitle a servant of the corporation to the option to contribute to the superannuation fund in respect of his "continuous temporary service"; as the corporation had not terminated the plaintiff's contract when he took part in the strike, he had "served continuously under the corporation," within the meaning of the sub-section, since June 27, 1925; and, therefore, the period in respect of which he was entitled to contribute to the fund commenced on that date.

E (ii) the resolution of the corporation's special labour committee, on June 3, 1947, that there should be "no victimisation," was merely a declaration of the corporation's policy, and gave rise to no contractual obligations between the plaintiff and the corporation.

F [AS TO CONTRIBUTIONS TO SUPERANNUATION FUNDS, see HALSBURY, Hailsham Edn., Vol. 21, pp. 74, 75, para. 130.]

Cases referred to:

- G (1) *Re Lawson*, [1914] 1 Ch. 682; 83 L.J.Ch. 519; 110 L.T. 573; 34 Digest 38, 149.
 (2) *Re Cole*, [1919] 1 Ch. 218; 88 L.J.Ch. 82; 120 L.T. 374; 34 Digest 62, 378.
 (3) *Price v. Guest, Keen and Nettlefolds*, [1918] A.C. 760; 87 L.J.K.B. 801; 119 L.T. 345; 11 B.W.C.C. 154; 34 Digest 408, 3325.
 (4) *Re Marryat*, [1948] 1 All E.R. 796; [1948] 1 Ch. 298; [1948] L.J.R. 1237; 2nd Digest Supp.
 H (5) *Petrie v. MacFisheries, Ltd.*, [1939] 4 All E.R. 281; [1940] 1 K.B. 258; 109 L.J.K.B. 263; 161 L.T. 408; 104 J.P. 40; 2nd Digest Supp.

ACTION by an employee of the defendants, the City of London Corporation, claiming *inter alia* a declaration that, for the purpose of the City of London (Various Powers) Act, 1944, s. 9 (2), the period of temporary service in respect of which he was entitled to contribute to the defendants' superannuation fund was the period commencing on June 27, 1925 (when he entered the employment

of the defendants in a temporary capacity) and ending on July 10, 1948, the date of his being placed on the establishment staff. The defendants contended that the plaintiff had broken the continuity of his temporary service with them by participating in a strike of some of their employees from Apr. 27, 1947, until May 8, 1947, and, therefore, his continuous temporary service, for the purpose of s. 9 (2) of the Act, ran only from May 9, 1947. The facts appear in the judgment.

Gardiner, K.C., and Stephen Chapman for the plaintiff.

Harold Williams, K.C., and Sir Shirley Worthington-Evans for the defendants.

Cur. adv. vult.

June 30. **SELLERS, J.:** On July 10, 1948, the plaintiff was placed on the establishment staff of the defendants and thereby became a servant of the defendants to whom the City of London (Various Powers) Act, 1944, s. 9 (2), applied, entitling him at his option after Apr. 1, 1939, to contribute to the defendants' superannuation fund in respect of the whole period of his continuous temporary service immediately prior to his being placed on the establishment staff, and, on so contributing, to have the whole of that period taken into account in assessing his superannuation benefit. Section 9 (2) of the Act of 1944 reads:

"Where any officer or servant as defined in [the City of London (Various Powers) Act, 1931] has been appointed in an established capacity or placed on the establishment staff on or after Apr. 1, 1939, and has served continuously under the corporation . . . in a temporary capacity immediately prior to the date of his appointment in an established capacity or of his being placed on the establishment staff as the case may be he shall have the option of contributing to the fund defined by the Act in respect of the whole or part of such continuous temporary service . . ."

The plaintiff entered the employment of the defendants in a temporary capacity at the metropolitan cattle market on June 27, 1925, and had been so employed at a weekly wage until July 10, 1948, subject to the event which gives rise to the controversy before me. On Apr. 27, 1947, there was an unofficial and illegal strike of the defendants' employees at the market where the plaintiff was employed, and the plaintiff performed no work for the defendants from then until May 9, 1947. On being placed on the establishment staff of the defendants, the plaintiff claimed under s. 9 (2) of the Act of 1944 that he had had continuous temporary service with the defendants from June 27, 1925, until he was placed on the permanent staff, but the defendants rejected this claim and alleged that the plaintiff's temporary service was broken by the strike period in 1947 and that his continuous temporary service ran only from May 9, 1947.

The plaintiff has now brought this action against the defendants claiming certain declarations, including a declaration that, for the purpose of s. 9 (2) of the Act of 1944, the period of temporary service in respect of which he is entitled to contribute to the defendants' superannuation fund is the period commencing on June 27, 1925, and ending on the date of his being placed on the establishment staff.

By their defence the defendants plead that, by participating in the strike and withdrawing his labour, the plaintiff repudiated his contract of employment, which repudiation was accepted by the defendants. The acceptance of the repudiation was alleged to be by a letter of May 7, 1947, written on behalf of the defendants. There is no doubt that the plaintiff by his conduct did repudiate his contract of employment with the defendants, but the letter of May 7, 1947, did not accept the repudiation as terminating the plaintiff's employment. It treated the contract as subsisting and before me it was admitted that the contract of employment had not been brought to an end.

The plaintiff has, therefore, been continuously employed by the defendants since 1925, but, notwithstanding this, the defendants submitted that the plaintiff

had not served continuously under the corporation in a temporary capacity since 1925. The plaintiff has not *worked* continuously. That could be said of him and other servants if they were away on holiday, with or without leave, or were absent through illness, or were idle through slackness of work or from fatigue by overwork, or owing to an opportunity and their willingness to avoid the work for which they were employed, or were occupied on other than the employer's work or duties during working hours. There must in any employment be a necessary break in active work for sleep and food, at least, but, if regard is paid only to the normal working hours, all the circumstances I have indicated would involve a cessation of work or services, but not, I think, a cessation of service. I construe s. 9 (2) of the Act of 1944 as requiring a continuous contract of employment with the defendants in a temporary capacity to give the servants the option of contributing to the fund "in respect of the whole or part of such continuous temporary service." The essential words are: "has served continuously . . . in a temporary capacity." The sub-section does not require continuous services or work. It would be most remarkable if it did. If continuity of work is not essential, I find it difficult to differentiate between idleness from a strike and idleness from any other, and, perhaps, blameless, cause while the contract of employment was subsisting. The defendants did not terminate the plaintiff's contract, as they could have done when he completely failed to perform his part of it by illegally refusing to work, and the plaintiff has, therefore, established continuity of employment with the defendants since 1925.

I think that support is given to the view which I have formed from a number of cases arising in quite different circumstances. From the many which were cited to me I will mention only four: *Re Lawson* (1), *Re Cole* (2), *Price v. Guest*, *Keen and Nettlefolds* (3), and *Re Marryat* (4), in which JENKINS, J., reviewed a number of the authorities on this question. In *Re Lawson* (1), EVE, J., said ([1914] 1 Ch. 686):

"Upon the second point Mr. Draper is no doubt quite right when he says that in order to comply with the condition attached to the bequest it is incumbent on the servant to show that his service has been a continuous one for the period named by the testator. He cannot fulfil the condition by proving discontinuous periods of service amounting in the aggregate to two years. But even so, that does not, I think, involve the necessity of actual daily service for the whole period. It cannot be that if, owing to ill-health or for any other reasonable cause, the servant absents himself for a time and suspends his services with the full authority and consent of the employer, the continuity of the relationship of master and servant is thereby broken. It is true that in this case, in the circumstances I have mentioned, no payment was made to the servant while his absence continued, but I do not think this element is of itself conclusive, coupled as it was with the arrangement that he was to return to his duties as soon as his health was restored."

In that case there was no conduct of the servant which had not the full authority and consent of the employer.

In *Price v. Guest*, *Keen and Nettlefolds* (3), which arose under the Workmen's Compensation Act, 1906, the employers contended that the continuity of a workman's employment had not been broken by his cessation from work for a period of a week. The county court judge found that, during the seven days that the men, including the deceased workman whose widow was claiming compensation under the Act, were on strike, there was no engagement, the relation of master and servant did not exist, and on the men's return to work there was a new contract of service. The House of Lords, by a majority, upheld the order of the Court of Appeal reversing the decision of the county court judge. Their Lordships said that there was no evidence to support the finding and that the compensation should be assessed on the workman's actual earnings during the

three years preceding the accident, because there had been no cessation in his employment. LORD ATKINSON said ([1918] A.C. 772):

"... if a workman contracts with his employer to perform certain services he will continue to be in the employment of his employer though he may not actually perform those services. Physical conditions may render the performance of them impossible, as, for instance, if a ploughman be hired to plough land and snow falls, or frost intervenes which renders ploughing impossible. The servant discharges his duty while his contract lasts if he is ready and willing to do that which his contract of service binds him to do. If he refuses to render these services, or is unable to render them, that may, and under most circumstances would, furnish just cause for his dismissal, but does not by itself terminate his contract of service. Illness, for instance, might be of such a temporary character that, though disabling the workman from performing his service while it lasted, it would not justify his dismissal, or it might be of such a permanent character that it would justify it."

Counsel for the defendants relied on some observations of ATKINSON, J. ([1939] 4 All E.R. 290) in *Petrie v. MacFisheries, Ltd.* (5), in which the learned judge was dealing with the right to wages during sickness. ATKINSON, J., referred to employment in the weaving industry, "where the amount of wages payable depends on the quantity and quality of the work done," and to contracts "where, by the custom of the industry, wages are payable only for services rendered, as with agricultural labourers, or as, apparently, in the mining industry." In the case now before me, however, the plaintiff was entitled to wages on a weekly basis not dependent on any particular work achieved by him.

The plaintiff further relied on what his counsel described as a "no victimisation" clause, and it was contended that that clause precluded the defendants from treating the plaintiff in any different way from that in which he would have been treated if he had not been on strike. In the course of the strike a deputation of representatives of the strikers met representatives of the defendants, and among the demands put forward as a condition of the defendants' servants returning to work was "no victimisation." The terms were not accepted and on May 9, 1947, the strikers returned to work unconditionally. Shortly after that a meeting for discussion between the parties' representatives was arranged and was held on June 3. After the discussion, the defendants' special labour committee resolved, among other things: "(5) there shall be no victimisation." I regard this resolution as a declaration of the defendants' policy. In my view, it gives rise to no contractual obligations between the plaintiff and the defendants. It had no such intention, and, also, it was too vague, indefinite and uncertain in its incidence and its duration to be enforceable as a contractual term. The plaintiff does not, in my judgment, need to rely on this second contention, but succeeds, as I have held, on the construction of the Act, and I shall make a declaration that, for the purpose of s. 9 (2) of the Act of 1944, the period of temporary service in respect of which he is entitled to contribute to the defendants' superannuation fund is the period commencing on June 27, 1925, and ending on the date of his being placed on the establishment staff.

Judgment for the plaintiff with costs.

Solicitors: *L. Bingham & Co.* (for the plaintiff); *Desmond Heap*, Comptroller and City Solicitor (for the defendants).

[Reported by F. A. AMIES, Esq., Barrister-at-Law.]

Re Nos. 102—107, FETTER LANE.

[CHANCERY DIVISION (Vaisey, J.), June 20, July 6, 1950.]

War Damage—Damage not made good—Discretion of War Damage Commission—Amount of payment—Payment of interest—War Damage Act, 1943 (c. 21), s. 13 (1) (b).

A On May 10, 1941, the applicants' premises suffered damage by enemy action, the premises being destroyed except for the basement. On May 27, 1941, the War Damage Commission was notified of the damage, and subsequently made a temporary works payment to the applicants. On Nov. 30, 1943, the commission informed the applicants that the premises were considered to be a total loss. On Mar. 24, 1944, the premises sustained further damage by enemy action, and on June 27, 1944, the commission was formally notified of the further damage. On July 18, 1944, the premises were again damaged, the commission being notified on Aug. 18, 1944, and on Apr. 25, 1946, the commission made a further temporary works payment. In October, 1947, the commission informed the applicants that, in consideration of representations made by them, the commission was of the opinion (contrary to their earlier view) that the damage had not involved a total loss, and, therefore, that a cost of works payment was appropriate. On Apr. 1, 1949, as it was not possible to reinstate the premises in their original form, the applicants requested the commission to make a value payment under the War Damage Act, 1943, s. 13 (1) (b), and on Dec. 6, 1949, the commission gave notice of determination of the amount of the value payment under that sub-section as £42,000, which was increased (by virtue of the War Damage (Increase of Value Payments) Order, 1947), by sixty per cent. to £67,200, with interest at $2\frac{1}{2}$ per cent. per annum on the total amount "from the last notified date of damage to the date of payment." The applicants claimed that interest should be paid from the first notified date of damage, or, alternatively, that the value payment should be apportioned to the damage sustained on each occasion and interest paid on the appropriate amount referable to each occurrence from the date thereof.

E HELD: under s. 13 (1) (b) the commission had a discretion to make a value payment up to the amount which might have been awarded under s. 10, and, even if a larger sum for interest than that proposed to be made could have been given (e.g., by allowing interest from May 10, 1941, or Mar. 24, 1944, instead of from July 18, 1944), the determination actually made was a valid exercise of the discretion vested in the commission and should not be disturbed.

[FOR THE WAR DAMAGE ACT, 1943, s. 13, see HALSBURY'S STATUTES, Vol. 36, pp. 352, 353.]

G ORIGINATING NOTICE OF MOTION whereby the Solicitors' Law Stationery Society, Ltd., sought an order that a determination of the respondents, the War Damage Commission, (whereby the commission determined that a payment under the War Damage Act, 1943, s. 13, in respect of the society's hereditament should be £42,000 with interest at the rate of $2\frac{1}{2}$ per cent. per annum less income tax) should be set aside so far as it determined that the interest was payable from the date of the damage last notified, and for a declaration that the interest was payable from the date of damage first notified. The question of law was stated to be: "From what date or dates is interest payable on the said payment according to the true construction of the relevant provisions of the War Damage Act, 1943?"

H *Milner Holland, K.C., and Slack for the applicants.*

Rowe, K.C., and Denys B. Buckley for the respondents.

Cur. adv. vult.

July 6. **VAISEY, J.**, read the following judgment. The points which arise for my decision in this case were said to be as follows: (i) Is a payment made under the War Damage Act, 1943, s. 13, a "value payment" on which interest accrues under s. 10 (5) of the Act? (ii) If so, in a case (such as the present) where there have been several occasions of war damage to the hereditament, does such interest run from the date of the first of such occasions, or from the date of the last of such occasions, or must there be some kind of apportionment by reference to the dates of all the occasions?

The applicants, the Solicitors' Law Stationery Society, Ltd., ask me to say that interest runs from the first of the occasions (*i.e.*, May 10, 1941). They state, as is, undoubtedly, the fact, that by far the greater part of the damage occurred on that day. The respondents, the War Damage Commission, contend (a) that in strictness no interest is payable, but admit (b) that they are willing to pay it as from the third and last of the occasions (July 18, 1944) in the circumstances of the present case. There was a second occasion, the date of which is Mar. 24, 1944. Each of the parties would naturally prefer me to hold that the principle of apportionment should be applicable rather than that the contention of the other party should prevail. The applicants submit that it would be difficult, although not impossible, to apply that principle. The respondents suggest that it could not be done at all.

The question is entirely one of the construction of the Act, through the tortuous windings of which I have once more been conducted under the expert guidance of counsel. The amount involved is large. The payment on which the interest (if any) has to be calculated is £42,000, increased by sixty per cent. under the War Damage (Increase of Value Payments) Order, 1947, to £67,200. The annual interest on that sum at $2\frac{1}{2}$ per cent. is £1,680. The difference between what the applicants claim and what the respondents are prepared to pay is about £5,370.

I think that a payment under s. 13 (1) (b), such as we have here, is one kind of a value payment, and may properly be described as a value payment, although it is, undoubtedly, a value payment of a peculiar and special kind—a value payment, one may say, with a difference. It is called a value payment in the section itself, sub-s. (2) beginning with these words: "In the case of a value payment made in exercise of the power conferred by this section . . ." It is so described in ss. 61 and 63 of the Act, and also in the War Damage (Increase of Value Payments) Order, 1947. It is likewise so described in the notice of determination from which the applicants are appealing. The omission of any reference to the section in s. 22 (1) (b), points to the same conclusion. With the exception of sub-s. (4), I think that s. 16 of the Act is not material to the question which I have to decide.

Now the difference between an ordinary value payment and what I may call a s. 13 value payment is in substance this. An ordinary value payment is an amount which must necessarily be ascertained under and according to the code of rules laid down in s. 10 of the Act. It is, notionally at any rate, a fixed amount, and, when once the right to an ordinary value payment has been established, the amount of it can, and must be, calculated without any room for variation either in the way of addition or deduction, and the amount so calculated must in such a case carry interest at the rate of $2\frac{1}{2}$ per cent. per annum payable when the payment is discharged: s. 10 (5) of the Act. I think that the interest falls to be calculated from the time of the occurrence of the war damage, if there was but one occasion, or probably by the method of apportionment to which I have already alluded if there were more occasions, but I need not so decide, for, in my judgment, the point does not really arise in the present case. The s. 13 value payment is, not a fixed amount, but a discretionary amount with a maximum limit of the amount at which an ordinary value payment would have been calculated: see s. 13 (1) (b) of the Act.

Now let me look at the notice of determination against which the applicants

appeal. It must be read as a whole. It is described as a determination of the appropriate payment under s. 13, and by it the respondents give notice that, in exercise of the powers conferred on them by the section, they have determined that the payment should be the sum of £42,000, increased by the sixty per cent. to £67,200. True it is that they go on to say that they have computed that amount exactly as though it had been a case of an ordinary value payment, which looks as though the maximum amount permissible under the section was being awarded, but, at the foot of the form, attention is drawn to the notes on the back of it, which are headed "Important" and are described as notes "relating to the determination overleaf," *i.e.*, on the other side of the sheet, and the first of such notes is in the following words:

"Interest at the rate of $2\frac{1}{2}$ per cent. per year (less income tax) will be paid on the amount of the value payment from the last notified date of damage to the date of payment."

Now, assuming without deciding, that a larger sum in respect of interest, *i.e.*, interest from an earlier date than the last notified date, *viz.*, July 18, 1944, could have been claimed if no mention of interest had been made in the determination appealed from, I think that the determination was validly made in this case under s. 13 (1) (b) fixing the amount at £67,200 plus interest from July 18, 1944, even though that was not the maximum sum of interest which might have been awarded under the section. The notice makes it quite clear to me that what the respondents have intended the applicants to have is £67,200, plus £1,680 per annum interest from July 18, 1944, and not £67,200, plus a larger sum for interest, *i.e.*, interest calculated from some earlier date or dates. To put the matter in another way, if the applicants were justified in their contention that it was the larger amount of interest which should have been awarded, the respondents would be equally justified in saying that, if the interest or any part of the interest were to be calculated from an earlier date or dates, they would be giving the applicants more than they intended to give them in exercise of the discretion vested in them by the section, and that the matter could, and should be, re-opened to enable the necessary adjustments to be made. The result is that this application fails and must be dismissed with costs.

Order accordingly.

Solicitors: *Lee & Pembertons* (for the applicants); *Treasury Solicitor* (for the respondents).

[*Reported by R. D. H. OSBORNE, Esq., Barrister-at-Law.*]

O'MEARA *v.* SOUTH EASTERN GAS BOARD.

[COURT OF APPEAL (Somervell and Denning, L.JJ.), June 30, 1950.]

Gas—Nationalisation—Agreement made after Nov. 19, 1945, but before Jan. 23, 1948—Disclaimer by area gas board—Reference to Gas Arbitration Tribunal—Disclaimer not allowed by tribunal—Jurisdiction of court—Gas Act, 1948 (c. 67), s. 36 (5).

By an agreement under seal, dated Dec. 28, 1945, and made between the plaintiff and the South Croydon Gas Co., the plaintiff was appointed general manager of the company and was admitted to the company's pensions fund. Under cl. 8 of the agreement the plaintiff was entitled to retire and to receive a pension and a payment for loss of office in the event of the transfer of the company's undertaking to any other authority or company. As from May 1, 1949, the property, rights, liabilities and obligations of the company were vested, by virtue of s. 17 of the Gas Act,

1948, in the defendants, the South Eastern Gas Board, who sought to disclaim the agreement under s. 22 (1) of the Act. On a reference of the matter to the Gas Arbitration Tribunal it was determined that the agreement ought not to be disclaimed and that the defendants' notice disclaiming the agreement should be revoked. The plaintiff then commenced proceedings against the defendants claiming (i) a declaration that he was entitled, under the agreement of Dec. 28, 1945, to an annuity for life as from May 1, 1949, and (ii) payment of the instalment of that annuity due on May 1, 1950. The preliminary point was taken by the defendants that, as reference had been made to the Gas Arbitration Tribunal with respect to a notice given under Part II of the Act, the tribunal had exclusive jurisdiction under s. 36 (5) of the Act to determine all claims arising under the agreement.

HELD: the application of s. 36 (5) of the Act was limited, by the opening words of sub-s. (1), to transactions entered into on or after Jan. 23, 1948, and, therefore, the court had jurisdiction to entertain the proceedings.

[FOR THE GAS ACT, 1948, s. 22, s. 36, see HALSBURY'S STATUTES, Second Edn., Vol. 10, pp. 888, 912.]

INTERLOCUTORY APPEAL by the plaintiff from an order of PARKER, J., in chambers, dated June 16, 1950, allowing an appeal by the defendants from an order of MASTER BURNAND, dated June 13, 1950, refusing the defendants' application for an order that the writ of summons in the action and all subsequent proceedings be set aside on the ground that the court had no jurisdiction to entertain the proceedings by reason of the provisions of the Gas Act, 1948. The facts and the relevant sections of the Act of 1948 appear in the judgment of SOMERVELL, L.J.

Gardiner, K.C., and M. L. Lyell for the plaintiff.

Upjohn, K.C., and Megaw for the defendants.

SOMERVELL, L.J.: This appeal raises a question of construction of two sections of the Gas Act, 1948. The main purpose of the Act—which was to effect what is ordinarily called the nationalisation of the gas industry—is familiar, and only the broad outlines are necessary for understanding the sections which we have to construe. Part I sets up area gas boards and the Gas Council. Part II deals with the acquisition of the existing gas undertakings, and it is on the construction of the sections in that Part of the Act that this case turns. Before going to them I will refer to s. 63 which sets up a Gas Arbitration Tribunal which is to deal with questions which under the Act are to be determined by arbitration. One of the sections that we have to construe contains an express reference to it.

The plaintiff, Mr. O'Meara, had a contract with the Croydon Gas Co. which was one of the companies or undertakings taken over by the South Eastern Gas Board under the statutory nationalisation scheme. The writ which he issued against the Gas Board claims a declaration that he is entitled, under an agreement in writing with the Croydon Gas Co., dated Dec. 28, 1945, to an annuity until his death and he claims payment of the instalment of that annuity due on May 1, 1950. The date of the agreement falls within what in the course of the argument was called "Period 2," the period referred to in the Act as between Nov. 19, 1945, and Jan. 23, 1948. The learned judge, reversing the learned master, decided that this court had no jurisdiction to entertain this claim, exclusive jurisdiction having been given to the arbitration tribunal under the Gas Act. The plaintiff appeals.

Section 22 of the Act is in a group of sections which is headed: "Part II. Acquisition of gas undertakings. Vesting of assets." It contains provisions by which agreements made by the undertakers are transferred to and become

vested in the board. Section 22 gives the board power to disclaim agreements made in or subsequent to Period 2. It provides:

“(1) Where there are vested in any area board or in the Gas Council the rights, liabilities and obligations of any undertaker to whom this Part of this Act applies, being rights, liabilities and obligations under an agreement made or varied on or after Nov. 19, 1945, and the board or council are of opinion that the making or the variation of that agreement was not reasonably necessary for the purposes of the activities of the said undertaker or that the agreement was made or varied with an unreasonable lack of prudence on the part of the said undertaker, the board or council may, by notice in writing given to the other parties to the agreement before the expiration of three months from the vesting date, disclaim the agreement: Provided that any of the said parties may, within the prescribed period from the date on which the notice is served, refer to arbitration under this Act the question whether or not the agreement ought to be disclaimed. (2) On such arbitration, the arbitration tribunal, if satisfied that the agreement or variation was not reasonably necessary as aforesaid or was made with unreasonable lack of prudence, shall confirm the notice and if not so satisfied shall revoke it: Provided that, if the arbitration tribunal are satisfied that the agreement or variation thereof was made in the ordinary course of business and was in no way connected with any provision made by this Act, or with any anticipation of the making of any such provision, the tribunal shall revoke the notice. (3) Where a notice is so given by an area board or by the Gas Council with respect to any agreement and is not revoked by the arbitration tribunal . . . (b) the agreement shall be deemed to have been frustrated on the vesting date and the parties thereto for that reason to have been discharged from the further performance thereof . . .”

Broadly speaking, so far as that section is concerned, the only issues that would arise are: Is this a contract made in the ordinary course of business and in no way connected with any provision made by this Act; was it not reasonably necessary; and so on? I think that the section contemplates that every agreement should fall into one or other of those categories. Pausing there, it is possible that in settling that dispute a question of construction might arise. The board might say: “Look at this agreement. The consequences of it are clearly oppressive, and it was entered into with a view to nationalisation.” The other side might say with regard to an agreement before it: “That is not what it means at all. Properly construed, its effect is not onerous and is such as shows that it was entered into in the ordinary course of business.” It seems to me that that might be so, and if the board did come to a conclusion on a certain construction of the agreement and later proceedings should be taken—as I am going to hold is possible—in court, a question might arise whether the decision of the arbitration tribunal on the construction of the contract *quoad* the issue then raised constituted *res judicata* between the parties. That is a point that we have not got to decide today, and I mention it only because it seems to me that a point of construction might arise under s. 22. Section 22, then, gives a right to disclaim in respect of contracts made after Nov. 19, 1945, down to the vesting date.

The section on which this case turns is s. 36. In its opening words it is clearly dealing *inter alia* with a class of contract which might be included in the class dealt with in s. 22. It provides:

“(1) This section shall apply in any case where on or after Jan. 23, 1948, any company, being an undertaker to whom this Part of this Act applies and not being an ancillary gas undertaker, have—(a) made any payment . . . for an inadequate consideration; (b) sold or disposed of any of its property . . . for an inadequate consideration; (c) acquired any property . . . for an excessive consideration; (d) entered into or varied any agree-

ment so as to require an excessive consideration to be . . . given by the company; or (e) entered into any other transaction of such an onerous nature as to cause a loss . . . and the payment . . . was not reasonably necessary for the purposes of the company or was made with an unreasonable lack of prudence on the part of the company . . .”

That section applies to agreements entered into after Jan. 23, 1948. Therefore, *prima facie*, this agreement, which was entered into in December, 1945, is outside it. Sub-section (2) provides: A

“The appropriate board may, at any time before the expiration of a period of twelve months beginning with the vesting date, make an application to the arbitration tribunal in respect of any transaction to which in the opinion of the board this section applies . . .” B

and all interested parties are to be made parties to that application. It is not disputed that that applies to any transactions of the kind specified made after Jan. 23, 1948. Sub-section (3) provides:

“Where the arbitration tribunal are satisfied that the transaction in respect of which an application is made is a transaction to which this section applies, then, unless they are also satisfied that the transaction was in the ordinary course of business and was in no way connected with any provision made by this Act or with any anticipation of the making of any such provision, the tribunal shall determine the extent of the net loss or liability caused to or imposed on the company by the transaction, and shall make such orders against all or any of the parties to the application (other than the appropriate board) as the tribunal think just, having regard to the extent to which the parties were respectively responsible for the transaction or benefited from it, for the payment by them to the appropriate board of sums sufficient to enable the net loss or liability, or such part thereof as the tribunal think just, to be made good or met.” C D

The position, therefore, is that, in regard to contracts held to be unduly onerous which were made after Nov. 19, 1945, and up to, but not including Jan. 23, 1948, there is power to disclaim only. In respect of such contracts and transactions made after that date, in addition to the board's power to disclaim, the parties can be ordered to make repayments to the board in accordance with the provisions which I have read. E

So far, that provision might be invoked in a case where there was no question of disclaimer because the contract might have been executed and the loss incurred. The procedure had also to be adapted to cases where the contract had not been concluded, but there was a continuing agreement made after Jan. 23, 1948, which the board wished to disclaim. F

Sub-section (4) provides:

“Where the appropriate board have disclaimed an agreement or lease by a notice under this Part of this Act, being an agreement or lease entered into or varied on or after Jan. 23, 1948, the board may make an application to the arbitration tribunal under this section in respect of any loss or liability caused to or imposed on the company before the vesting date and, in the case of a lease, any loss or liability caused to or imposed on the board between the vesting date and the disclaimer of the lease, in consequence of the onerous nature of the agreement or lease.” G H

So far it is clear that we are dealing with applications by the board. As I see it, sub-s. (4) contemplates the case where the disclaimer, which would be under s. 22, has not been challenged, and it is saying that in that case the board can make an application for repayment.

The present dispute turns on sub-s. (5) which provides:

"Where any application is made to the arbitration tribunal under this section in respect of any transaction [in respect of third period matters] or a reference is made to that tribunal with respect to any notice given under this Part of this Act disclaiming an agreement or lease, the tribunal shall have exclusive jurisdiction—(a) to determine claims arising in respect of the transaction or under the lease or agreement . . ."

A Counsel for the board contends, and the learned judge has so held, that those words cover a reference in respect of a claim to disclaim an agreement made in Period 2. Counsel for the plaintiff contends that they must be restricted to what has so far been dealt with in s. 36, namely, Period 3, or post-Jan. 23, 1948, transactions. That is the first matter of dispute. Counsel for the board goes on to submit that, if he is right, and these words cover disputes as to the disclaimer of Period 2 agreements, then the words of sub-s. (5) (a) "to determine claims arising in respect of the transaction or under the lease or agreement" cover all claims in respect of that transaction including claims as to what the party to it is entitled to on the supposition, as happened here, that the agreement has been held not to be disclaimable. When the matter went before the arbitration tribunal on a reference under s. 22, the tribunal held that it was made in the ordinary course of business, and could not be disclaimed. That being so, we are now concerned with what the plaintiff is entitled to under it.

Counsel for the board says with force that whereas, for instance, in sub-s. (4), notwithstanding the opening words of s. 36 (1), it was thought necessary to repeat the limit of date and make it clear that sub-s. (4) applied only to post-Jan. 23, 1948 matters, when one comes to sub-s. (5) there is no such limitation, and that it would have been natural to insert the date or to put in the words "to which this section applies"—in other words, expressly to limit the generality of the words used if that had been intended. That argument has force, but I have come to the conclusion that the words must be limited for more than one reason. There is, I think, force in the submission of counsel for the plaintiff that where one is dealing, as we are in this appeal, with a claim as to what are the ordinary rights at law under a contract, one needs clear words to oust the jurisdiction of the court.

As was pointed out by DENNING, L.J., in the course of the argument, it is common ground that, if a contract the period of which is to extend after the vesting date is not disclaimed and no attempt is made to disclaim it, no one suggests that any tribunal other than the ordinary courts would decide the rights of the parties under it. Why should there be a different procedure if the board has unsuccessfully claimed that the contract should be disclaimed? The words of s. 36 (5) can, I think, be given effect while being limited to third period transactions. When Parliament came to sub-s. (5), it had, I think, covered the case of sub-s. (3), an application for payment when no question of disclaimer arises. It had covered the case where the board had disclaimed and the disclaimer was not challenged. Then it was realised that one might have a case of an agreement within this third period where the board had sought to disclaim and the party had claimed his right under s. 22 to refer the matter to the arbitration tribunal. Therefore, it was natural, when one came to sub-s. (5), to pick up that matter which might be in the process of getting itself before the tribunal in respect of a Period 3 agreement or transaction. I think that this sub-section, in dealing with the two matters which might be making their way towards arbitration, is emphasising the tribunal's exclusive jurisdiction. If that is right, I think that it decides this appeal. *Prima facie*, s. 36 is confined to third period matters. The words of sub-s. (5) can be given meaning and effect within that limit. It would be wrong by giving them a wider meaning to oust the jurisdiction of the court.

Counsel for the board does not contend that if sub-s. (5) is limited in the relevant

words to Period 3 agreements we can do other than allow the appeal, but for myself I would like to say that I am not satisfied that the construction for which he contends with regard to sub-s. (5) (a) is necessarily right in its application to Period 3 agreements to which admittedly the words apply. I do not wish to express an opinion on a matter which we have not got to decide. I say only that to my mind it is not clear. It is an open issue which may or may not have to be decided some day whether these words in sub-para. (a) should not be confined to claims or disputes which arise out of the provisions of the Act and do not apply to a claim which is a claim under an agreement and has nothing to do with the Act in a case such as the present one where an agreement has been held to be of continuing effect as a legal agreement between the original party to it and the board instead of the undertaker. It is not clear to me that the tribunal is given exclusive jurisdiction to try claims of that kind which, as was pointed out in argument, might arise three or four years hence, long after the issue whether the agreement could or could not be disclaimed had been decided. For these reasons I think that the appeal must be allowed.

DENNING, L.J.: I agree with all that my Lord has said and I only add a few words in deference to the opinion of the judge. I start with the settled principle that the jurisdiction of these courts is not to be taken away except by clear words. I can find no such words in this Act. The opening sub-s. (1) of s. 36 defines the cases to which the whole section applies, and sub-s. (5) must, I think, be limited to those cases. The present case does not fall within them. The tribunal, therefore, has not got exclusive jurisdiction over it. In confirmation of this view I would point out that these courts clearly have jurisdiction over agreements which are not disclaimed at all. The courts also have jurisdiction over agreements which are rightfully disclaimed when the disclaimer is not challenged. It would be a strange thing if the courts had no jurisdiction when the agreements are wrongfully disclaimed. In my opinion, the courts have jurisdiction to deal with this case, and the appeal should be allowed.

Appeal allowed with costs.

Solicitors: *Timothy Hales* (for the plaintiff); *Slaughter & May* (for the board).
[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

CAMINER AND ANOTHER v. NORTHERN AND LONDON INVESTMENT TRUST, LTD.

[HOUSE OF LORDS (Lord Porter, Lord Normand, Lord Oaksey, Lord Reid and Lord Radcliffe), May 22, 23, 24, July 10, 1950.]

Negligence—Nuisance—Tree—Elm tree adjoining road—Fall on passing car—Fall due to disease—Liability of occupier of land.

The respondents were lessees of a block of flats which they occupied by their tenants. In the forecourt of the flats was a row of elm trees. On Apr. 7, 1947, the appellants were driving past the flats when one of the trees fell on their car, wrecking it and injuring the appellants. The fall was proved to have been due to a disease of the roots, which was of long standing, but the disease had not taken a normal course and there was no indication from the condition of the tree above ground that it was affected by the disease. The tree, which was about 130 years old, carried a considerable crown, although not abnormal for a tree of that age, and had never been lopped, topped or pollarded. Evidence was given that elm trees should be inspected every five or seven years, and, if this tree had been

topped, it was unlikely that it would have fallen when it did, but it had not appeared to be dangerous to any of the witnesses who were called. On Mar. 1, 1947, the respondents had engaged a timber haulage contractor to advise what should be done with the elm tree in question as well as with the other elm trees on their property, not because they had any suspicion of the soundness or safety of the tree, but because they wished to put their gardens into good order. It appeared that the contractor did not think that the tree was likely to be a source of danger, and he proceeded to pollard the other trees first, leaving the tree in question untouched, with the result that some of the protection from the wind which the tree had formerly enjoyed was withdrawn. In an action by the appellants against the respondents for damages for negligence, and, alternatively, nuisance,

HELD: in the absence of any evidence that the respondents had failed in their duty to take reasonable care in the management of their premises, they were not liable.

Decision of the COURT OF APPEAL ([1949] 1 All E.R. 874), *affirmed*.

Per LORD RADCLIFFE: "I hope that I do not misinterpret the significance of this decision if I say that I do not think that it can be the last word on the position or liability of the tree-owner . . . The accepted test that liability only begins when there is apparent in the tree a sign of danger has the advantage that it seems to ignore, or to a large extent to ignore, the distinction between the spot that is much, and the spot that is little, frequented, but, on the other hand, I think that it does end by making the standard of the expert the test of liability . . ."

[AS TO OCCUPIER'S DUTY TOWARDS THE PUBLIC IN RESPECT OF THE STATE OF PREMISES ADJOINING A PUBLIC PLACE, see HALSBURY, Hailsham Edn., Vol. 23, pp. 619-621, para. 870; and FOR CASES, see DIGEST Supp.]

APPEAL by the plaintiffs from a decision of the Court of Appeal (TUCKER, ASQUITH and SINGLETON, L.JJ.), dated Apr. 12, 1949, and reported [1949] 1 All E.R. 874, allowing the defendants' appeal from a decision of LORD GODDARD, C.J., dated Nov. 26, 1948, and reported [1948] 2 All E.R. 1101.

The first appellant and his wife, the second appellant, were injured by the fall of an elm tree standing on property occupied by the respondents, and they claimed damages from the respondents for negligence, and, alternatively, nuisance. LORD GODDARD, C.J., held that it was the duty of all owners of property to manage it in accordance with the principles of good estate management, so that their property might not be in a condition likely to cause damage to persons lawfully using highways in the immediate vicinity; as good estate management involved the inspection and trimming of trees from time to time, there was a duty on landowners to carry out those operations; and, as this duty had not been performed, the respondents were liable to the appellants. The Court of Appeal reversed this decision, and held that, since the appellants had failed to prove that the respondents, as ordinary, careful laymen, and not as experts, knew, or ought to have known, that the tree was dangerous, the respondents were not liable. In the House of Lords the appellants did not contend that any blame attached to the respondents for their failure to ascertain the diseased condition of the roots of the tree, but they maintained that the respondents were under a duty, as reasonable landowners in the proper management of their property, to lop, top, or pollard the tree in question, and that, if such action had been taken, the tree would not have fallen and injured the appellants. The facts appear in the opinion of LORD PORTER.

Fox-Andrews, K.C., and Rees-Davies for the appellants.

Beney, K.C., and R. M. H. Everett for the respondents.

The House took time for consideration.

July 10. The following opinions were read.

LORD PORTER: My Lords, this case was tried by LORD GODDARD, C.J., sitting without a jury, and resulted in a finding for the two appellants for damages amounting to a total sum of £1,400. The Court of Appeal, however, unanimously reversed his judgment, though ASQUITH, L.J., apparently, entertained some doubt, and your Lordships have now to determine which of these two views should prevail.

The facts can be shortly stated. On Apr. 7, 1947, at about 12.50 p.m., the appellants were travelling along Prince Albert Road, St. John's Wood, in a motor car owned and driven by the first appellant when, as they approached the junction of Prince Albert Road and Wells Rise, an elm tree standing on land immediately adjoining the highway fell on the appellants' motor car, wrecked the motor car and injured both the appellants. The elm tree was growing in the forecourt of a block of flats known as St. James's Close, at the corner of Prince Albert Road and Wells Rise, of which the respondents were lessees and in occupation by their tenants. They became lessees in 1940, but in June, 1941, the premises were requisitioned by the Air Ministry who remained in occupation until April, 1946, when the premises were vacated by the Ministry and returned to the respondents. The day was fine, there was nothing exceptional about the wind, but it was blowing in strong squally gusts from time to time. The tree was a large, well-grown elm, between 120 and 130 years old. After it fell it was found that three of its roots were badly affected by a disease known as elm butt rot. The other three roots showed signs of rot, but were not so badly affected. The disease was of long standing, and must have been present in the roots many years before the respondents took possession of the property. The roots had not been cut at the time when the tree fell and there was no indication from its condition above ground that it was affected by this disease which had not taken a normal course inasmuch as the fungus which caused it was working out sideways along the main roots and had not affected the trunk. There was nothing, therefore, to indicate by external examination that the tree was in any way diseased and even if the trunk had been bored it was very unlikely that the existence of the disease would have been discovered. The learned Lord Chief Justice found that it carried a considerable crown, some thirty-five feet across, but this finding was challenged by the respondents and the evidence on which it is based must be considered later. In the opinion of the learned Lord Chief Justice its fall was due to a combination of circumstances, namely, the action of the wind on a tree bearing a large crown, the roots of which had rotted to a greater or less extent, and the non-trimming or lopping of the tree or its branches. He said ([1948] 2 All E.R. 1103):

"Had it not been for the condition of the roots, it is probable that the wind was not heavy enough on the day in question to cause the tree to fall. On the other hand, had the tree not been bearing the amount of top hamper that it, in fact, was, and if it had been topped or pollarded, there is no reason to suppose that the tree would have fallen when it did, and it might have stood for a very considerable time."

On May 23, 1947, the appellants issued a writ claiming compensation for the damage alleged to have been suffered as a result of negligence or nuisance on the part of the respondents. In the circumstances set out above the appellants do not now contend that any blame attaches to the respondents for their failure to ascertain the diseased condition of the roots of the tree, but they maintain that in the particular circumstances of this case the respondents were under a duty as reasonable landowners in the proper management of their property to lop, top, or pollard this elm tree, and that, if such action had been taken, the tree would not have fallen when it did, and the appellants would not have suffered the damage complained of. In their submission, it is well-known that an elm tree is dangerous, treacherous, and shallow-rooted, and that either the branches are, or the whole tree is, liable to fall suddenly;

that this was a large tree and well into middle-age, situated close to a busy thoroughfare, and carried a considerable crown; that it had never been lopped, topped or pollarded or otherwise treated at all by the respondents, and it was, or should have been, obvious to them, when they took over the property, that no such action had ever been taken; that it was close to a wall so that the ordinary layman would expect that the roots had, in fact, been cut to enable the footings of the wall to be built; and that for these reasons this particular tree ought to have been suspected and dealt with. Finally, they pointed out that the respondents had ample time either before or after the requisitioning to take the appropriate steps to render it innocuous. No action of any kind was, in fact, taken by the respondents until Mar. 1, 1947, when one Chipping was instructed to advise what should be done with this and the other trees on the property which also appear to have been elms. In calling in Mr. Chipping, however, the respondents were not influenced by any suspicion of the soundness or safety of the tree, but they took action because certain repairs of war damage to the buildings had been completed and they were anxious to put their gardens into good order. Nor, indeed, does Mr. Chipping appear to have thought this tree to be the source of any danger. Indeed, so little was such an idea present to his mind that he proceeded to pollard the others first, leaving this tree untouched until they had been dealt with lest they should be injured by its falling boughs, and one result at any rate of proceeding in this order was to withdraw some of the protection from the wind which the tree had formerly enjoyed.

My Lords, I have set out somewhat fully the arguments presented by the appellants in their case lest I should have failed to give due weight to them. One matter may, I think, be dealt with in the forefront of my opinion. It is suggested that a reasonably prudent landowner seeing this tree and its contiguity to the wall would suspect that the roots had been cut, and that, as a result, its supports had been weakened or that some disease had been set up. In fact, they had not been cut, no questions were put to any witness suggesting that such an eventuality was, or should have been, present to their minds, and no finding to this effect is contained in the Lord Chief Justice's judgment. I see no reason for inferring that a layman would draw such a deduction from the position of the tree. Still less should I be prepared to infer that he would suspect any disease of the roots. Boring into the trunk would not have disclosed it, and the Lord Chief Justice in terms states that he is quite satisfied that there was nothing in the appearance of the tree to indicate that it was in any way diseased. It is true that Mr. Aitkins, an expert called on behalf of the appellants, said he would have bored the trunk and found out the existence of the disease, but the Lord Chief Justice did not accept his evidence in this respect. If, then, an expert had been called in to diagnose whether this elm tree suffered from elm butt rot he would have given it a clean bill of health. Whether he would have advised topping and lopping is a different question, dependent on different considerations, but I cannot accept the view that the respondents were negligent merely because they failed to call in an expert to advise as to the possible existence of an unsuspected and undiscoverable disease even though an expert, if called in, might have recommended topping and lopping.

The issue seems to me a broader and more general one, *viz.*, in the case of an apparently healthy elm tree, which was of obviously mature age, though by no means old, ought its owners either to have had it lopped and topped, or should they, at any rate, have called in an expert to advise them as to its treatment, and was this course the more imperative in the case of a tree standing near a public and well-used road? The answer in this particular case is somewhat complicated by the controversy as to whether the crown was a very large one or not.

The matter stands thus. Mr. Aitkins, at the beginning of his evidence on this part of the case, was asked:

"Q.—In your opinion is an elm tree of 125 years old, which has never been lopped, safe? A.—It depends on the size of its head. If it has a large head it should be lopped. Q.—Would you leave such a tree standing close to the highway without having it inspected? A.—No, most definitely not. The LORD CHIEF JUSTICE: You would not leave any elm tree close to the highway without it being inspected, would you? A.—No, you would not. The LORD CHIEF JUSTICE: You mean an old elm tree, Mr. Fox-Andrews. Mr. Fox-Andrews: Yes, my Lord. The Witness: Yes, or a tree completely out of balance, with an enormous head for the height of the bole. Mr. Fox-Andrews: That deals with inspection. Would you leave any tree such as this close to the highway without it being lopped? I say 'such as this,' meaning an elm tree 125 years old or more? A.—No, I would take precautions and have it lopped."

The witness had never seen the tree itself though he had seen photographs, presumably of it in its fallen state. Yet he expressed the view that it had a very large head and said that Mr. Chipping had told him so, though Mr. Chipping denied having done so, but, even so, the stress is mainly laid on an enormous head and inspection to see whether it required lopping rather than on lopping itself, though at the end the witness does say he himself would take precautions and have it lopped. Apart from his testimony no evidence as to the size of the head was given on behalf of the appellants except that of Mr. Dunk, who was garden superintendent of the St. Marylebone Borough Council. He knew the tree, had seen it in position, said it appeared to be perfectly healthy, and had instructed the Air Force to cut away the boughs below seven feet so as not to interfere with passers by. In re-examination he was asked:

"Q.—Ought elm trees to be lopped and topped from time to time? A.—I consider growing near a thoroughfare or open space I should certainly lop them if they had got any big tops at all."

Beside this question and answer, however, must be set what he had said earlier:

"Q.—In the course of your inspection and walking round, supposing you come across a tree which you regard as a potential danger to the public in any way, do you, as a fact, report it? A.—I do."

Admittedly he made no report on this tree. Later, Mr. Prosser, who was one of the respondents' tenants and occupied a flat in the building close to and looking immediately on the tree in question, expressed the opinion that the crown was by no means a large one more particularly when compared with others in the neighbourhood. After his evidence had been given, Mr. Dunk was recalled. He said, in the first place, that after the tree had fallen its top extended right across the road and estimated its crown as about thirty-five feet. This measurement I take to be the height of the crown, not its breadth, as the tree fell lengthwise across the road. Mr. Chipping, on the other hand, who removed it and disposed of the timber said that the tree was about forty feet in height—that about twelve feet of trunk fell inside the garden and the rest in the road. That would mean twenty-eight feet in the road only, and at best Mr. Dunk's estimate must be but a rough one. I should myself think Mr. Chipping a better judge of its size, and, after all, it is not the truthfulness of the witnesses that is in question, but their ability to make an accurate estimate. But I do not think its exact size, whether it was thirty or thirty-five feet, is of much importance. There is nothing to show that even thirty-five feet would be an exceptionally large head on such a tree. Like SOMERVELL, L.J., I can find no evidence to this effect, nor to the effect that a prudent landowner would have suspected any danger, and the question admittedly is not how an expert would deal with the tree but what a prudent landowner would do. So far as the

respondents' witnesses are concerned, none appears to have had any suspicion, and, if they are to be held negligent, it must be because they ought to have envisaged danger.

Unless one is to take the view that every elm tree over one hundred years old growing beside a busy street should be lopped and that its owner is guilty of negligence unless he so treats it, I see no reason for imputing a want of care on the part of the respondents. If I did so, I should feel obliged to regard Mr. Chipping to blame, since he not only saw no urgency in getting to work on this tree, but even weakened its staunchness by cutting away the branches of other trees in its neighbourhood and leaving it less protected than before. Moreover, it was not in leaf, but was just coming into bud so that it had not yet reached a stage at which a heavy strain might be expected to be placed on its roots. As I understand the judgment of the Lord Chief Justice, however, he does take the view that any prudent landowner on whose soil an elm tree of one hundred years' growth or over is to be found should foresee the danger of it falling or of its branches breaking away, and this is the basis of his judgment. For this view he finds particular support in the evidence of Mr. Le Sueur, an expert admittedly of great eminence, called on behalf of the respondents. The Lord Chief Justice's words have been quoted in the Court of Appeal, but, perhaps, I may be excused for repeating them. He says ([1948] 2 All E.R. 1103):

"... it is the duty of all owners of property to manage it in accordance with the principles of good estate management so that their property may not be in a condition likely to cause damage to persons lawfully using highways in the immediate vicinity, and, if good estate management involves the inspection and trimming of trees from time to time, there is a duty on landowners to carry out those operations. Mr. Le Sueur, who was called by the defendants, and who gave his evidence with a frankness which was most refreshing, said that elm trees should be inspected every five to seven years, and that if this tree had been lopped it is very unlikely that it would have fallen when it did. If, therefore, principles of good estate management require periodical inspection and cutting, it is not open to an occupier of property who maintains on his land trees which immediately adjoin or are very close to a highway to say: 'Well, I did not know that I ought to have done it'."

I take the suggested obligation to manage property in accordance with the principles of good estate management to mean no more than that the party concerned must act as a prudent landowner would. If it means more I could not subscribe to it, but, even so, to the extent that the passage is based on the impression that Mr. Le Sueur considered that elm trees should be inspected every five or seven years in order to see whether they require lopping, it contains, as I think, a misapprehension as to that gentleman's view. As I understand him, he did not state that an elm, even if mature, should be inspected with a view to lopping at these intervals, but he said that once it was lopped it ought thereafter to be inspected every five or seven years because after lopping its wounds may rot. He was asked:

"Q.—If it was lopped how long do you think it reasonable to elapse before you lopped it again? A.—If you treat the wounds very carefully, it does not rot as fast as it would if you leave the branches alone but ordinarily speaking I should say five to seven years from the lopping point of view. Lopping a tree may make it more dangerous in the end, of course."

This evidence expresses no opinion as to when an elm tree should first be lopped. It is concerned only with the question as to the intervals at which it should be inspected after it has once been lopped in order to see if the wounds caused

by lopping have rotted. Mr. Le Sueur's general view as to when an elm tree requires lopping is, I believe, summed up in his statement in answer to the learned Lord Chief Justice, who said:

"I want to know what a prudent owner should do in deciding whether an elm tree should be lopped. A.—If a trunk is a straight one and it has not swelled out at the bottom and does not have rising roots and has a comparatively compact crown and has not any obviously very heavy boughs, that owner should consider his tree safe. Beyond that I do not think any reasonable being can go."

From this view I do not think he ever resiled. Indeed, except possibly in the case of falling boughs, which are not now in issue, he was not inclined to give an exceptionally bad name to the elm tree. He says:

"I have a very wide experience of elms and I think the elm is a rather maligned tree. It is a very easy statement to make [*i.e.*, that elms are notoriously untrustworthy]. I know elms have a higher percentage of heart rot for the species than other trees, but there are an awful lot of elms in the country which have not."

Undoubtedly, he thinks elms less staunch than other trees and that as a matter of theory they should be inspected, as soon as they are big enough to damage anyone if they fall. He is, however, speaking theoretically and not practically, and of inspection not lopping, and however carefully this tree had been inspected it would have shown no flaw. When the question to and answer of Mr. Aitkins: "Would you leave any tree such as this close to the highway without it being lopped? I say 'such as this' meaning an elm tree 125 years old or more? —No, I would take precautions and have it lopped," are put to him and he is asked: "Do you disagree with that?", he will go no further than to say: "Not in a general way, no"—a reply which I find of very little assistance one way or the other. The appellants laid much reliance on one answer given by Mr. Le Sueur to a question put to him from the bench. He had said:

"Judging from the photograph, I should say it was a normal tree, but with regard to it not requiring attention, of course, I cannot get sufficient from the photograph to say anything at all."

The Lord Chief Justice then asked him:

"Q.—Do you think you might have said if you went by: 'Why on earth don't they have it lopped?' A.—Yes, I think so."

If I thought that this answer meant that judging from the appearance of the tree Mr. Le Sueur regarded it as potentially unsafe, the evidence would require very careful consideration before one could conclude that the respondents had exercised due care, but to give his answer this interpretation is to contradict everything he has just said and the response is so condensed that its meaning is obscure. Had the question been: "Do you think you *would* have, not you *might* have, said, 'Why don't they have it lopped'?", the witness might be taken to be saying that the tree was, in his opinion, unsafe. As it is, it seems to me merely the scientist's careful reply in a case where he has insufficient evidence to give a certain answer one way or the other. He might, or he might not, have expected it to require lopping and had not the material requisite to enable him to make up his mind. In any case he is answering as an expert not as a prudent landowner.

If, as I have said, it is the duty of every owner of an elm tree near or overhanging a road to lop and top that tree as soon as it has reached an early middle age, however sound it is found to be on external examination, then the respondents were negligent, but short of this, in the circumstances of the case now under consideration, they appear to me to be free from blame whether the case against them is framed in negligence or nuisance. For myself, I do not regard the evi-

dence as establishing that elm trees are so plainly a danger as to require their being lopped and topped lest they should fall, though to all external appearance they are sound and no inspection would raise a doubt as to their general condition. If such a duty existed there would be, I imagine, a vast number of negligent persons who are only saved from liability owing to the chance that their elm trees have, in fact, resisted the forces tending to make them fall. I should dismiss the appeal with costs.

LORD NORMAND (read by **LORD PORTER**): My Lords, the appellants felt themselves unable to support the ground of judgment on which they had succeeded before **LORD GODDARD**, C.J. Mr. Le Sueur, one of the expert witnesses, had said that once an elm had been lopped it should, ordinarily speaking, be lopped again five to seven years later because the wounds inflicted by lopping exposed it to the invasion of disease. The evidence that elms should be lopped at brief intervals was taken by the learned Lord Chief Justice to apply to unlopped elms, and he held on this evidence that it is a reasonable and proper precaution for the occupier of property on which there are elm trees bordering on or near to a public road to lop or pollard them as an ordinary incident of good estate management. I respectfully think that good estate management is not the correct test and that the misunderstanding of the import of Mr. Le Sueur's evidence deprives the finding, so far as it is a relevant finding of fact, of the value which it would otherwise have had. The Court of Appeal applied what is, I think, the proper test—the conduct to be expected from a reasonable and prudent landowner—and held on the evidence that the respondents had satisfied this test, because there was nothing dangerous in the appearance of the tree, no sign of disease, advanced age, disproportion of crown to stem, or of rising roots. The appellants in this House accepted the test applied by the Court of Appeal, but they put forward the proposition that on the evidence it was established that a reasonable and prudent landowner, having on his property a well-grown elm with a large crown, which has not been lopped or topped and which is adjacent to a busy thoroughfare, has the duty either to lop or top the tree or to take the advice of a reasonably competent expert as to the necessary action to be taken for the protection of the public safety.

The test of the conduct to be expected from a reasonable and prudent landlord sounds more simple than it really is. For it postulates some degree of knowledge on the part of landlords which must necessarily fall short of the knowledge possessed by scientific arboriculturists but which must surely be greater than the knowledge possessed by the ordinary urban observer of trees or even of the countryman not practically concerned with their care. The evidence in this case was not directed with the precision which I should have liked to defining the degree of knowledge to be expected from a reasonable and prudent landlord, but it is possible to piece together from the evidence the characteristics of the elm, or, at any rate, of the common elm, which are notorious or generally recognised by persons concerned with the care of them and which have a bearing on the danger which they may cause when they are growing on or near ground to which the public has lawful access. They are less resistant to wind than the other common British trees; the limbs and branches are more likely to fall; they are more prone to disease; their lateral roots are shallow and their tap root decays with age, so that the trees themselves are also more likely to fall. That knowledge the reasonable and prudent landlord may be expected to possess, and if through lack of it he fails to take appropriate precautions he must bear the consequences. If a landlord is aware of his ignorance about elms he would obtain the advice of someone better instructed, not a scientific expert in the ordinary case, but another landlord with greater experience or a practical forester, for example.

The elm which caused the damage complained of was a mature tree. It was about 130 years old as was found when the rings were counted after it

was cut up, and though no one could have told its age merely by looking at it while it was still standing it would have been apparent to anyone that it was a well grown tree. Its growth was upright; it was about forty feet high; its bole was about three feet in diameter; and its crown as estimated by a witness, whose evidence the Lord Chief Justice accepted, was some thirty-five feet across. That is, according to the evidence, not an abnormal crown for a well grown elm forty feet high, but it can fairly be described as considerable. The tree was growing close to a busy street in north London. The roots were not rising, but some of them were badly affected by rot caused by fungus which usually attacks the tree at the point where it has received a wound. There was, however, no evidence that the roots had ever been cut. The disease was of long-standing, and it had taken an unusual course by moving along the main roots without affecting any part of the trunk. There was nothing in the appearance of the tree to suggest that it was in any way diseased, and the presence of the disease could not have been detected by the methods usually employed when disease is suspected. The fall of the tree was caused by the force of a squally gust of wind acting on the crown and by the diseased condition of the roots.

What would a reasonable and prudent landlord have done about the tree? There is more than enough evidence of what scientific experts would have thought or done, but there is a paucity of evidence about what a reasonable and prudent landlord would have done. The appellants called Mr. Aitkins, who had been a lecturer on forestry at Aberdeen University and was, at the time of the trial, carrying on business as an adviser in forestry. I shall quote a short passage from his examination-in-chief.

"Q.—In your opinion, is an elm tree of 125 years old, which has never been lopped, safe? A.—It depends on the size of the head. If it has a large head, it should be lopped. Q.—Would you leave such a tree standing close to the highway without having it inspected? A.—No, most definitely not. Q.—You would not leave any elm tree close to the highway without it being inspected, would you? A.—No, you would not. The LORD CHIEF JUSTICE: You mean an old elm tree, Mr. Fox-Andrews. Mr. Fox-Andrews: Yes, my Lord. The Witness: Yes, or a tree completely out of balance, with an enormous head for the height of the bole. Mr. Fox-Andrews: That deals with inspection. Would you leave any tree such as this close to the highway without it being lopped? I say 'such as this,' meaning an elm tree 125 years old or more. A.—No, I would take precautions and have it lopped."

In his re-examination he is asked:

"Q.—If you had found this tree—about 130 years old and in this position with a very large crown which had never been lopped—what would you have said was the proper thing to do from the point of view of public safety, quite apart from disease? A.—To have it lopped and docked to safe proportions for the benefit of the public, without any doubt."

Reasonable exception may be taken to the description of the crown as very large, but, allowing for that, I think that this witness does support the proposition advanced by the appellants. Mr. Dunk, garden-superintendent of the St. Marylebone Borough Council, was also called by the appellants. During the war he had observed this tree and had asked the occupants to cut some branches which were lower than seven feet from the ground. This was in the exercise of a statutory power and the occupiers complied with his request. He was asked in cross-examination whether he would report it if he came across a tree which he regarded as a potential danger to the public and he said that he would, but he had never had occasion to make any adverse report on this tree. In his re-examination he said of elm trees in general that he would lop them,

though they were not apparently diseased, if they were growing near a thoroughfare or in an open space and had "any big tops at all." The appellants do not, in my opinion, obtain much advantage from the evidence of Mr. Dunk.

Of the respondents' witnesses Mr. Gabell, a maintenance surveyor employed by Messrs. Hillier, Parker, May & Rowden, who managed the property on which the tree grew, said that it was similar in size to many other elms in the neighbourhood. He had advised that this tree and others growing beside it should be topped, not because of any question of safety, but to let more light and air into the garden of the respondents' block of flats. Mr. Chipping was employed in March, 1947, by Messrs. Hillier, Parker & Co., to top this group of trees. He said that there was nothing whatever which would have led him to say that he was suspicious of this tree. He left the topping of it to the last because that suited the work he had to do and he does not seem to have thought that his men working near it were running any risk. In cross-examination he stated that he had lopped or topped many elm trees close to highways or property though they were less than one hundred years old, but this bare statement without more detail is of little assistance in the case. Mr. Le Sueur, another witness for the respondents, holds a special diploma in forestry and arboriculture and has long been a consultant in forestry. He is a specialist and a scientist, but he showed more than once in his evidence his understanding that the reasonable and prudent landlord was not to be expected to have his knowledge of trees and their treatment. The Lord Chief Justice was favourably impressed by him and commended his frankness. By experience and by the quality of his evidence I think that he is by far the most important witness on this question of the alleged duty to lop elm trees. In his examination-in-chief he explained the considerations which would guide him in advising whether to lop an elm tree—whether it is standing where unsuspecting people go; whether it is standing upright or inclined; the size of the crown; whether any work had been done which might have damaged the roots. He sums up thus:

"If the trunk is a straight one and it has not swelled out at the bottom and does not have rising roots, and has a comparatively compact crown and has not any obviously very heavy boughs, the owner should consider his tree safe. Beyond that I do not think any reasonable human being can go."

In his cross-examination, after some introductory matter, in which he said that the elm is a rather maligned tree but that it is nevertheless more dangerous than other trees and that it owes most of its popular ill-repute to damage caused by the falling of branches, he is asked:

"Q.—If you have got a tree 130 years old standing in a position in which if it falls or a branch falls a member of the public may be killed, and if you have occupied the land for years, ought you not at some time to have it inspected? A.—Well, I think so; though, of course, I may say that if everybody thought so I would be a much richer man than I am now—the enormous number of trees that are never inspected."

The duty of inspection is put to him in a series of questions following on this. Then the evidence of Mr. Aitkins embodied in the answer to the last question in the passage which I have quoted above is put to him, and he says that in a general way he would not disagree with it. I must refer also to a question put to him by the Lord Chief Justice at the end of his re-examination. He was asked:

"Q.—Do you think you might have said if you went by 'Why on earth don't they have it lopped?' A.—Yes, I think so."

My Lords, I hope that I have fairly and adequately summarized Mr. Le Sueur's very important evidence. After repeated consideration of his evidence

as a whole, I think that it comes to this. A reasonable and prudent landlord would inspect or cause to be inspected any good-sized elm growing in a place where unsuspecting persons may lawfully approach it; that this inspection is for the purpose of deciding whether to have it lopped; that if the trunk is straight and there are no rising roots, a comparatively compact crown, no obviously very heavy boughs, and, it may be added, no sign of rot or disease, the owner may count the tree safe. He himself, if inspecting on behalf of the owner, would certainly have lopping or topping very much in mind and would, judging from his answer to the Lord Chief Justice, begin by asking, not whether it ought to be lopped, but whether it ought not to be lopped. I think it would be unfair to him, however, to conclude that he resiled from his evidence that, if the trunk is straight and has not swelled out at the bottom, if there are no rising roots and the crown is comparatively compact, and there are no obviously heavy boughs, the owner would consider his tree safe. From his evidence, as also from the evidence of Mr. Gabell, it is plain, as indeed everyone who can recognise an elm can see for himself, that, if there is a duty to lop or top all well grown elms in or near public places, it is a duty which is not observed by a vast number of owners, public and private.

The next question is whether the respondents performed the duty of inspection which, I infer from the evidence of Mr. Le Sueur, a reasonable and prudent landlord would perform. Plainly they did not, but it is not less plain that, if they had, it would probably have made no difference. The tree was just such a tree as Mr. Le Sueur says the owner might consider safe. I cannot hold that the appellants have satisfactorily proved that the negligence was a cause of the accident by which they suffered the damage in respect of which they sue. In general I respectfully agree with the judgment in the Court of Appeal. The appeal should, in my opinion, be dismissed with costs.

LORD OAKSEY: My Lords, I agree with the judgment of TUCKER, L.J. The respondents' duty was to act as ordinary prudent landowners would act. Landowners are not all experts in the management of trees and those who are not perform their duty if they take reasonable steps to employ persons who are experts. The respondents employed the well known firm of estate agents, Messrs. Hillier, Parker, May and Rowden, to manage this property and they in their turn employed Mr. Chipping, a timber contractor, who has been engaged in timber felling since 1915. It was decided between Mr. Gabell, a maintenance surveyor of Messrs. Hilliers, and Mr. Chipping that the trees in front of the respondents' flats including the tree in question should be lopped and topped generally to open up the gardens to get more light and air into them so that the grass and flowers might grow. It was not suggested in cross-examination either to Mr. Gabell or to Mr. Chipping that the trees were being lopped for any other reason or because they appeared to anyone to be unsafe. On the contrary, Mr. Chipping said when asked:

"Q.—To you, a man who has been engaged in the timber business and tree felling business for a good many years, walking up to that tree on Mar. 1 and looking at it, was there anything which would have led you to say 'I am very suspicious of this'? A.—Nothing whatever."

What more would the ordinary prudent landowner do? Mr. Chipping was not a servant of the respondents. It cannot be that a landowner must consult other experts or that because experts may be called at the trial after an accident who think the accident might have been foreseen that the landowner who did not consult them or act in accordance with their view is negligent. As a matter of fact none of the experts called in the case who had seen the tree before it fell thought it appeared dangerous, and it is not at all clear, in my view, that even the expert witnesses who had not seen the tree in growth would have considered it dangerous. For these reasons I am of opinion that there

was no evidence that the respondents failed in their duty to take reasonable care in the management of their premises, and the appeal should be dismissed.

LORD REID (read by LORD RADCLIFFE): My Lords, I have no doubt

that a person who has a tree which is in such a position that it or some of its branches may fall and injure some person passing along a busy thoroughfare is under some duty to those who pass. The place where the accident happened out of which this case has arisen was a busy street in London and in what I say I do not intend to express any opinion about the extent of the duty of a person who has trees near an unfrequented highway or near some other place to which the public have access. I think that the respondents' duty was to take such steps to prevent danger as a reasonable man in the respondents' position would have taken. In 1940 they became lessees of a block of flats in the forecourt of which stood a number of trees. The premises were requisitioned from 1941 to 1946, when the respondents regained possession. On Apr. 7, 1947, one of the trees in the forecourt fell across the adjoining street and struck a motor car in which the appellants were travelling. It is clear that the respondents were entitled to deal with this tree but they had done nothing to it. The question is whether its fall on that occasion was due to negligence on their part. No separate case of nuisance is now maintained.

I think that the respondents' duty was not limited to dealing with any danger of which they might happen to be aware, and if a person has any further duty than that with regard to trees his first step must be to look at those trees which are near the highway or to get someone else to do so on his behalf to see whether any of them is dangerous. The respondents being a company could only adopt the latter alternative. I think that it was their duty to have this tree inspected within a reasonable time and it was not suggested that before the accident they did not have ample time to do this and to consider the results of an inspection and take any necessary action. In fact, in January, 1946, before the end of the period of requisition they appointed a firm of auctioneers and surveyors as their managing agents, but those agents never inspected the trees in the forecourt to see whether they appeared to be safe or not. After certain repairs were completed and in the course of "tidying up" they ordered a contractor to top and lop the trees to let in more light and air and the contractor would have reached the tree which fell a few days after the accident. This operation, however, had nothing to do with safety and any steps with that object could and should have been taken much earlier. It is not material to this case to consider whether or not the managing agents had any duty under their contract with the respondents to see to the safety of the trees. If they had not, the respondents failed in their duty because they did nothing about safety. If the managing agents had a duty under their contract, they failed to carry it out, but the respondents would not be absolved by engaging agents to carry out their duty if in fact those agents did nothing.

But it is not enough for the appellants to prove that the respondents failed to take any steps. To succeed they must also prove that proper inspection ought to have led to something being done which would have prevented the accident. The tree in question was an elm tree. The evidence shows that its roots were much weakened by disease, but that disease had taken an unusual course and no reasonable examination, even by an expert in tree diseases, would have disclosed this danger. The tree was perfectly healthy in appearance, but that appearance was deceptive and the hidden weakness in its roots led to its fall. In these circumstances the first question to consider is, I think, whether the evidence in this case establishes that every fully grown elm tree in a dangerous position ought to be lopped or otherwise dealt with as a safety precaution no matter how healthy it may seem to be. It is only if that is not proved that it is necessary to go on to consider whether there was anything special about this tree which should have been apparent on inspection and which called for precautionary action.

On the first question LORD GODDARD, C.J., who tried the case, found for the appellants. I think that the basis of his decision is contained in this sentence ([1948] 2 All E.R. 1104):

"In this case the evidence satisfies me that it is a reasonable and proper precaution for the occupier of property on which there are elm trees bordering or near to the road to top or pollard them as an ordinary incident of good estate management."

This is so broadly stated as to include all fully grown elm trees (I assume that young trees were not intended to be included), and if I could find evidence to support this conclusion I would be very reluctant to disturb it. But with all respect I cannot find that evidence. If it were an ordinary incident of good estate management or a general practice to lop or pollard or otherwise remove parts of all fully grown elms standing near roads, whether the tree appeared to be normal and healthy or not, that must have been known at least to the expert witnesses who gave evidence in this case, but no witness speaks of such a practice. Mr. Aitkins, the expert who gave evidence for the appellants, carries on business as a forestry adviser and has been a university lecturer. He gave evidence at some length to show that inspection would have revealed peculiar features about this tree—in particular, the root disease—which required that action should be taken, but his evidence as to what should have been done on the assumption that inspection revealed nothing abnormal was confined to a few short answers. It had been found by counting the rings in a section of the trunk after the tree had fallen that the tree was about 130 years old, and Mr. Aitkins, who never saw the tree, said that he had been told that it had a very large crown and he thought that this was so from looking at a photograph of the fallen tree. He was then asked:

"Q.—In your opinion is an elm tree of 125 years old which had never been lopped safe? A.—It depends on the size of the head. If it has a large head it should be lopped."

He then referred to an old elm tree or a tree "completely out of balance with an enormous head for the height of the bole" and when asked:

"Q.—Would you leave any tree such as this close to the highway without it being lopped? I say 'such as this', meaning an elm tree 125 years old or more. A.—No, I would take precautions and have it lopped."

In re-examination he was asked, leaving the question of disease entirely out of account:

"Q.—If you had found this tree at about 130 years old and in this position with a very large crown which had never been lopped what would you have said was the proper thing to do from the point of view of public safety, quite apart from disease? A.—To have it lopped and docked to safe proportions for the benefit of the public, without any doubt."

Not only does Mr. Aitkins nowhere say that there is any general rule or practice of lopping elms in the interests of safety; he does not even say that, in his opinion, there ought to be. When he advocates lopping it is always with reference to trees with large crowns or with some other particular feature. The other expert who gave evidence is Mr. Le Sueur. He is highly qualified and has been in practice as a consultant for twenty years. LORD GODDARD, C.J., said of him that he gave his evidence with a frankness which was most refreshing. When he was asked what a prudent owner should do in deciding whether an elm tree should be lopped, he said:

"If the trunk is a straight one and it has not swelled out at the bottom and does not have rising roots and has a comparatively compact crown and has not any obviously very heavy boughs that owner should consider his tree safe. Beyond that I do not think any reasonable human being can go."

He agreed that an elm should certainly be inspected with a view to lopping before it is one hundred years old, but he did not say that it should certainly be lopped. He was asked whether he disagreed with Mr. Aitkins' answer which I have quoted: "No, I would take precautions and have it lopped" and he replied: "Not in a general way, ^{no}." I cannot find that any of the other witnesses refer to dealing with elms as an ordinary incident of good estate management or speak of any general rule that all elms near a road should be lopped. All the witnesses agree that elms are more dangerous than other trees commonly found in this country, partly because the branches are apt to fall unexpectedly and partly because they are shallow rooted, and I think that it is plain that action should be taken if there is any reason to suspect weakness on inspecting any particular tree. That, however, is quite another thing from lopping all elms irrespective of their condition as an ordinary incident of good estate management.

So, in my judgment, the appellants can only succeed in this appeal if they can show that there was something about this particular tree which should have suggested that lopping or other action was necessary. What inspection suggests will depend on the knowledge and experience of the inspector, and there has been some controversy about the degree of knowledge and experience necessary for adequate inspection. Plainly it would be no use to send a person who knew nothing about trees. The alternatives put forward were that he should be an expert or that he should have at least such knowledge and experience of trees as a landowner with trees on his land would generally have. As the question depends on what a reasonable man would do I think that it may be put in this way. Would a reasonable and careful owner without expert knowledge but accustomed to dealing with his trees and having a countryman's general knowledge about them think it necessary to call in an expert to advise him or would he think it sufficient to act at least in the first instance in his own knowledge and judgment? The evidence in this case does not convince me that he should call in an expert. There must be many owners of elm trees beside busy roads, and, if it were proper for them to seek expert advice, I would expect, making every allowance for the facts that not all owners are reasonable and careful and that even reasonable people frequently omit to do what they know they ought to do, that it would appear that expert advice was not infrequently sought, but the evidence in this case does not bear this out. Mr. Le Sueur gave clear evidence that inspection was necessary, but he did not say that it should be, or commonly was, by an expert, and Mr. Chipping, a contractor accustomed to dealing with trees, spoke of a number of his clients who had engaged him to lop elms but not of any who had consulted him as to whether their trees should be lopped. In his experience, apparently, the decision to lop was the unaided decision of the client. So, I think, the question is whether a person with general knowledge and experience of trees would, or should, have advised the respondents that this elm tree, notwithstanding its normal healthy appearance, ought to be lopped, or at least that there was such doubt that expert advice should be sought if it was desired to keep the tree untouched. It appears from the evidence that lopping is an operation which can damage a tree. It wounds the tree, and, according to Mr. Le Sueur, even if the wound is carefully treated, the tree should not be left untended thereafter for more than five or seven years. He said: "Lopping a tree may make it more dangerous in the end of course," but he admitted that, if this tree had been lopped, any immediate danger would have been removed.

Apart from the root disease, which could not have been detected on inspection, the two features of this tree which are dealt with in the evidence are its age and the size of its crown. When this tree fell the rings were counted in a section of the trunk and its age was found to be about 130 years. The experts were agreed that this is only middle age for an elm. Mr. Aitkins said that an elm

can reach the age of five hundred years provided it is not exposed to wounding. There is no evidence of how the approximate age of a growing tree can be determined, or whether an elm of 130 years old would appear to a person of ordinary knowledge different from a younger tree which has just attained full stature, and I can find no basis in the evidence for the suggestion that, while it may be safe as a general rule to leave a younger elm unlopped, it is different when it comes to such an age as 130 years. In my opinion, it is not proved that on inspection the age of the tree alone ought to have suggested that action was necessary. The main feature relied on for the appellants was the size of the crown. The experts were agreed that any tree with a very large crown ought to be lopped for safety and I think that a person with general knowledge of trees would take the same view. But how large was this crown? Mr. Aitkins, who never saw the tree, thought from information given to him and from looking at photographs of the fallen tree that it was very large. One witness, Mr. Dunk, being recalled, estimated its diameter at thirty-five feet and thought it was large, but the experts were not asked whether a thirty-five feet crown would be large for a tree of this character. Mr. Dunk was an officer of the borough council and he had observed the tree in the course of his duties. He said that when he came across a tree which he regarded as a potential danger he reported it, but he made no report about this tree. The maintenance surveyor of the respondents' managing agents, asked whether it appeared to be an unusually large top, said it was quite in keeping with the rest of the trees in the neighbourhood, but, no doubt, he had an interest as his firm might be blamed for taking no action. A resident who saw the tree every day saw nothing unusual about it. He was interested in elm trees, but may not have had much knowledge. The contractor, who was engaged in topping and lopping the trees and knew something about trees, saw nothing abnormal about this tree, and said he thought the crown, not a large, but an ordinary, one, but Mr. Aitkins said that this contractor had told him that it was a very large crown. Mr. Le Sueur did not see the tree, and, when asked whether the photograph showed anything abnormally large about the top, he said he would not like to answer that question. The evidence which gives me most difficulty on this question is a passage in his re-examination:

"If I looked at the photograph I would not say 'Good gracious what is the matter with this tree.' Q.—Would you say 'Good gracious what an enormous tree; it ought to have been lopped' or would you say that it was a normal tree not calling for attention? A.—Judging from the photograph I should say that it was a normal tree, but with regard to it not requiring attention, of course I cannot get sufficient from the photograph to say anything at all. The LORD CHIEF JUSTICE: Do you think you might have said if you went by: 'Why on earth don't they have it lopped?' A.—Yes, I think so."

If the last answer means that Mr. Le Sueur thinks that he would have thought lopping appropriate even at a glance, that would tell very strongly in favour of the appellants, because if the matter was so clear to him as that it surely ought not to have escaped the notice of a less highly qualified inspector, but, if he meant that, this answer is quite out of line with the rest of his evidence. I do not think that he can have meant more, in assenting to what was suggested to him, than that if he had seen the tree he might have seen something which called for lopping. The rest of his evidence is to the effect that, so far as his information went, it did not suggest that. But, perhaps, the best reason for not attributing too much importance to this passage is that it is not mentioned in the judgment of LORD GODDARD, C.J. LORD GODDARD, C.J., refers to the tree carrying "a considerable crown" and "bearing a large crown," but, as I have already said, he does not base his judgment on this. The matter was

argued again in the Court of Appeal, and I agree with the opinion of TUCKER, L.J., who said ([1949] 1 All E.R. 876):

A "If the judgment had been based on the ground that the crown of the tree was of abnormal size so as to make it apparent to a layman that it was a potential danger, I should have been of the opinion that the evidence was not sufficient to justify such a finding. A study of the judgment, however, satisfies me that it was not based on this finding. The Lord Chief Justice does not say it was abnormal, merely that it was large or considerable, which I take to mean no more than that it was the kind of crown which an elm tree of this age which had never been lopped might be expected to carry."

B So I do not find either in the judgment of LORD GODDARD, C.J., or on a reconsideration of the evidence enough to establish that there was anything unusual about the size of the crown. The case is a difficult one, and I have not reached my conclusion without some hesitation, but in the end I have come clearly to be of opinion that the appeal should be dismissed.

C LORD RADCLIFFE: My Lords, I should have preferred to see this appeal allowed, but, since the majority of your Lordships take a different view, I am not prepared to dissent. The difference that would have been between us would not have been one of principle. It would, in fact, have been confined to the proper interpretation of the evidence given at the trial by one witness, Mr. Le Sueur. Left to myself, I should, though not with certainty, have deduced from the written record of his testimony that he left the court in little doubt that, in his opinion, it would have been the reasonable and proper thing for the owner of this elm to have had it lopped, and I think that the Lord Chief Justice, who had the advantage, denied to us, of hearing and seeing Mr. Le Sueur, did so understand him. Again, I think that Mr. Le Sueur probably did mean to convey that a "well-grown fully-branched elm tree" ought to be lopped every five or seven years to ensure safety, and I doubt very much whether D that estimate depends at all on the consideration that lopping may promote decay. In fact, he says that, if you treat the wounds very carefully, the tree does not rot as fast as it would if you leave the branches alone, but the truth is that the evidence is not in a satisfactory state for the purposes of an appellate court. There is too much ambiguity in some of the questions, and there are too many inconclusive answers that were left unresolved. If the majority of your E Lordships take the view that the evidence as a whole leaves no reasonable certainty as to what, if anything, it would have been prudent to do to this tree, had it been inspected, I think that that is the best proof that the plaintiffs at F the trial failed to make out their case.

G I hope that I do not misinterpret the significance of this decision if I say that I do not think that it can be the last word on the position or liability of the tree-owner. To say that it is a natural use of land to grow trees on it seems to me too wide a generalisation to be of much use in practice. It would be conceded, I believe, that there is somehow a difference between the legal responsibilities of the owner of a mature forest tree in a built-up area immediately adjacent to a busy street and the responsibilities of the owner of a stand of timber bordering a country lane, but is the difference only this, that the latter is H entitled to take more chances at the expense of his neighbours than the former? I am not certain of the logic, for a tree or its branches only falls once, and it must be poor consolation to an injured passer-by in the country lane to be assured that the chances were all against his being at the place of the accident at the moment when it occurred. The accepted test that liability only begins when there is apparent in the tree a sign of danger has the advantage that it seems to ignore, or to a large extent to ignore, the distinction between the spot that is much, and the spot that is little, frequented, but, on the other hand,

I think that it does end by making the standard of the expert the test of liability. Anyone can own a tree, there is no qualifying examination, but to how many people in this country can be credited as much general knowledge as will warn them that a tree's top is unusually large, or that it is, in fact, diseased, dangerously or otherwise?

My Lords, I have formed no final view on any of these points. I allude to them only because I think that they still await final exposition and that it would be regrettable if they were regarded as finally determined by the authority of this case.

Appeal dismissed with costs.

Solicitors: *G. Howard & Co.* (for the appellants); *Barlow, Lyde & Gilbert* (for the respondents).

[Reported by J. D. PENNINGTON, ESQ., Barrister-at-Law.]

Affirmed. H.L. [1952] 1 All E.R. 888.

REYNOLDS AND GIBSON *v.* CROMPTON (INSPECTOR OF TAXES).

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Singleton and Jenkins, L.JJ.), June 29, 30, July 14, 1950.]

Income Tax—Profits from trade—Capital profit—Profit on collection of book debt—Book debt included among assets acquired from predecessor—Purchase of debt at discount—Election to be treated as having set up new trade—Ultimate payment of debt in full—Income Tax Act, 1918 (c. 40), sched. D, Case I.

One of the assets of a partnership firm of cotton brokers as originally constituted was a debt owing by a customer which had been incurred in the course of their trade as cotton brokers. The firm, having doubts about the recoverability of the debt, made reserves against it which were duly allowed as deductions in computing the firm's profits for assessment to income tax in the relevant years. In 1933 a change took place in the constitution of the firm. A further change occurred in 1938, and the firm which was then formed carried on the business, purchased the assets and took over the liabilities of the previously existing firm, but elected, under the proviso to r. 11 (1) of the Rules Applicable to Cases I and II of sched. D, to be treated for tax purposes as having set up a new trade. There was a further change in the constitution of the firm, but the firm constituted on the change in 1938 and its successor (the appellant firm) were treated for tax purposes as one and the same. The assets taken over by the appellant firm were valued and paid for, and these assets included the book debt which was acquired at its written down value. Subsequently, the debt was collected in full in part by the appellant firm and in part by its predecessor, a profit of £50,000 being thereby made. It was found as a fact that the new firm did not carry on any trade of dealing in book debts.

HELD: the profit accrued, not in the course of carrying on a trade, but from the purchase of a capital asset which subsequently appreciated in value, and was, therefore, not assessable to income tax under Case I of sched. D.

Hall (Harry), Ltd. v. Barron (Inspector of Taxes) (1949) (30 Tax Cas. 451), distinguished.

[FOR THE RULES APPLICABLE TO CASES I AND II OF SCHED. D TO THE INCOME TAX ACT, 1918, r. 11 (1), AS AMENDED BY THE FINANCE ACT, 1926, s. 32, AND THE FINANCE ACT, 1930, s. 16, see HALSBURY'S STATUTES, Second Edn., Vol. 12, p. 164.]

Cases referred to:

- (1) *Golden Horse Shoe (New), Ltd. v. Thurgood*, [1934] 1 K.B. 548; 103 L.J.K.B. 619; 150 L.T. 427; 18 Tax Cas. 280; Digest Supp.
- (2) *Jones v. Leeming*, [1930] A.C. 415; 99 L.J.K.B. 318; 143 L.T. 50; Digest Supp.
- (3) *Hall (Harry), Ltd. v. Barron (Inspector of Taxes)*, (1949), 30 Tax Cas. 451.
- (4) *Assets Co., Ltd. v. Forbes (Inspector of Taxes)*, (1897), 61 J.P. 616; 3 Tax Cas. 542; 28 Digest 18, q.
- (5) *Ducker v. Rees Roturbo Development Syndicate, Inland Revenue Comrs. v. Same* [1928] A.C. 132; 97 L.J.K.B. 317; 138 L.T. 598; 13 Tax Cas. 366; *revsg., Rees Roturbo Development Syndicate v. Inland Revenue Comrs. Same v. Ducker*, [1928] 1 K.B. 506; 96 L.J.K.B. 944; 138 L.T. 143; Digest Supp.

APPEAL by the taxpayers from an order of ROXBURGH, J., made on Apr. 3, 1950, dismissing an appeal by the taxpayers from a determination of the Special Commissioners who had confirmed an assessment to income tax under Case I of sched. D for the year ended Apr. 5, 1949, in respect of the annual profits or gains from the trade of cotton brokers carried on by the taxpayers in Liverpool from Oct. 1, 1945, onwards in succession to a series of firms trading under the same name as the taxpayers.

In 1930 a partnership firm of cotton brokers, called Reynolds and Gibson, were the creditors of Combined Egyptian Mills, Ltd., for £200,000 for cotton supplied to them. This partnership firm, firm No. 1, had doubts about the recoverability of the debt, and made reserves against it, amounting to £50,000 in all. These reserves were duly allowed as deductions for income tax purposes in the appropriate years. On a change of partners, firm No. 2 took over the debt which was subsequently reduced to £174,600, but the reserve against that amount remained at £50,000. On Oct. 1, 1938, a further change of partners occurred, and firm No. 3 came into existence and took over the assets and liabilities of firm No. 2 on its succession to that firm and paid for the book debt in question a sum less by £50,000 than its face value. All the partners of firms No. 2 and No. 3 elected, under the proviso to r. 11 (1) of the Rules Applicable to Cases I and II of sched. D, that the firm should be treated, for income tax purposes, as though a new trade had been set up. In the years ended Sept. 30, 1939, 1940, 1941, 1942, 1943 and 1944, firm No. 3 received from the debtor company in reduction of the debt sums totalling £84,114 13s. 10d., and in the years ended Sept. 30, 1942, 1943, 1944 and 1945, firm No. 3 re-credited to profit and loss account reserve sums totalling £40,000. There was a further change in the constitution of the firm, but firms No. 3 and No. 4 fell to be treated for income tax purposes as one and the same firm since on the occasion of that succession recourse was not had to the proviso to r. 11 (1) of the Rules Applicable to Cases I and II of sched. D. The position at the date of firm No. 4's succession was that the debt stood at £90,485 6s. 2d., with a reserve against it of £10,000, and, in taking over the assets and liabilities of firm No. 3, firm No. 4 paid for this particular asset £10,000 less than its face value. On various dates firms No. 3 and No. 4 received payment of the debt in full. The debt of £174,600 having thus been discharged completely, its acquisition by firm No. 3 from firm No. 2 at the price of £124,600 resulted in a profit of £50,000 of which £40,000 was received by firm No. 3 and £10,000 by firm No. 4. The Special Commissioners found (in para. 7 of the Case) that neither firm No. 3 nor firm No. 4 traded in book debts. They found also (in para. 11 of the Case) that in the hands of firm No. 1 and firm No. 2 the debt in question was not a capital asset but an ordinary trading debt, and that the debt did not change its quality from revenue to capital when it was taken over by firms Nos. 3 and 4. They, therefore, confirmed the assessment on firm No. 4. On appeal by the taxpayers, firm No. 4, ROXBURGH, J., held that the debt in question did change in quality from revenue to capital

on its acquisition by firm No. 3, but that it represented circulating capital, so that the profit on its collection properly fell for inclusion in the profits of firm No. 4, and he, therefore, confirmed the determination of the Special Commissioners. The facts are fully set out in the judgment of JENKINS, L.J.

A further appeal by the taxpayers (*Reynolds and Gibson v. Inland Revenue Commissioners*) on an excess profits tax assessment involving the same point was heard together with the present case, but was not separately argued, and the judgment related to both appeals.

Cyril King, K.C., and Bowe for the taxpayers.

Grant, K.C., R. P. Hills and P. M. B. Rowland for the Crown.

Cur. adv. vult.

July 14. The following judgments were read.

SIR RAYMOND EVERSLED, M.R. (read by JENKINS, L.J.): In this appeal both my brethren (whose judgments I have had the advantage of reading) have arrived at a clear conclusion in favour of the taxpayers. I have felt, for myself, impressed by the force of the argument of counsel for the Crown that the question whether the item in suit, the debt—counsel for the taxpayers was reluctant to call it a “book debt”—due from Combined Egyptian Mills, Ltd., was, in the hands of the taxpayers or their immediate predecessors, called firm No. 3, a capital or revenue item, was one of fact; that the Special Commissioners had found the facts in favour of the Crown; and that there was some evidence to support that finding. The Case Stated is, in its exposition of the character of the taxpayers’ business as cotton brokers, of the way in which this particular debt was dealt with, and of the business relations (if any) between firms No. 3 and No. 4, on the one hand, and the debtor company, on the other, undoubtedly meagre, but there is (as it seemed to me) much to be said for the view that the Special Commissioners intended to find as a fact that the debt in question was treated for all practical or business purposes as a revenue item, and retained the revenue character which, admittedly, it had originally possessed in the hands of firms No. 1 and No. 2. Both my brethren, however, clearly think that the relevant part of para. 11 cannot, in its context, be regarded as a finding of fact, but constitutes rather an expression of opinion based on the matters previously set forth. If this is the right view, then I agree that the Case and the conclusions of the Special Commissioners appear to do less than justice to the effect of the advantage taken on the formation of firm No. 3 of the proviso to r. 11 (1) of the Rules Applicable to Cases I and II of sched. D to the Income Tax Act, 1918. In all the circumstances I am not prepared to dissent from the view of my brethren that the appeal should be allowed.

SINGLETON, L.J. : The taxpayers have carried on the business of cotton brokers in Liverpool for many years. The appeal is against an assessment to income tax made on them for the year ended Apr. 5, 1949, under Case I, sched. D, of the Income Tax Act, 1918. ROXBURGH, J., upheld the decision of the Special Commissioners confirming the assessment, and the taxpayers appeal to this court.

Under Case I income tax is chargeable in respect of the annual profits or gains arising or accruing to the firm in respect of their trade. Thus, it must be shown that the assessment is based on profits arising from the business of cotton brokers or accruing to the firm in respect of it. It is not enough to show merely that there was a profit of some kind. It must be a profit accruing to the firm in the course of its trade.

Some thirty years ago, the firm of Reynolds and Gibson, as then constituted, supplied cotton to Combined Egyptian Mills, Ltd., and as a result, the latter incurred a debt to the former of £200,000. There have been various changes in the firm since that date. The firm which supplied the cotton was firm No. 1 (or a firm which was in existence before firm No. 1), and the firm on which the assessment is made is firm No. 4. The debt was regarded as doubtful to some

extent, and during the existence of firm No. 1 sums amounting to £50,000 were reserved against it, and these amounts were allowed as deductions in computing the profits or gains of firm No. 1 in the relevant years. In later years, during the time of firm No. 3, it was considered that the value of the debt was greater than had been thought, and amounts aggregating £40,000 were re-credited to the profit and loss accounts. Firm No. 1 had taken securities from the company in respect of the debt, and the company made certain payments. Firm No. 2, in which some of the partners were the same as in firm No. 1, was treated as continuing the business of firm No. 1. When firm No. 3 was formed on Oct. 1, 1938, the proviso to r. 11 (1) of the Rules Applicable to Cases I and II of sched. D was invoked by all those who were engaged in the business both immediately before and immediately after the change, so that firm No. 3 fell to be treated for income tax purposes as though a new trade had been set up or commenced. Firm No. 3 acquired the debt owing by Combined Egyptian Mills, Ltd. It was then £174,600, but, as I have said already, it had been written down in the books by £50,000 so that it was of the book value of £124,600. The taxpayers, firm No. 4, was formed on Apr. 1, 1945. No notice to bring into operation the proviso to r. 11 (1) was given. At the time of the formation of firm No. 4, £90,485 6s. 2d. of the original indebtedness of Combined Egyptian Mills, Ltd. was still outstanding. There is nothing in the Case to show the figure at which it was taken over by firm No. 4 from firm No. 3, though the £40,000 I have mentioned had already been credited in the profit and loss account of firm No. 3. The amount was paid off by Combined Egyptian Mills, Ltd. on Dec. 24, 1946. The contention of the Crown is that the sum so paid results in a profit to the firm of £50,000, and that that sum must be brought into account in order to arrive at the profits or gains of firm No. 4 in respect of the year of assessment ended Apr. 5, 1949. The difficulty in the Case is created by the paucity of the facts found and stated. ROXBURGH, J., referred to this and appears to have thought that there was need for further elucidation, but neither party wished the Case to go back. Speaking for myself, I do not think that the court ought to be asked to give judgment on the meagre statement of facts contained in this Case. The original debt had arisen from sales of cotton by firm No. 1 many years ago and they had taken securities to cover it. There is nothing whatever to show that business relationship continued (apart from payments on account of the debt from time to time). Nor is there anything to show whether this kind of transaction is usual when one firm takes over the business of another firm engaged in cotton-broking. It may well be an important element in preserving goodwill on a change of firm such as took place in 1933, in 1938 and in 1945, but there is no suggestion of that kind in the Case. All that we are told is that the assets and liabilities were valued on each occasion for the purpose of fixing the amount of consideration to be paid by the new firm. There may well have been other book debts. Only this one is mentioned in the Case.

The taxpayers rely strongly on the finding in para. 7 of the Case that neither firm No. 3 nor firm No. 4 traded in book debts, and, undoubtedly, this is of importance in view of the necessity of its being shown that the profit arose from trade or business carried on by the firm. The Crown places reliance on para. 11, and counsel submitted that that paragraph amounted to a finding of fact that the balance of the debt remained a debt on revenue account. I do not regard para. 11 as a finding of fact. The commissioners had already stated their findings of fact, and para. 11 should be read as containing the conclusions at which the commissioners arrived on the facts set out earlier in the Case. In any event I agree with the view of ROXBURGH, J., that, whatever the position had been earlier, as from the time the debt was acquired by firm No. 3 it became a capital asset purchased out of capital. Yet I find myself unable to agree with the learned judge that the findings of the Special Commissioners are equivalent to a finding that the profit in question arose from

the utilisation of circulating capital in the trade. Circulating capital is normally something used by a trading concern for the purpose of buying goods in which it trades in the hope of making a profit. I do not see that this debt in the hands of firm No. 3 or of firm No. 4 can be described as circulating capital in any sense. It was a debt and, so far as we know, an isolated case of a debt taken over, and there is nothing to show that it had any connection with the trade or business of firm No. 3 or of firm No. 4—unless that can be assumed from the fact that the indebtedness arose from sales of cotton by a predecessor firm, and I cannot think it is right to make such an assumption. In *Golden Horse Shoe (New), Ltd. v. Thurgood* (1), ROMER, L.J., dealing with the difference between fixed capital and circulating capital, said ([1934] 1 K.B. 563):

“Unfortunately, however, it is not always easy to determine whether a particular asset belongs to the one category or the other. It depends in no way upon what may be the nature of the asset in fact or in law. Land may in certain circumstances be circulating capital. A chattel or a chose in action may be fixed capital. The determining factor must be the nature of the trade in which the asset is employed.”

Herein lies the importance of the finding that neither firm No. 3, nor firm No. 4 traded in book debts, coupled with the absence of any finding that any business relationship continued or that the debt had anything to do with the business of firm No. 3 or of firm No. 4. It is true to say that firm No. 4 collected the balance of the debt and included it in the books of the firm: it is that fact, I take it, which leads the commissioners to say that it remained “collectible in the ordinary course of trade and its collection was incidental to the trade.” I am not quite sure what that means and I do not think that it carries one much further.

In *Jones v. Leeming* (2), LORD BUCKMASTER said ([1930] A.C. 419):

“This brings the argument back to the original position. Can the profits made in this case be described as income? Were the respondent a company promoter or were his business associated with purchase and sale of estates, wholly different considerations would apply, but this is negatived; the transaction in this case stands isolated and alone. It is, to my mind, in the circumstances, purely an affair of capital.”

For some reason which I do not profess to understand, both parties wish to have a decision on this Case as it stands. Having regard to the isolated nature of the transaction, to the finding that neither firm No. 3 nor firm No. 4 dealt in book debts, to the application of the proviso to r. 11 (1) in 1938, and to the lack of anything to show that the debt was in any way connected with the trade or business of either firm No. 3 or firm No. 4, I am not prepared to say that the sum of £50,000 falls to be dealt with as part of the profits or gains from the trade or business of the taxpayers. Such part of the profit as was made by either firm accrued, not by reason of its trade or by reason of its carrying on the business of cotton brokers, but because of the acquisition of a debt. The position would have been the same had firm No. 3 acquired at a low figure a debenture which was ultimately paid in full. In my view, the appeal should be allowed.

JENKINS, L.J. : This is an appeal from a judgment of ROXBURGH, J., dated Apr. 3, 1950, dismissing an appeal by the taxpayers, the firm of Reynolds and Gibson, from a determination of the Special Commissioners to the effect that the assessment to income tax under Case I of sched. D made on the taxpayers for the year ended Apr. 5, 1949, should be confirmed.

The assessment under appeal was made in respect of the profits of the trade of cotton brokers carried on by the taxpayers in Liverpool from Oct. 1, 1945, onwards in succession to a series of firms of the same name, three of which, covering the period from Oct. 1, 1928, to Sept. 30, 1945, are specifically mentioned

in the Case, and conveniently referred to in chronological order as firms Nos. 1, 2 and 3 respectively, the taxpayers being distinguished from their three immediate predecessors as firm No. 4. Firm No. 1 (which succeeded a yet earlier firm of Reynolds and Gibson) operated from Oct. 1, 1928, to Sept. 30, 1933, firm No. 2 from Oct. 1, 1933, to Sept. 30, 1938, and firm No. 3 from Oct. 1, 1938, to Sept. 30, 1945, when it was succeeded by the taxpayers, firm No. 4. As will appear below, the only significant change for the present purpose is the succession of firm No. 3 to firm No. 2 on Oct 1, 1938. The method of effecting the succession on each occasion is thus described in the Case:

“On the formation of each new firm the assets and liabilities of its predecessor were valued for the purpose of fixing the amount of the consideration to be paid by the new firm to the old and were taken over at the figure so fixed.”

The question in the appeal is, in effect, whether a sum of £50,000, representing the difference between the value (namely, £124,600) at which firm No. 3 took over a certain debt from firm No. 2 and the full amount (namely, £174,600) of the debt as ultimately recovered from the debtor by firms Nos. 3 and 4, was rightly included in the assessment under appeal as a profit of firm No. 4's trade as cotton brokers.

The debt in question was the balance of a larger sum which had become due from a company called Combined Egyptian Mills, Ltd. (to which I will refer as “the debtor company”) in respect of cotton supplied to the debtor company in or about the year 1920 by the firm of Reynolds and Gibson as then constituted. In 1930 the amount of the debt was £200,000, and firm No. 1, having doubts as to its recoverability, made reserves against it in the years ended Sept. 30, 1930, and Sept. 30, 1932, of £37,500 and £12,500 respectively, making £50,000 in all. These reserves were duly allowed as deductions for income tax purposes in the appropriate years. At a date not specified in the Case, but clearly before Oct. 1, 1938, arrangements were made between firm No. 1 or firm No. 2 and the debtor company under which the debt was to be discharged over a period by means of three month bills drawn by the firm and accepted by the debtor company, and the debtor company gave collateral security in the form of a mortgage. Under this arrangement the amount of the debt had, by Oct. 1, 1938 (that is to say, the date of firm No. 3's succession to firm No. 2), been reduced to £174,600, but the reserve against it still stood at £50,000. Thus, in effect firm No. 3 in taking over the assets and liabilities of firm No. 2 on its succession to that firm paid for this particular asset a sum less by £50,000 than its face value (that is to say, £174,600 less £50,000, which equals £124,600). In the years ended Sept. 30, 1939, 1940, 1941, 1942, 1943 and 1944, firm No. 3 received from the debtor company in reduction of the debt sums totalling £84,114 13s. 10d., and in the years ended Sept. 30, 1942, 1943, 1944 and 1945, firm No. 3 re-credited to profit and loss account from the reserve sums totalling £40,000. The position at the date of firm No. 4's succession to firm No. 3 (that is to say, Oct. 1, 1945) therefore, was that the debt stood at £90,485 6s. 2d., with a reserve against it of £10,000, and, in taking over the assets and liabilities of firm No. 3, firm No. 4 thus, in effect, paid for this particular asset £10,000 less than its face value (that is to say, £90,485 6s. 2d. less £10,000, which equals £80,485 6s. 2d.). On Dec. 24, 1946, the debtor company discharged the balance of the debt in full by payment to firm No. 4 of the sum of £90,485 6s. 2d. The debt of £174,600 having thus been paid in full, its acquisition by firm No. 3 from firm No. 2 at the price of only £124,600 resulted in the end in a profit of £50,000 of which, as appears above, £40,000 was received by firm No. 3 and £10,000 by firm No. 4. The question is whether, in the circumstances I have stated, this profit of £50,000 was for income tax purposes a profit of the trade of cotton brokers carried on by firm No. 4, so as to attract tax under Case I of sched D.

In the consideration of this question the succession of firm No. 4 to firm No. 3

must admittedly be ignored, as on the occasion of that succession recourse was not had to the proviso to para. (1) of the new r. 11 of the Rules Applicable to Cases I and II of sched. D, introduced by s. 32 of the Finance Act, 1926, and consequently for income tax purposes firms Nos. 3 and 4 fall to be treated as one and the same firm, with the result that, if the £50,000 is taxable at all, the whole amount is rightly assessed on firm No. 4 notwithstanding that £40,000 of it was in fact received by firm No. 3. But it is important to observe that the proviso to para. (1) of r. 11 was invoked on the succession of firm No. 3 to firm No. 2 and consequently that the liability or otherwise of the £50,000 to tax as a profit of the trade of firm No. 4 must be judged on the assumption that on Oct. 1, 1938, firm No. 3 set up a new trade as cotton brokers and for that purpose purchased the assets and undertook the liabilities of the previously existing firm No. 2.

I should, perhaps, read para. (1) of r. 11, as amended by the Finance Act, 1926, s. 32, and the Finance Act, 1930, s. 16, which is in these terms:

"If at any time after Apr. 5, 1928, a change occurs in a partnership of persons engaged in any trade, profession or vocation, by reason of retirement or death, or the dissolution of the partnership as to one or more of the partners, or the admission of a new partner, in such circumstances that one or more of the persons who until that time were engaged in the trade, profession or vocation continue to be engaged therein, or a person who until that time was engaged in any trade, profession or vocation on his own account continues to be engaged in it, but as a partner in a partnership, the tax payable by the person or persons who carry on the trade, profession or vocation after that time shall, notwithstanding the change, be computed according to the profits or gains of the trade, profession or vocation during the period prescribed by the Income Tax Acts: Provided that, where all the persons who were engaged in the trade, profession or vocation both immediately before and immediately after the change require, by notice signed by all of them or, in the case of a deceased person, by his legal representatives, and sent to the surveyor within twelve months after the change took place, that the tax payable for all years of assessment shall be computed as if the trade, profession or vocation had been discontinued at the date of the change, and a new trade, profession or vocation had been then set up or commenced, and that the tax so computed for any year shall be charged on and paid by such of them as would have been charged if such discontinuance and setting up or commencement had actually taken place, the tax shall be computed, charged, collected and paid accordingly."

The Special Commissioners, after narrating the facts to which I have already referred, recorded (in para. 7 of the Case) a finding that "neither firm No. 3 nor firm No. 4 traded in book debts." Then, after summarising the contentions of the parties, they expressed their decision in para. 11 of the Case in the following terms:

"We, the commissioners, gave our decisions as follows: 'In September, 1938, firm No. 3 took over from firm No. 2, for £124,600, the debt of £174,600 due from Combined Egyptian Mills. Eventually the full sum of £174,600 was realised, £84,114 13s. 10d. being received by firm No. 3 and £90,485 6s. 2d. by firm No. 4. For income tax purposes firm No. 3 fell to be treated as having set up a new trade, and we accept that it did not trade in book debts. Nevertheless, in the hands of firms Nos. 1 and 2 the debt in question was in no sense a capital asset, but simply an ordinary trading debt, and, on the facts of this case, we are unable to see that when it was taken over by firms Nos. 3 and 4, successively, its "quality" was changed from revenue to capital, as contended on behalf of the appellant

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firm. In our opinion, it remained a debt on revenue account, collectible in the ordinary course of trade and its collection was incidental to the trade. If the full £174,600 had been received by firm No. 3, we should have felt no doubt that its profit of £50,000 over the amount which it had paid for the debt would have been a profit on revenue account. But the final £90,485 6s. 2d. was received by firm No. 4 (the taxpayers) and the Crown admits that if all the members of firms Nos. 3 and 4 had given the requisite notice under the proviso to sub-s. (1) of s. 32 of the Finance Act, 1926, firm No. 4 would fall to be treated as having set up a new trade, with the result that its profit on realisation would have been only £10,000 (being the excess of the amount received over the amount at which it took over the debt from firm No. 3). It is admitted, however, that no such notice was given, and we accept the contention of the Crown that, in these circumstances, for income tax purposes this change of partnership must be ignored, with the result that the above profit of £50,000 must be brought into the income tax assessment of firm No. 4. The appeal, therefore, fails."

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As I have already indicated, the correctness of this decision is not challenged so far as the effect of para. (1) of r. 11 is concerned. In other words, it is admitted that if and so far as the £50,000 constituted a profit of the trade of firm No. 3 or firm No. 4 at all, firm No. 4 is assessable to tax on the whole amount notwithstanding that the greater part of it was in fact received by firm No. 3. The contest is directed solely to the question whether it was a profit of their trade at all. It was argued before us on the part of the Crown that the Special Commissioners' decision of this question adversely to the taxpayers, firm No. 4, involved a finding of fact which ought not to be disturbed. I do not think this is so. Apart from the somewhat meagre narrative summarised above and the finding in para. 7 of the Case that neither firm No. 3 nor firm No. 4 traded in book debts, the only findings bearing on the character of the debt in question appear in the second paragraph of the decision, and are to the following effect: (1) That in the hands of firms Nos. 1 and 2 the debt in question was in no sense a capital asset but simply an ordinary trading debt; (2) that on the facts of the Case the Special Commissioners were unable to see that when it was taken over by firms Nos. 3 and 4 successively its "quality" was changed from revenue to capital; and (3) that in their opinion it remained a debt on revenue account collectible in the ordinary course of trade and its collection was incidental to the trade. I cannot regard these as findings of fact concluding the matter against the taxpayers, firm No. 4. That the debt in question was in origin an ordinary trading debt is not open to doubt. But the question is not whether it was a trading debt in the hands of the firm to which it originally became due or in the hands of firms Nos. 1 and 2, but whether, on the assumption that it preserved its original character as a trading debt down to the date of the succession of firm No. 3 to firm No. 2, and was at that date a trading debt owing to the latter, it then became a trading debt owing to firm No. 3 notwithstanding that firm No. 3, by virtue of the proviso to para. (1) of r. 11 of the Rules Applicable to Cases I and II of sched. D, is to be considered as having set up a new trade as opposed to merely continuing the trade of its predecessor. The Special Commissioners do not seem to me to have addressed themselves adequately to this question. They draw no distinction between the succession of firm No. 3 to firm No. 2 (to which the proviso to para. (1) of r. 11 applied) and the succession of firm No. 4 to firm No. 3 (to which that proviso did not apply), but content themselves by saying that on the facts of the case they are unable to see that when the debt was taken over by firms Nos. 3 and 4 successively its "quality" was changed from revenue to capital. Now, if firm No. 3 is to be considered as having set up a new trade, the trading operations by which the right to receive the debt in question was originally earned are *ex hypothesi* not to be regarded as operations of the trade carried on by firm No. 3, since

they were wholly completed and done with long before firm No. 3's trade was ever set up. Therefore, if the debt in question became a trading debt of firm No. 3, it can only have done so because its acquisition by firm No. 3 as part of the assets of firm No. 2 amounted to an operation of firm No. 3's new trade. But, as found by the Special Commissioners, the new trade set up by firm No. 3 did not include dealing in book debts. It was simply the trade of cotton brokers. It follows that the acquisition of the debt in question was not *per se* an operation of the new trade set up by firm No. 3. The question, therefore, is whether on the facts of the case its acquisition was an operation of firm No. 3's new trade, although such trade was simply that of cotton brokers and not dealers in book debts. On the facts as found by the Special Commissioners, I see no warrant for so holding. Their statement of the opinion that the debt in question "remained a debt on revenue account, collectible in the ordinary course of trade and its collection was incidental to the trade" appears to me to carry the matter no further. The question, as I understand it, is whether the acquisition of the debt was an operation in the course of firm No. 3's trade. If the answer to that question is "yes" then *prima facie* any profit resulting from such acquisition would be a profit of firm No. 3's trade and taxable accordingly. If the answer is "no," then *prima facie* any such profit would be simply the appreciation of an asset acquired otherwise than in the course of such trade, and accordingly not part of the profits of such trade or taxable in that character. There seems no doubt that the debt in question was in fact treated in the books of firm No. 3 in the same way as a debt arising in the course of its own trade would have been treated, and I am prepared to assume it was similarly dealt with for the purposes of collection (if that is what the Special Commissioners mean by "collectible in the ordinary course of trade") and also that its collection was carried out in conjunction with the ordinary trading operations of firm No. 3 (if that is what the Special Commissioners mean by saying "its collection was incidental to the trade"). But these circumstances cannot suffice to convert it into an asset acquired by firm No. 3 in the course of its trade if in fact it was not so acquired. The learned judge expressed doubts, which I fully share, as to the effect of the Special Commissioners' findings of fact, but added that neither party wished him to ask them for further elucidation. A similar reluctance was shown on both sides when it was suggested in this court that the case might with advantage be remitted to the Special Commissioners for further facts to be found.

After referring to the statement of the Special Commissioners' decision in para. 11 of the Case, the learned judge continued:

"I understand this to be a finding that, although firms Nos. 3 and 4 did not trade in book debts generally, it was a part of their trade to acquire and collect this particular book debt. Is this finding of fact one which justifies treating the £50,000 as profits of the trade for income tax purposes? I do not share the view of the Special Commissioners that when the debt had been purchased by firm No. 3 it remained a debt on revenue account. It seems to me that it clearly became a capital asset, purchased out of capital. But the question remains whether it was fixed or circulating capital. As ROMER, L.J., pointed out in *Golden Horse Shoe (New), Ltd. v. Thurgood* (1) ([1934] 1 K.B. 563): ' . . . the profits or losses in a year of trading cannot be ascertained unless a comparison be made of the circulating capital as it existed at the beginning of the year with the circulating capital as it exists at the end of the year. It is, indeed, by causing the floating capital to change in value that a loss or profit is made.' Between assets which clearly constitute fixed and circulating capital respectively there is a debatable territory, and in that territory the decision is one of fact, and may be one of degree. I think that the findings of the Special Commissioners, as I understand them, are equivalent to a finding that the

A profit in question arose from the utilisation of circulating capital in the trade, and was accordingly profit liable to taxation and was not a realised accretion to a fixed capital asset. Counsel for the taxpayers submitted that the finding in para. 7 of the Case was conclusive against this view, but that submission is inconsistent with the decision of CROOM-JOHNSON, J., in *Hall (Harry), Ltd. v. Barron (Inspector of Taxes)* (3), who upheld a determination of the Special Commissioners that the profits on realisation of purchased book debts were taxable although the company was not a dealer in book debts, holding that the question was essentially one of fact. As he pointed out, the book debts had a particular characteristic. They had arisen in the conduct of a business of the same nature. That also applies here. It was a book debt in a cotton broker's business. It would certainly seem to me difficult to regard this particular book debt as fixed capital, and, in my judgment, the determination of the Special Commissioners cannot be successfully impeached."

The learned judge thus arrived at what may perhaps be described as a rationalisation of the Special Commissioners' findings which enabled him to uphold their decision. For my part, however, I do not think the importation into the Case of the somewhat debatable distinction between fixed and circulating capital really contributes anything to the solution of the question in issue. After all, if I understand the cases correctly, "circulating capital" is simply an expression used to denote capital expended in the course of the trade with a view to disposal at a profit of the assets produced or acquired by means of such expenditure, and represented at different stages of its career by cash, assets into which the cash has been converted, and debts owing from customers to whom those assets have been sold. It follows that to describe the sum of £124,600 expended by firm No. 3 in the present case on the acquisition of the debt of £174,600 owing to firm No. 2 as circulating capital is really to beg the question, since the £124,600 was circulating capital employed in firm No. 3's trade if, but not unless, the acquisition of the debt was an operation of firm No. 3's trade. The question, therefore, still remains to be answered: Was the purchase of the debt in question a purchase in the course of the new trade which firm No. 3 is treated as having set up, with the result that the profit of £50,000 accruing through the ultimate payment of the debt in full was a profit of that trade? For this purpose, firm No. 3 must be regarded as a complete stranger to firm No. 2, purchasing the assets and undertaking the liabilities of firm No. 2 with a view to setting up a new business of the same kind on its own account. The mere fact that a given asset was included in the totality of the assets so acquired clearly could not of itself make its acquisition an operation in the course of the new trade set up by firm No. 3, so as to turn any appreciation in the value of that particular asset into a profit of such trade. For instance (the trade being that of cotton brokers) appreciation in the value of such assets as premises, office furniture, or investments acquired from firm No. 2 would clearly not answer that description. The result must, therefore, depend on the nature of the asset. If it was an asset of the kind dealt in in the course of the particular trade, or, in other words, if it was in the nature of stock in trade, its purchase would clearly amount to a trading operation, and any resulting profit would be a profit of the trade. If it was an asset which could only be turned to account by the exercise of the trade (for example, an uncompleted contract for the supply of goods of the kind dealt in in the trade) the same result would, I apprehend, ensue. But, if it was an asset neither of the kind dealt in in the trade, nor such that it could only be turned to account by the exercise of the trade, I cannot for my part see on what ground its purchase could be regarded as in itself constituting an operation of the trade.

Applying these principles to the present case, I find that firm No. 3 purchased from firm No. 2, among other assets, a debt, the right to receive which had

been fully earned many years ago by trading operations long since completed. Nothing whatever in the way of the relevant trade remained to be done in order to recover the amount, and it was in due course recovered by firms Nos. 3 and 4 simply by virtue of the former's purchase of the right to receive it. It is true that the trading operations by which the debt had originally been earned were of the same kind as those upon which firm No. 3 was proposing to embark, but this seems to me to be beside the point. It was simply a right to receive £174,600, and it mattered not on what account that right had arisen. Precisely the same profit would have arisen to any purchaser of the debt, whether a cotton broker or not. Its value in no way depended on firm No. 3 carrying on the business of cotton brokers or any other business. The transaction, as I see it, was simply the purchase of an asset which subsequently appreciated in value by a firm whose trade did not include the purchase of or dealing in assets of that character.

I ask myself whether in the converse event of firm No. 3 having purchased from firm No. 2 a similar debt which ultimately realised £50,000 less than the price paid for it the deficiency would have constituted a loss sustained in the course of the new trade set up by firm No. 3, and find difficulty in seeing how the answer to that question could fail to be in the negative. If this view is right, the following passage from the judgment of LORD YOUNG in *Assets Co., Ltd. v. Forbes (Surveyor of Taxes)* (4), seems to me to be closely in point (3 Tax Cas. 549):

"Is it to be said that they were making a trade of buying and selling doubtful debts? There is nothing to indicate that in the least. The proposition that where anybody who purchases a doubtful debt and makes more than he paid for it—one purchase, he not being a trader in that kind of thing—that that is income, is, I think, a proposition which cannot be sustained. Now, I think we have nothing upon the face of this case to show that in a trade of buying and selling there was income or gain made by this company upon which the assessment is made."

I would refer also to the opening passage in the judgment of ROWLATT, J., in *Rees Roturbo Development Syndicate, Ltd. v. Inland Revenue Comrs., Same v. Ducker* (5), where he said (138 L.T. 147):

"This is one of those cases which raise great difficulty in applying a principle which in itself is perfectly clear. It has been said before in this court, and in more important courts, and it is perfectly clear, that where profit accrues from the sale of property a question arises whether that forms the basis of liability to income tax. Now income tax is not attracted by the mere circumstance that there is a profit, because the profit may be a mere accretion of the value of the article, and the profit may not accrue in the course of any trade at all. On the other hand, the circumstance that the profit is due to an accretion in the value of the article does not negative the application of income tax, because the accretion of value to the article may have been the very thing that a trader, within Case I, was established to secure. In that case you have a trade which is going to be in articles with a view to securing the accretion of value to those articles, and the accretion of value does not negative the incidence of income tax."

The present case, as I see it, is one in which *quoad* firms Nos. 3 and 4 the profit did not, in the words of ROWLATT, J., "accrue in the course of any trade at all." As to *Hall (Harry), Ltd. v. Barron (Inspector of Taxes)* (3), in which CROOM-JOHNSON, J., treated the question whether a profit realised by the collection of book debts purchased from one tailoring concern by another was a trading profit in the hands of the purchaser as a question of fact which had been concluded in favour of the Crown by the findings of the Special Commissioners,

I need only say that, whether that case was rightly decided or not, there were facts found by the Special Commissioners which have no counterpart here. On the facts as found in the present Case I am of opinion, for the reasons I have endeavoured to state, that the Special Commissioners and the learned judge came to a wrong conclusion and that the appeal should be allowed.

Appeal allowed with costs.

A Solicitors: *Lightbounds, Jones & Co.* (for the taxpayers); *Solicitor of Inland Revenue* (for the Crown).

[*Reported by C. N. BEATTIE, ESQ., Barrister-at-Law.*]

B

Re FRERE (deceased). KIDD AND ANOTHER v. FARNHAM
GROUP HOSPITAL MANAGEMENT COMMITTEE
AND OTHERS.

C

[CHANCERY DIVISION (Wynn-Parry, J.), July 6, 7, 1950.]

Will—Gift to hospital “if not taken over by the State”—Residuary gift to same hospital—Effect of condition on residuary gift.

Charity—Hospital—Vesting in Minister of Health—Whether remaining a charity—National Health Service Act, 1946 (c. 81), s. 59 (1) (2).

D

By his will, dated Mar. 10, 1941, a testator, who died on Aug. 22, 1941, directed payment out of his residuary estate of certain legacies and proceeded: “To the following hospitals if still at my death run on a voluntary system and not taken over by the State, namely:—To the Fleet and District Hospital £6,000 . . . To the same hospital £300 to build a library for the hospital and such of my books as shall be approved as suitable by my executors . . .” He then specified certain further legacies, gave

E

directions for payment of duty and in connection with the administration of his estate, and provided: “Any residue of my estate I give to the Fleet and District Hospital for endowment purposes.” On July 5, 1948, the Fleet and District Hospital vested in the Minister of Health under the National Health Service Act, 1946, ss. 6 and 7, and it was accepted that the condition on which the pecuniary and specific legacies to the hospital were defeated had then occurred.

F

HELD: (i) the condition did not affect the ultimate residuary gift, which, therefore, took effect.

(ii) it was not open to the court to hold that the hospital had, consequent on the passing of the Act of 1946, ceased to be a charity.

G

Re Morgan's Will Trusts ([1950] 1 All E.R. 1097) and *Re Dean's Will Trusts* ([1950] 1 All E.R. 882), *applied*.

[FOR THE NATIONAL HEALTH SERVICE ACT, 1946, s. 59, see HALSBURY'S STATUTES, Second Edn., Vol. 15, p. 391.]

Cases referred to:

H

(1) *Re Morgan's Will Trusts*, [1950] 1 All E.R. 1097.

(2) *Re Dean's Will Trusts*, [1950] 1 All E.R. 882.

ADJOURNED SUMMONS to determine, *inter alia*, whether on the true construction of the will of John Edward Frere, deceased, and in the events which had happened a gift of the testator's ultimate residuary estate took effect as a good charitable bequest.

L. J. M. Smith for the plaintiffs, the trustees of the will.

Denys B. Buckley for the first, second, fifth and seventh defendants, the

Farnham Group Hospital Management Committee, the South-West Metropolitan Regional Hospital Board, the Ministry of Health and the Attorney-General.

V. M. C. Pennington for the third and fourth defendants, the board of governors of the London Hospital, and the governors of the London Hospital.

O. R. Smith for the sixth defendant, one of the next-of-kin.

WYNN-PARRY, J.: This is an originating summons raising certain questions of construction on the will and the first codicil of the testator. After appointing executors and giving certain directions and making certain bequests not material to be further referred to, the testator deals with his residuary estate. Having directed payment thereof of a number of legacies he proceeds as follows:

"To the following hospitals if still at my death run on a voluntary system and not taken over by the State, namely:—To the Fleet and District Hospital £6,000 for investment in stock or stocks of the British government and to apply the income to provide (a) £100 a year as an X-ray deposit fund to be called the 'Frere X-Ray Fund,' (b) £50 a year for extra comforts for the nursing staff, (c) the balance for a free bed for ex-service men to be called the 'Frere bed.' Any surplus yearly income may in the discretion of the executive committee be applied for the general benefit of the hospital. To the same hospital £300 to build a library for the hospital and such of my books as shall be approved as suitable by my executors. To the London Hospital £1,000 to endow one or more 'Frere' children's beds."

He gave legacies to a number of bodies including the Royal Air Force Benevolent Fund, the British Sailors' Society, the Royal Lifeboat Institution, the Fleet Cricket Club, the Fleet Football Club and a legacy to the Fleet Urban District Council for the purpose of erecting a certain memorial, and other legacies. He then gave a direction that all legacies should be free of duty, and provided for the lapse of a legacy to a person dying in his lifetime and for machinery for abatement if his estate should be insufficient to pay all the legacies he had given. Then he provides: "Any residue of my estate I give to the Fleet and District Hospital for endowment purposes."

By the first codicil to his will, so far as material for the purposes of this case, he revoked the legacy of £1,000 to the London Hospital to endow one or more "Frere" children's beds, and he directed that his residence at Fleet and his personal chattels as defined by the Administration of Estates Act, 1925, s. 55, should be excluded from the gift and devise of his residuary estate and gave and devised that residence and his personal chattels to the London Hospital so that the property and contents should be used as a rest home for the nursing staff. He gave to the same hospital the sum of £1,000 to form an endowment fund for the maintenance of the property for that purpose, and directed that the gifts and devise should be free of duty. There follows this proviso:

"Provided that if at my death the hospital shall have ceased to be run on a voluntary system and shall have come under State control no one of the said gifts or devise to the hospital shall take effect and in lieu thereof I direct that such gifts and devise shall take effect for such charitable purpose or purposes as my trustees after consultation if possible with former members of the board of governors of the hospital shall decide to secure if possible the retention of the property for some good and charitable purpose and I further separately provide that if after my death the hospital shall cease to be run on a voluntary system and shall be taken under State control the benefit of the said gifts and devise to the hospital shall immediately before the taking over by the State cease and determine and shall go and be applied and transferred to such charitable purpose

or purposes as the majority of the then members of the board of governors of the hospital shall decide with the object if possible of retention for some good and charitable purpose."

The will is dated Mar. 10, 1941, and the first codicil Aug. 22, 1941. On the appointed day, July 5, 1948, under the National Health Service Act, 1946, the property of the Fleet and District Hospital was taken over under s. 6 of that Act and its other property under s. 7. The activities of the hospital are now conducted by the Farnham Group Hospital Management Committee, who act as the management committee for a group of hospitals including that hospital. The London Hospital was designated a teaching hospital and was so treated for the purposes of ss. 6 and 7 of the Act.

It is conceded that, as regards the Fleet and District Hospital, the condition on which the gift of £6,000 was made has come into operation and that that gift does not take effect. So far as the gift in the will and first codicil to the London Hospital is concerned, the position is that those who are now managing the activities of that hospital and are responsible for its property do not desire to have this property and the endowment fund transferred, the view being taken that it would be impossible to give effect to the testator's wishes. It is contended by counsel for the hospital management committee that, in any event, the proviso in the first codicil operates, and, in the result, that position is not disputed and, therefore, the gift over takes effect.

The question then arises of the effect of the short residuary disposition which I have already read. Counsel for the hospital management committee contends that on the true construction of the will the residue is given without any such condition attached as is attached in the case of the earlier gifts in the will to the Fleet and District Hospital and the London Hospital respectively. He points out that between the earlier gifts and the residuary gift there are, first of all, a number of further legacies to some of the recipients, to which I have already referred, and the directions to which I have also referred. Therefore, he says, when you come to read the residuary gift there is no justification for reading it as subject to any such condition as is imposed in the case of the earlier gifts. It is, of course, to be observed that the object of the testator as regards the earlier gifts to the two hospitals was to indulge his charitable instincts. He emphasises that in the first codicil, which is, of course, later in date than the will. In both the earlier gifts in the will and in the codicil he expressly provides that as regards the two hospitals in the will and the London Hospital in the codicil the gifts are to be effective only if the hospitals shall not have come under State control. Can it be said that there is an indication there that the testator is intending that, if the hospitals are taken over by the State, that shall be regarded as having the result that, for the purposes of his will, they shall cease to be regarded as charities? If the construction for which counsel for the hospital management committee contends is the correct construction, the extraordinary result follows that the very institution which in the earlier part of the will is deprived of the limited legacies of £6,000 by the operation of the condition, obtains, under the residuary gift, not only £6,000, but any balance of the residue.

With considerable reluctance, however, I feel driven to the conclusion that I cannot find a sufficient justification to enable me to import into the residuary bequest by necessary implication the condition which is imposed in the case of the earlier gifts to the two hospitals. It seems to me that the only way that that could possibly be done would be by coming to the conclusion in construing the earlier gifts that the testator has established his own vocabulary and has shown, with sufficient clarity to allow the court to act on it, that, for the purposes of his will, the taking over by the State of a hospital results in that hospital ceasing to be a charity. But, on consideration, I do not see that I should be justified in so construing the testator's will. Therefore, I must give effect

to the words of the residuary gift as I find them unqualified by the words preceding the earlier gifts and hold, as a matter of construction, that there is a good residuary bequest.

There remains the interesting question, which counsel for the next-of-kin raised, whether or not on the basis that the gift of the residue was otherwise good the gift should not fail on the ground that the Fleet and District Hospital has ceased to be a charity. The force of that submission lies in this, that the gift of the residue is for endowment purposes, that it is a gift of the residue as a capital sum on trust to apply the income in perpetuity, and is, therefore, a gift which could be good only if it is charitable. On the evidence it appears to me to be satisfactorily established that, so far as identity is concerned, there is a body to answer the description "the Fleet and District Hospital," and the evidence satisfies me that the activities which were previously being carried on by the hospital before the appointed day are still being carried on. It seems to me that, having regard to the National Health Service Act, 1946, s. 59 (1), which empowers a regional hospital board and the board of governors of any teaching hospital and a hospital management committee

" . . . to accept, hold and administer any property upon trust for purposes relating to hospital services or to the functions of the board or committee under Part II of this Act with respect to research,"

having regard to the provisions of sub-s. (2) of that section to the effect that Part II of the Mortmain and Charitable Uses Act, 1888, and the Mortmain and Charitable Uses Act, 1891,

" . . . shall not have effect with respect to any assurance . . . to any such board or committee of land or of personal estate to be laid out in the purchase of land,"

and having regard further to the two recent cases of *Re Morgan's Will Trusts* (1), and *Re Dean's Will Trusts* (2) it is not open to me to hold in the present case that this is not a good charitable disposition of the residuary estate. The fact that the hospital is still to be regarded as a charity seems to me implicit in the reasoning of ROXBURGH, J., in *Re Morgan's Will Trusts* (1), and, further, it appears to me that, in *Re Dean's Will Trusts* (2), HARMAN, J., has, in effect, held that a hospital does not cease to be a charity merely because of the coming into effect of the National Health Service Act.

For these reasons, therefore, I come to the conclusion that the gift of the residuary estate is a good and valid gift to which effect should be given.

Order accordingly. Costs of all parties as between solicitor and client to be taxed and paid out of the residue.

Solicitors: *Stevenson & Couldwell*, agents for *Nash & Vann*, Fleet (for the plaintiffs and the sixth defendant); *Hanbury, Whitting & Ingle* (for the third and fourth defendants); *Solicitor, Ministry of Health* (for the first, second and fifth defendants); *Treasury Solicitor*.

[Reported by H. McL. MORRISON, Esq., Barrister-at-Law.]

THE ARDENNES (OWNER OF CARGO) v. THE ARDENNES (OWNERS).

[KING'S BENCH DIVISION (Lord Goddard, C.J.), June 27, 28, 29, July 5, 1950.]

Shipping—Bill of lading—Inclusion of term at variance with contract between parties—Admissibility of evidence as to true contract.

Shipping—Carriage by sea—Breach of contract—Measure of damages—Shipper taking delivery and paying freight—Right to recover increase in import duty and loss of profit.

On Nov. 22, 1947, in reliance on a promise made by the shipowner's agent that the ship would proceed direct to London, and, therefore, in the belief that she would arrive there by Nov. 30, at the latest, a shipper in Cartagena, Spain, shipped three thousand cases of mandarines which were intended for sale in the London market. The shipper was anxious that the goods should arrive in England by Nov. 30, as the import duty on them would be considerably increased on Dec. 1, and also because the sooner they arrived the better prices they would fetch. These facts were known to all persons handling this class of merchandise, and, when making the contract, the shipper impressed on the shipowner's agent the importance of the ship arriving in London by Nov. 30. The bill of lading contained a clause that the shipowner was to be at liberty to carry the goods to their port of destination "proceeding by any route, and whether directly or indirectly to such port, and in so doing to carry the goods beyond their port of destination." Instead of proceeding direct to London from Cartagena, the ship went first to Antwerp, where she arrived on Nov. 30, and she did not arrive in London until Dec. 4, with the result that the shipper had to pay the higher import duty and obtained an appreciably lower price for the goods than the price which he would have realised if he had been able to sell them earlier. In an action by the shipper claiming damages against the shipowner for breach of contract, the shipowner relied *inter alia* on the clause in the bill of lading and contended that evidence of any other contract or promise was inadmissible.

HELD: (i) the bill of lading was not in itself the contract between the shipowner and the shipper, and, therefore, evidence was admissible of the contract which was made before the bill of lading was signed and which contained a different term.

Dictum of LORD BRAMWELL in *Sewell v. Burdick* (1884) (10 App. Cas. 105), *applied*.

Leduc v. Ward (1888) (20 Q.B.D. 475), *distinguished*.

(ii) the shipper had not waived his claim for damages by taking delivery and paying freight.

(iii) as the shipowner must have known that the earlier the goods arrived the better would be the price obtained for them, the shipper was entitled not only to damages representing the increased import duty, but also to the additional sum which he would have realised if the ship had arrived in London on Nov. 29, and the goods had been sold at Covent Garden on Dec. 2.

The Parana (1877) (2 P.D. 118), *distinguished*.

Dunn v. Bucknall Bros., Dunn v. Donald Currie & Co. ([1902] 2 K.B. 614), *applied*.

[AS TO EFFECT OF BILL OF LADING ON CONTRACT OF AFFREIGHTMENT, see HALSBURY, Hailsham Edn., Vol. 30, pp. 378, 379, para. 550; and FOR CASES, see DIGEST, Vol. 41, pp. 371, 372, Nos. 2180-2188.]

Cases referred to:

(1) *Sewell v. Burdick*, (1884), 10 App. Cas. 74; 54 L.J.Q.B. 156; 52 L.T. 445; 41 Digest 372, 2186.

- (2) *Crooks v. Allan*, (1879), 5 Q.B.D. 38; 49 L.J.Q.B. 201; 41 L.T. 800; 41 Digest 602, 4294.
- (3) *Leduc v. Ward*, (1888), 20 Q.B.D. 475; 57 L.J.Q.B. 379; 58 L.T. 908; 41 Digest 485, 3172.
- (4) *The Parana*, (1877), 2 P.D. 118; 36 L.T. 388; 41 Digest 492, 3207.
- (5) *Dunn v. Bucknall Bros., Dunn v. Currie (Donald) & Co.*, [1902] 2 K.B. 614; 71 L.J.K.B. 963; 87 L.T. 497; 41 Digest 410, 2552.

ACTION for damages for breach of contract.

The plaintiff, a fruit grower and exporter in Southern Spain, wished to arrange for a shipment of cases of mandarines from Cartagena to reach England before Dec. 1, 1947, on which date the import duty would rise from 3s. 6d. a cwt. to ten per cent. *ad valorem*. On or about Nov. 20, his son, Basilio, had an interview with the sub-agent in Cartagena of the defendants, the owners of s.s. Ardennes. Basilio informed the sub-agent that the plaintiff wanted to ship the goods by a ship sailing direct for London and impressed on him the importance of the cargo reaching London by Nov. 30. The sub-agent told Basilio that, if a minimum consignment of three thousand cases were guaranteed, he would have the Ardennes, which was then at Candia taking on cargo for Antwerp, brought immediately to Cartagena and would then dispatch her direct to London. Pursuant to this arrangement, the Ardennes arrived at Cartagena on the morning of Nov. 22, the plaintiff's goods were put on board, and the ship sailed on the evening of the same day, her destination on the clearance documents being given as London. Before she sailed, however, instructions had been received by the master from the ship's agents in Valencia, directing him to proceed to Antwerp, but the plaintiff was not informed of this change of plans. The new instructions were sent, presumably, as a result of objections on the part of other shippers who had shipped their goods in the belief that the ship would proceed first to Antwerp. The Ardennes arrived at Antwerp on Nov. 30, and did not reach London until Dec. 4. On Dec. 5, she discharged 2,626 cases belonging to the plaintiff, the other 374 having been left at Antwerp, by mistake. Of these, 362 were brought over by another ship on Dec. 15, and twelve were lost. The defendants admitted liability for the twelve which were lost. The duty paid by the plaintiff on the goods was £721 12s. 11d., which was £451 1s. 7d. more than he would have had to pay if they had arrived by Nov. 30.

The defendants, the shipowners, were the Belgian government, but no point was taken that they were a foreign sovereign State, and they submitted to the jurisdiction. They contended, *inter alia*, (a) that there had been no contract that the ship should proceed direct from Cartagena to London, (b) that evidence of an oral contract was inadmissible to contradict a clause in the bill of lading permitting them to proceed by any route and to carry the goods beyond their port of destination, and (c) that the plaintiff had waived the claim for damages by taking delivery and paying the freight.

Sir William McNair, K.C., Charles Lawson and J. E. Williams for the plaintiff.
Sir Robert Aske, K.C., Mocatta and Michael Holman for the defendants.

Cur adv. vult.

July 5. LORD GODDARD, C.J., read the following judgment. The plaintiff is a fruit grower and exporter at Cartagena in Southern Spain. He has for many years done a considerable business with this country, particularly in exporting here mandarines, a fruit more usually known in this country as tangerines. The trade is, eminently, a seasonal one. Generally speaking, the fruit becomes ready for export towards the latter part of November, until when it is, if not unobtainable, scarce in this market. Accordingly, the earlier the shipment, the better the price it is likely to obtain. Another and very important reason for getting the fruit to this country before the last day in

November is that, whereas the import duty on this class of goods is 3s. 6d. a cwt. from Apr. 1 to Nov. 30, on Dec. 1 the duty rises to ten per cent. *ad valorem*. The Spanish growers, therefore, have every incentive to secure the arrival of their fruit as early as possible in November, and, at the latest, by Nov. 30.

[His LORDSHIP stated the facts, and found that the plaintiff had shipped his goods, comprising three thousand cases of mandarines, in the Ardennes, a ship belonging to the defendants, in reliance on a promise made by the ship's sub-agent in Cartagena that she would proceed direct to London, and that, had it not been for that promise, he would not have put his goods in that ship, especially as there was another ship, the Pelayo, which was, admittedly, proceeding direct to London, but starting on Nov. 23, a day later than the Ardennes. (This ship arrived in London on Nov. 28, while the Ardennes, having gone to Antwerp first, did not arrive in London until Dec. 4.) His LORDSHIP found that all parties were aware of the importance of the Ardennes arriving in London at the latest on Nov. 30, but, in view of the weather conditions at that time of the year, he was not prepared to hold that there was a binding promise as to the date of arrival. On the evidence of the master, however, he found that, had she not gone first to Antwerp, the ship would have arrived in London on Saturday, Nov. 29, and, therefore, whether or not the cargo were discharged on that day, the goods could not have been sold in Covent Garden before Dec. 2. He further found that people engaged in the fruit trade and in handling this kind of merchandise realised how advantageous it was to the shipper to get early delivery in London on account of the higher prices to be obtained for early shipments. His LORDSHIP continued:] The defences raised were, in substance, that there was no oral agreement between the parties that the ship should proceed direct to London, and that liability was excluded by one of the conditions in the bill of lading. I have no hesitation in finding that there was a promise made to the plaintiff's representative that the ship should proceed direct to London and that he shipped in reliance on that promise. I have, therefore, now to consider the defence which arises out of the terms of the bill of lading. This document was in the form known as "received for shipment," and the operative part reads:

"Received for shipment in apparent good order and condition from Basilio A. Cobarro Tornero in and upon the steamship called the Ardennes or upon any other steamship substituted or following with liberty to call any port or ports for the purpose of receiving and delivering coals . . . and bound for London . . . 3,000 cases of mandarines . . . to be delivered . . . at London to order . . ."

There are then stamped on the bill of lading words in Spanish which, translated read: "Merchandise received on board." It seems to me, therefore, that this was a bill of lading for goods shipped in the Ardennes. The main controversy, however, turned on the clause in the bill of lading which reads:

"The owners are to be at liberty to carry the said goods to their port of destination, by the above or other steamer, or steamers, ship or ships or railway, either belonging to themselves or to other persons, proceeding by any route, and whether directly or indirectly to such port, and in so doing to carry the goods beyond their port of destination, and so tranship or land and store the goods either on shore or afloat and reship and forward the same at the owner's expense but at merchant's risk."

Counsel for the defendants contended that this clause was a complete defence, and that evidence of any other bargain or promise was not admissible. Whether his contention is correct seems to me to be the main question for decision in this case.

It is, I think, well settled that a bill of lading is not, in itself, the contract between the shipowner and the shipper of goods, though it has been said to be excellent evidence of its terms: see *Sewell v. Burdick* (1), per LORD BRAMWELL

(10 App. Cas. 105), and *Crooks v. Allan* (2). The contract has come into existence before the bill of lading is signed. The bill of lading is signed by one party only and handed by him to the shipper, usually after the goods have been put on board. No doubt, if the shipper finds that it contains terms with which he is not content or that it does not contain some term for which he has stipulated, he might, if there were time, demand his goods back, but he is not, in my opinion, thereby prevented from giving evidence that there was a contract which was made before the bill of lading was signed, and that it was different from that which is found in the document or contained some additional term. He is not a party to the preparation of the bill of lading, nor does he sign it. It is unnecessary to cite further authority than the two cases which I have already mentioned for the proposition that the bill of lading is not itself the contract, and, therefore, in my opinion, evidence as to the true contract is admissible. *Leduc v. Ward* (3), on which counsel for the defendants strongly relied, was a case between shipowners and indorsees of the bill of lading, between whom its terms are conclusive by virtue of the Bills of Lading Act, 1855, s. 1, so that no evidence was admissible in that case to contradict or vary its terms. Between those parties the statute makes it the contract.

In this case, moreover, the representation that the ship would sail direct to London would amount to a warranty, for it was in consequence of that representation that the goods were shipped, both parties being fully aware of its high importance in the circumstances. In other words, it was a promise that the shipowner would not avail himself of a liberty which otherwise would have been open to him. Having formed this view, it is unnecessary for me to consider the other matters argued by counsel for the plaintiff, as, *e.g.*, whether the liberty clause is not inconsistent with the opening clause of the bill of lading. Nor do I think that there is anything in the point as to waiver, taken in the defence. Whatever the reason may have been, the ship arrived late, *i.e.*, later than she would have done had she not gone first to Antwerp. She had the plaintiff's goods on board and they were of a perishable nature. I cannot see that he can be said to have waived his claim for damages because he took delivery and paid the freight rather than let the goods remain to be dealt with in some way by the shipowner, a course which might and, probably, would, have largely increased the damages, as the fruit might then have perished or deteriorated, and this is also true of the 362 cases which arrived later.

[HIS LORDSHIP considered the question of damages, and said :] This case is, in my opinion, quite distinguishable from *The Parana* (4), because all parties must have been aware that the earlier the goods arrived, the better would be the price. The case is much more akin to *Dunn v. Bucknall Bros.*, *Dunn v. Donald Currie & Co.* (5). [HIS LORDSHIP assessed the damages at £451 1s. 7d., representing the increased import duty, plus the additional sum (to be computed) which would have been realised if the cargo had been sold at £4 per case gross instead of £3 0s. 11d., and he gave judgment for the plaintiff with costs.]

Judgment for the plaintiff with costs.

Solicitors : *Chapman-Walkers* (for the plaintiff) ; *Holman, Fenwick & Willan* (for the defendants).

[Reported by F. A. AMES, ESQ., Barrister-at-Law.]

FIELD v. PERRYS (EALING), LTD.

[KING'S BENCH DIVISION (Devlin, J.), June 6, 7, 1950.]

Factory—Building operations—“Premises . . . temporarily used for . . . construction of a building”—Night watchman injured during week-end stoppage of work—Machinery not being used, but available for use—“Working-place”—Watchman's tour of inspection—“Efficiently lighted”—Watchman provided with hurricane lamp—Building Regulations, 1926 (S.R. & O., 1926, No. 738), reg. 15.

The Building Regulations, 1926, “apply to all premises on which machinery worked by steam, water or other mechanical power is temporarily used for the purpose of the construction of a building . . .” and by reg. 15: “Every working-place and approach thereto shall be efficiently lighted.”

A night watchman employed by building contractors on a site on which they were constructing a block of flats was supplied only with a hurricane lamp to light his way. While on his round at 10.30 p.m. during a week-end when work had ceased until the following Monday, he tripped over a loose plank left in the roadway of the site and sustained injuries. On a claim by him against his employers for damages for breach of their duty under the Building Regulations, 1926, reg. 15,

HELD: (i) the Building Regulations, 1926, applied to the site at the time of the accident, since it was “temporarily used for the purpose of the construction of a building” so long as there was machinery on the site for the purpose of the construction of the building and available for use, although during the week-end it was not in active use.

Barnett v. Caxton Floors, Ltd., Butler v. Kleine Patent Fire Resisting Flooring Syndicate, Ltd. (1928) (140 L.T. 138), applied.

(ii) the regulations applied to the night watchman as well as to building operatives, since it was the duty of an employer to observe such requirements in Part I of the regulations “as affect any workman engaged by him.”

(iii) a place on the night watchman's ordinary tour of inspection was not a “working-place” within the meaning of reg. 15.

(iv) if reg. 15 had applied to that place, it would have required that that “working-place” itself should be lit, and it would not be a compliance with it to provide the watchman with a lamp to take there.

[AS TO SAFETY OF EMPLOYMENT, see HALSBURY, Hailsham Edn., Vol. 22, pp. 176-178, paras. 296-298; and FOR CASES, see DIGEST, Vol. 34, pp. 194-203, Nos. 1581-1661.]

FOR THE APPLICATION OF THE FACTORIES ACT, 1937, to premises used for building operations, see HALSBURY, Hailsham Edn., Vol. 14, pp. 621, 622, para. 1175.]

Case referred to:

(1) *Barnett v. Caxton Floors, Ltd., Butler v. Kleine Patent Fire Resisting Flooring Syndicate, Ltd., (1928), 140 L.T. 138; 93 J.P. 59; Digest Supp.*

ACTION for damages for negligence and breach of statutory duty.

The plaintiff was a night watchman employed by the defendants on a site on which they were constructing a block of flats. He was injured through falling over a loose plank left in the roadway while making his round at 10.30 p.m. during a week-end when work on the site had ceased until the following Monday. He was provided at the time of the accident only with a hurricane lamp. He contended (i) that there had been a breach of the common law duty owed by the defendants to their servants, and (ii) a breach of their duty efficiently to light his “working-place” under the Building Regulations, 1926, reg. 15. The defendants denied liability at common law and contended that the regulations did not apply to the site since it was not “temporarily used for the purpose of the construction of a building” at a week-end, that the regulations applied only to

actual building operatives, and that "every working-place" meant the place of building operations, and, even if it extended further, did not include the round of the night watchman.

N. Lawson for the plaintiff.

Jukes for the defendants.

DEVLIN, J.: The plaintiff is a one-legged man. At the time of the accident of which he complains he was employed by the defendants as a night watchman. The defendants are building contractors and they were engaged in constructing a block of flats at a site in Fulham Road, London. The buildings were fairly well advanced at the time when the accident occurred, on Aug. 9, 1947. The plaintiff's duty was to take care of the premises during the night and the week-end. It was on a Saturday at about 10.30 p.m. that this accident occurred. As night watchman, the plaintiff was provided with a hut and it was his duty to go round the premises from time to time. His ordinary tour took him along what is described as the main roadway or driveway of the block of flats—a road or drive which goes round the inside of the block of flats and comes out again to give access to the road. There were various huts and other buildings situated at or near that roadway, and it was part of the plaintiff's duty to see that they were all in order. While he was on one of those rounds he tripped and fell over a loose plank that had been left in the roadway and injured himself. As a result of the injuries he received he has brought this action. He relies on a breach of the common law duty which a master owes to his servant, and also on a breach of reg. 15 of the Building Regulations, 1926, which are made under the Factories Acts.

[HIS LORDSHIP examined the evidence, found that the defendants had not committed any breach of their duty at common law, and continued:] The alternative claim is made under the Building Regulations, 1926, reg. 15 of which reads:

"Every working-place and approach thereto shall be efficiently lighted."

For reasons which I shall give later I am satisfied that, if this regulation applies, there was no efficient lighting, and the main argument that has been addressed to me on behalf of the defendants on this point has been that these regulations do not apply. Counsel for the defendants put the point in three ways. He said (i) that the regulations apply only when building operations are actually in progress; (ii) that they apply only to building operatives; and (iii) that the place where the accident occurred was not a working-place within the meaning of reg. 15.

With regard to the first point, my attention has been directed to the introductory words to the regulations, which read as follows:

"In pursuance of s. 79 of the Factory and Workshop Act, 1901, I hereby make the following regulations and direct that they shall apply to all premises on which machinery worked by steam, water or other mechanical power is temporarily used for the purpose of the construction of a building, or for the purpose of any addition to the structure of an existing building."

It is not disputed that machinery was being used on these premises, nor is it disputed that it was being temporarily used. That is to say, counsel for the defendants has not sought to impugn the authority of *Barnett v. Caxton Floors, Ltd.* (1) where it was argued that, by reason of the word "temporarily," the regulation only applied when machinery was actually in use, but the Divisional Court held that that was not the true view of the section and the regulation applied to the whole period during which machinery was available for use. In that case the accident occurred during ordinary working hours. Here, the accident occurred during the week-end, and counsel for the defendants relied on that distinction and said that where building operations cease altogether the regulations cannot apply. I cannot find anything in the language of the regula-

tions which would lead me to arrive at that conclusion. It seems to me once it is conceded that the words "temporarily used" do not mean actually in use, but mean available for use, the only question to consider is whether machinery is on the site for the purpose of construction of a building, and whether it is available for use. All those conditions are just as much satisfied during the week-end as during actual working hours. It may be—although I have not
A to consider the point—that, if there were some prolonged interruption of the building operations, the regulations would not apply, but I am satisfied that they do apply during the ordinary interruptions to work, that is to say, during the night and during the week-end. If that were not so—if the duty ceased immediately building operations ceased—I can imagine very difficult questions arising as to what would be the position at the conclusion of building operations,
B say, at 4.30 in the afternoon, when men were still engaged, perhaps, in clearing up and leaving the site.

So far as the second submission is concerned—that the regulations apply only to building operatives—there, again, I accept the argument of counsel for the plaintiff that the regulations themselves are framed widely. Under the heading "Duties" the regulations say:

C "It shall be the duty of every contractor and employer of workmen to observe such of the requirements in Part I of these regulations as affect any workman engaged by him."

I do not think I can cut down that wide phrase "any workman engaged by him" to mean only any building operative or any workman actually engaged in any
D part of the building operations. As counsel for the plaintiff pointed out, there are other regulations of a similar sort in which the beneficiaries of them, if I may so phrase it, are more narrowly defined, but here is a wide definition and I see no reason for cutting it down.

Thirdly, as to the working-place, counsel for the defendants advanced a stronger argument, and one which, in a sense, can be divided into two. He relied on a
E general submission that these regulations were never intended by the legislature to apply in the case of a night watchman merely caretaking in the course of building operations, but that they were intended to apply to the work of building, and he has relied particularly on the phraseology of reg. 15. He suggested that "every working-place" means a place that is used as a working-place for the purpose of building operations, and he submitted that the plaintiff was not
F injured at any "working-place" within this meaning. I do not think it is necessary that I should make up my mind with regard to this wider proposition. I am impressed by the argument, but I need not consider it because I am in the defendants' favour on another aspect of it. Assuming that the regulations apply, and that a night watchman is capable of having a working-place within the meaning of reg. 15, I am not satisfied that the working-place extended to the
G place where the accident occurred in this case. One thing seems quite clear to my mind, and that is that the regulation is not designed to provide that the whole of the premises should be "efficiently lighted." The regulation says "Every working-place and approach thereto." It contemplates, therefore, a specific working-place where people are doing a specific piece of work. I do not think it can extend to the case of a night watchman who—leaving out, conceivably, his hut—has no specific working-place at all. His duties take him to any
H part of the building or site where he may have any reason to apprehend there is something which it is necessary to investigate. It is obviously unreasonable to contend, and counsel for the plaintiff does not contend, that it means that every part of the site is to be floodlit, and, holding the view I do that the regulation refers to a specific working-place, I am satisfied that once work for the day has ceased and there is only a night watchman on duty, there is no longer on the site any specific working-place that the regulation requires to be efficiently lit. I

omit the possible question of the night watchman's hut, with which I am not concerned.

Counsel for the plaintiff argued that the working-place of the night watchman might be said to be the tour of inspection which took him round the carriageway and to the place where the accident occurred. I am not satisfied that the evidence in this case shows that the plaintiff's duty was so clearly defined as to make that tour and no other round a specific working-place. He did normally go that round, but it would obviously be his duty to look into anything which might attract his attention in the course of the tour as something needing investigation. It would be surprising if he made his tour without diverting to one side or the other, almost as a matter of course, each time, to investigate some particular point, some particular hut or some particular stack of wood that he thought might need investigation. I am not satisfied, therefore, that his ordinary tour can be regarded as his working-place. Nor am I satisfied that any proper distinction can be drawn between the tour which he ordinarily makes, as a matter of his discretion, to see whether the building is in order, and other parts of the building to which it is equally his duty to go if he thinks there is anything which requires his presence there.

Accordingly, I hold that reg. 15 does not apply to this case. Therefore, there cannot be any breach of it. If it had applied, I should have been of the opinion that the carriageway was not efficiently lighted. I accept the submission of counsel for the plaintiff that "efficient lighting" in this regulation means that the working-place itself has to be lit. I do not think it would be a compliance with the section to provide a workman with a light to take there. I think what the regulation has in mind, and what it is directed to, is the lighting up of the place itself.

Since I accept that the regulation requires the place itself to be lit up, it makes it all the more unlikely that it would apply to any place to which the night watchman might have to go. I have had very much in mind the principle that I cannot find that the regulation is to be applied unless its language is clear and unambiguous and it is reasonably obvious that the matter with which the case is concerned comes within its purview. I think there is serious doubt what "working-place" can mean in the case of night watchmen. I am not satisfied that the regulation is clear and unambiguous and I think that, if the legislature had intended to include this rather unusual and exceptional type of case within the regulation, they would have used clearer words than have been used. It follows the defence succeeds. [HIS LORDSHIP said that, if he had had to assess damages, he would have awarded £400, including special damages, and he gave judgment for the defendants with costs.]

Judgment for the defendants with costs.

Solicitors: *Kingsley Wood, Williams, Murphy & Ross* (for the plaintiff);
R. I. Lewis & Co. (for the defendants).

[*Reported by F. A. AMIES, Esq., Barrister-at-Law.*]

MASTER LADIES TAILORS ORGANISATION AND ANOTHER v. MINISTER OF LABOUR AND NATIONAL SERVICE.

[KING'S BENCH DIVISION (Somervell, L.J., sitting as additional Judge), July 4, 13, 1950.]

Wages—Regulation—Holiday remuneration—Order fixing remuneration—Remuneration to “accrue” in respect of periods before coming into force of order—Validity of order—Wholesale Mantle and Costume Wages Council (Great Britain) Wages Regulation (Holidays) Order, 1949 (S.I. 1949, No. 1402), sched., para. 9.

The Wages Councils Act, 1945, s. 10, empowers the Minister of Labour and National Service to make orders giving effect to proposals submitted by a wages council established under the Act for fixing remuneration for work and holiday remuneration of workers in respect of whom the council operates, as from such date as may be specified in the order, which must be a date subsequent to that of the making of the order. On July 25, 1949, the Minister made a holiday remuneration order for workers engaged in wholesale mantle and costume making, which came into force on Aug. 15, 1949. Para. 8 of the schedule to the new order provided: “When a worker ceases to be employed after the provisions of this schedule become effective, accrued holiday remuneration shall, immediately on the termination of the employment, be paid to him by his employer in accordance with the next following paragraph . . .,” and by para. 9 “holiday remuneration shall accrue to a worker during the period of twelve months commencing on May 1, 1948, and thereafter in each successive period of twelve months commencing on May 1, and such remuneration shall accrue in accordance with the provisions of” a table which specified twice the normal wage if an employee had worked for forty-eight weeks and a diminishing proportion of that sum for lesser periods. On the question whether the order was *ultra vires* the Act of 1945 and void since it purported to confer on workers remuneration not merely measured by, but in respect of, employment before the order became effective and thus imposed on the employers liabilities which had accrued in respect of antecedent employment,

HELD: the effect of the provisions relating to accrued remuneration being merely to determine and limit the *quantum* of payments to be made after the order came into force, the order could not be construed as having a retrospective operation and was valid.

[FOR THE WAGES COUNCILS ACT, 1945, s. 10, see HALSBURY'S STATUTES, Second Edn., Vol. 9, p. 166.

AS TO RETROSPECTIVE EFFECT OF STATUTES, see HALSBURY, Hailsham Edn., Vol. 31, pp. 513-518, paras. 670-673; and FOR CASES, see DIGEST, Vol. 42, pp. 693-700, Nos. 1083-1168.]

Cases referred to :

- (1) *R. v. St. Mary, Whitechapel (Inhabitants)*, (1848), 12 Q.B. 120; 17 L.J.M.C. 172; 11 L.T.O.S. 473; 116 E.R. 811; 42 Digest 694, 1095.
- (2) *R. v. Christchurch (Inhabitants)*, (1848), 12 Q.B. 149; 18 L.J.M.C. 28; 12 L.T.O.S. 214; 12 J.P. 792; 116 E.R. 823; 42 Digest 636, 388.

ACTION for a declaration.

The plaintiffs were a trade union and a member of the union, which was an organisation of employers of workers employed in the wholesale mantle and costume making industry. The plaintiffs contended that the Wholesale Mantle and Costume Wages Council (Great Britain) Wages Regulation (Holidays) Order, 1949 (S.I. 1949, No. 1402), made by the defendant, the Minister of Labour and National Service, under s. 10 of the Wages Councils Act, 1945, was *ultra vires* and void on the ground that it was in part retrospective and, therefore,

not authorised by the Act of 1945. The facts appear in the judgment of SOMERVELL, L.J.

Sir David Maxwell Fyfe, K.C., and Quass for the plaintiffs.

The Attorney-General (Sir Hartley Shawcross, K.C.) and Winn for the defendant.

Cur. adv. vult.

July 13. SOMERVELL, L.J., read the following judgment. In this case the first plaintiff is a trade union, the members of which are employers of workers employed in wholesale mantle and costume making. The second plaintiff is a member of the first plaintiff and an employer of workers employed as above. They claim a declaration that the Wholesale Mantle and Costume Wages Council (Great Britain) Wages Regulation (Holidays) Order, 1949 (S.I. 1949, No. 1402) made or purported to be made under the Wages Councils Act, 1945, is *ultra vires* and void. The basis of the claim is: (i) that the order is in certain respects retrospective; (ii) that an order in certain respects retrospective is *ultra vires* unless the Act under which it is made plainly authorises such an order; (iii) that the Act does not plainly authorise the retrospective elements in this order. The Attorney-General submitted in the first place that the order was not retrospective, and that is the first issue.

The Wages Councils Act, 1945, deals with the matters previously dealt with by the Trade Boards Acts, 1909 and 1918. It also deals with holidays with pay which had been dealt with in the Holidays With Pay Act, 1938. By virtue of s. 20 (2) of the Act of 1945 the trade boards existing under the earlier legislation, including the trade board for the wholesale mantle and costume trade, became wages councils under this Act. The argument is concerned with s. 10 of the Act. Sub-section (1) gives power to a wages council to submit proposals to the Minister for fixing remuneration for work and holiday remuneration. Sub-section (4) provides that, if these proposals are approved, the Minister shall make a wages regulation order giving effect to them as from such date as may be specified in the order, which date has to be subsequent to the making of the order. The order in question here had its origin in this procedure. Sub-section (2) lays down certain matters which have to be contained, and certain matters which may be contained, in proposals dealing with holidays. It reads as follows:

“(2) Wages regulation proposals for requiring a worker to be allowed a holiday shall not be made unless both holiday remuneration in respect of the period of the holiday and remuneration other than holiday remuneration have been or are being fixed under this Part of this Act for that worker, shall provide for the duration of the holiday being related to the duration of the period for which the worker has been employed or engaged to be employed by the employer who is to allow the holiday, and, subject as aforesaid, may make provision as to the times at which or the periods within which, and the circumstances in which, the holiday shall be allowed; and wages regulation proposals for fixing holiday remuneration may contain provisions as to the times at which, and the conditions subject to which, that remuneration shall accrue and shall become payable, and for securing that any such remuneration which has accrued due to a worker during his employment by any employer shall, in the event of his ceasing to be employed by that employer before he becomes entitled to be allowed a holiday by him, nevertheless become payable by the employer to the worker.”

I will now turn to the order. It was signed on July 25, 1949. The specified date was Aug. 15, and as from that date a previous order (S.R. & O., 1946, No. 604), ceased to have effect. The main difference is that the maximum holiday which was six days under the earlier order is twelve days under the present order. It is para. 9 of the schedule to the order which is relied on, but

I think it is of assistance to refer first to para. 3. It provides that an employer shall before Sept. 30, 1949, and between May 1 and Sept. 30 in future years allow to workers to whom the schedule applies a holiday, the duration of which is to be determined by the period of employment with the employer. The provisions were complicated by the fact that the specified date was in the middle of the holiday season and account had to be taken of holidays already granted in that season under the previous order to which I have referred. It is, however, plain that the length of the holiday to be granted after the specified date depended or might depend up to Aug. 15, 1950, on whether or not the man had been employed prior to the specified date.

Counsel for the plaintiffs did not rely on this as retrospective. I think he was right. The fact that a prospective benefit is in certain cases to be measured by or depends on antecedent facts does not necessarily, and I think does not in this case, make the provision retrospective. The Attorney-General referred to *R. v. St. Mary, Whitechapel (Inhabitants)* (1), where this principle was stated by LORD DENMAN, C.J., in very concise language. The Poor Removal Act, 1846, s. 2, provided that:

“ . . . no woman residing in any parish with her husband at the time of his death shall be removed . . . from such parish, for twelve calendar months next after his death, if she so long continue a widow.”

It was sought to remove within the twelve months a widow whose husband had died before the Act came into force. It was argued that to make the Act apply in such a case was to construe it retrospectively. The right to remove was, it was argued, a vested right which accrued on his death. The court held otherwise and LORD DENMAN, C.J., used these words (12 Q.B. 127):

“ . . . we have before shown that the statute is in its direct operation prospective, as it relates to future removals only, and that it is not properly called a retrospective statute because a part of the requisites for its action is drawn from time antecedent to its passing.”

Substituting “ holidays ” for “ removals ” this principle seems to me properly applicable at any rate to para. 3. In *R. v. Christchurch (Inhabitants)* (2) a somewhat similar point arose on a different provision of the same statute. LORD DENMAN, C.J., said this (12 Q.B. 156):

“ The statute is prospective only: its direct operation is only on removals; after it has passed, it does not alter existing rights in respect of completed removals. A space of time is an essential ingredient in the case to which it applies: and this space of time may consist in part of time passed before the statute passed, as is the case with statutes in limitation and prescription; but they are not therefore classed with the retrospective statutes.”

In order to understand para. 9 it is necessary to read the first part of para. 8:

“ When a worker ceases to be employed after the provisions of this schedule become effective, accrued holiday remuneration shall, immediately on the termination of the employment, be paid to him by his employer in accordance with the next following paragraph for periods of employment in respect of which he has not been allowed or has not become entitled to be allowed an annual holiday under this schedule . . . ”

This is followed by a proviso dealing with the case of a man leaving his employment after having had part only of his annual holiday and this need not be read. The paragraph makes it clear that the order is providing, and providing only, for payments to be made to workers ceasing to be employed after the specified date. Paragraph 9 reads as follows:

“ (1) Subject to the provisions of this paragraph, holiday remuneration shall accrue to a worker during the period of twelve months commencing on May 1, 1948, and thereafter in each successive period of twelve months

commencing on May 1, and such holiday remuneration shall accrue in accordance with the provisions of the following table . . ."

The table provides that if the man has worked for forty-eight weeks or more he gets twice his normal wage, and, if for lesser periods, then a diminishing proportion of that sum.

The argument for the plaintiffs is based on the use of the word "accrue." It is argued that a provision for accrual before the specified date involves the conception of conferring rights before the specified date. The order purports to confer on those to whom payments are to be made rights measured, not merely by, but in respect of, antecedent employment, and to confer liabilities on employers which have been accruing in respect of antecedent employment. There is force in this, and the Attorney-General admitted that the use of the words "accrue" and "accrued" was unfortunate. It is clear, to my mind, that the result of para. 9 could have been achieved by words which, if I am right in my conclusion as to para. 3, would not have been retrospective in the sense to be given to the words in this area. If, for instance, the words had been "holiday remuneration to be paid to a man ceasing to be employed after the specified date shall be two weeks' wages if he has been employed forty-eight weeks or more prior to his ceasing to be employed" and so on for the lesser periods. The Attorney-General put forward this further argument. If the paragraph had provided that any worker who had not had his holiday and ceased to be employed after the specified day should have two weeks' pay, this could not have been challenged. It would be an odd result, he suggested, if a cutting down by reference to antecedent events of an obligation which could have been validly imposed made the provision retrospective and bad. The statement I have quoted from LORD DENMAN, C.J., shows that not every matter which is retrospective "in a sense" is retrospective in the sense in which I have to apply the words in the present case.

I have come to the conclusion that the effect of these provisions as to remuneration accruing, being, as I hold, to determine and limit the *quantum* of prospective payments, do not make this order retrospective in the sense which has to be given to the word in this issue. The claim, therefore, fails. Most of the cases dealing with retrospective legislation, some of which were cited to me by counsel for the plaintiff are concerned with a different issue. It has, of course, been laid down in the clearest possible terms that no statute or order is to be construed as having a retrospective operation unless such a construction appears very clearly or by necessary and distinct implication in the Act. That most salutary principle does not assist in solving the problem which I have so far been considering.

If I had held that the provisions of para. 9 *quoad* persons ceasing to be employed in the first year was retrospective, the Attorney-General argued that its retrospective character was expressly authorised by s. 10 (2) of the Act of 1945. The principle to which I have just referred would, I think, have been a formidable obstacle in the way of any such argument. For these reasons I think the claim fails and must be dismissed.

Judgment for the defendant with costs.

Solicitors: *A. L. Dolland & Co.* (for the plaintiffs); *Solicitor of the Ministry of Labour and National Service* (for the defendant).

[Reported by F. A. AMIES, ESQ., Barrister-at-Law.]

WOLFE v. CLARKSON.

[COURT OF APPEAL (Tucker and Cohen, L.JJ.), July 13, 1950.]

Rent Restriction—County court—Jurisdiction—Breach of covenant to repair in original tenancy agreement—Claim for £414 damages—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (c. 17), s. 15 (1), s. 17 (2).

By an agreement dated Dec. 31, 1943, the landlord demised to the tenant a dwelling-house (which was within the Rent Restrictions Acts) from Jan. 9, 1944, until June 24, 1945, and thereafter from quarter to quarter. On Feb. 20, 1948, the landlord gave the tenant notice to quit on June 24, 1948, but the tenant remained in possession. In November, 1948, the landlord began an action in the county court against the tenant claiming possession under the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, sched. I, para. (a), damages for breach of covenants to repair contained in the tenancy agreement, and arrears of rent. In his particulars of claim the landlord recited the covenants to repair, stated that on Feb. 23, 1948 (while the contractual tenancy was subsisting) he had served the tenant with a schedule of repairs required to be carried out under the terms of the lease and alleged that the tenant had failed to execute any of the said repairs. The county court judge referred the case to the registrar for an inquiry and report on the issue of damages, and before the registrar it appeared that the amount of damages claimed was £414 2s. 6d. The registrar remitted the matter to the judge on the question whether he had jurisdiction to deal with the claim for damages. The judge held that he had jurisdiction, and the tenant appealed.

HELD : the breach of the covenant to repair was a continuing breach, and in November, 1948, when the county court proceedings began, in view of the provisions of s. 15 (1) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, and on the construction of the particulars of claim, the landlord was claiming damages for the breach of the tenant's statutory obligation to comply with the terms of the contractual tenancy, and, therefore, the county court had jurisdiction to deal with the claim under s. 17 (2) of the Act.

Lee v. Roberts (1925) (60 L.Jo. 574), *applied*.

Smith (A. J.) & Co., Ltd. v. Kirby ([1947] 1 All E.R. 459), *distinguished*.

[AS TO JURISDICTION OF THE COUNTY COURT UNDER THE RENT RESTRICTIONS ACTS, see HALSBURY, Hailsham Edn., Vol. 20, p. 335, para. 402; and FOR CASES, see DIGEST, Vol. 31, pp. 584, 585, Nos. 7337-7343.]

Cases referred to:

- (1) *Lee v. Roberts*, (1925), 60 L.Jo. 574; 159 L.T.Jo. 531; 31 Digest 585, 7346.
- (2) *Smith (A. J.) & Co., Ltd. v. Kirby*, [1947] 1 All E.R. 459; 2nd Digest Supp.

APPEAL by the tenant from an order of His Honour JUDGE BLAGDEN, Clerkenwell County Court, dated May 17, 1950.

On Nov. 2, 1948, the landlord issued a plaint claiming from the tenant possession of a dwelling-house under the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, sched. I, para. (a); damages for breach of covenants to repair contained in a tenancy agreement dated Dec. 31, 1943; and arrears of rent. No amount of damages was specified in the particulars of claim, and the county court judge referred the case to the registrar for an inquiry and report on the issue of damages. Before the registrar it appeared that the total amount claimed as damages for breach of the covenant to repair was £414 2s. 6d. and the registrar remitted the question of jurisdiction to the judge. The question turned, having regard to s. 17 (2) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, on whether the damages were claimed for breach of the contractual obligation of the tenant or of the statutory obligation which, by virtue of s. 15 (1) of the Act of 1920, was imposed on him during the statutory tenancy which arose on the termination of the contractual tenancy. The particulars of

claim recited the tenancy agreement (made between the landlord's predecessor in title and the tenant) including covenants to pay rent, to keep the premises in good tenantable repair, and to yield up the premises in good tenantable repair. The tenant was alleged to be a statutory tenant consequent on the expiration on June 24, 1948, of a notice to quit delivered by the landlord on Feb. 20, 1948. The particulars of claim continued:

"6. On Feb. 23, 1948, the [landlord's] solicitors at the instance of the [landlord] served the [tenant] with a schedule of repairs required to be done to the demised premises in accordance with the terms of the said agreement of Dec. 31, 1943. 7. The [tenant] has failed to carry out the repairs specified in the said schedule or any part of them."

The landlord claimed, *inter alia*, "damages for breach of the covenants to repair contained in the said lease." The county court judge held that he had jurisdiction to deal with the matter.

Widgery for the tenant.

Hackforth-Jones for the landlord.

TUCKER, L.J.: I will ask COHEN, L.J., to deliver the first judgment.

COHEN, L.J.: This is an appeal from a decision of His Honour JUDGE BLAGDEN sitting, first, at the West London County Court and, later, at the Clerkenwell County Court, by which he referred a claim for damages for breach of repairing covenants to the registrar for report.

The claim was issued on Nov. 2, 1948. It related to a dwelling-house known as 13, Anderson Street, Chelsea, which had been demised to the tenant from Jan. 9, 1944, until June 24, 1945, and thereafter on a quarterly tenancy at a yearly rental of £95, the rateable value being £52 per annum. There was no doubt, therefore, that the premises were within the Rent Restrictions Acts. Notice to quit had been given on Feb. 20, 1948, the notice expiring on June 24, 1948, and at the date of the issue of the plaintiff the tenant was a statutory tenant. By his particulars of claim the landlord set out the tenancy agreement and the repairing covenants, including an obligation to repair while the lease was in force and to yield up the premises, etc., in good tenantable repair and condition. He stated the facts about the notice to quit and that the tenant was at the time a statutory tenant, and alleged that on Feb. 23, 1948, while the lease was still in force, he served the tenant with a schedule of repairs required to be done to the demised premises under the agreement of tenancy. He alleged that the tenant had failed to carry out the repairs specified in the schedule or any part of them. He then claimed possession of the demised premises without proof of alternative accommodation on the grounds set out in the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, sched. I, para. (a), damages for breach of the covenants to repair contained in the lease, and £33 odd as arrears of rent. The tenant, in his defence, admitted non-payment of part of the arrears of rent, but claimed a set-off and denied that the landlord was entitled to possession.

It is to be observed that in the particulars of claim no amount of damages was mentioned and that was still the position when the matter came before the learned county court judge on Mar. 8, 1950, on the question of the construction of the covenant to repair. After dealing with the question of construction, he referred the action to the registrar of the West London County Court for inquiry and report on the issue of damages. Still at that time nobody had any idea what the landlord was claiming by way of damages. When the matter came before the registrar it transpired that the amount of damages which the landlord was claiming was £414 2s. 6d. That being in excess of the limit in normal circumstances of the jurisdiction of the county court, the tenant took the objection that, whatever might be the position as regards the claim for possession and mesne profits, the county court had no jurisdiction to deal with the claim

for damages for breach of the covenant to repair. The registrar remitted the matter to the learned county court judge who decided that he had jurisdiction and again referred the matter to the registrar for inquiry and report. It is from that order that the tenant now appeals.

A There is no doubt that, apart from the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 17 (2), the tenant's contention that the claim for damages for breach of the covenants to repair would be outside the jurisdiction of the county court would be well founded, but s. 17 (2) provides:

B "A county court shall have jurisdiction to deal with any claim or other proceedings arising out of this Act or any of the provisions thereof, notwithstanding that by reason of the amount of claim or otherwise the case would not but for this provision be within the jurisdiction of a county court, and, if a person takes proceedings under this Act in the High Court which he could have taken in the county court, he shall not be entitled to recover any costs."

C The landlord alleged that his claim for damages for breach of the covenants to repair was a claim in respect of matters arising out of the Act or one of the provisions thereof when regard was had to the nature of the claim, which was, among other things, a claim to recover possession under the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, s. 3 (1) and sched. I. Schedule I provides:

D "A court shall, for the purposes of s. 3 of this Act, have power to make or give an order or judgment for the recovery of possession of any dwelling-house to which the principal Acts apply or for the ejectment of a tenant therefrom without proof of suitable alternative accommodation (where the court considers it reasonable so to do) if—(a) any rent lawfully due from the tenant has not been paid, or any other obligation of the tenancy (whether under the contract of tenancy or under the principal Acts), so far as the obligation is consistent with the provisions of the principal Acts, has been
E broken or not performed . . ."

Counsel for the landlord says that, even if his claim was in respect of the breach of an obligation under the contract of tenancy, none the less it was within s. 17 (2) of the Act of 1920 having regard to the terms of sched. I to the Act of 1933, and that, even if that be not so, he is entitled to damages for breach of the obligation, which lay on the tenant by virtue of s. 15 (1) of the Act of 1920, being
F incorporated by that section into the statutory tenancy.

The learned county court judge considered the various authorities to which his attention had been directed. He relied, in particular, on *Lee v. Roberts* (1), where the plaintiff sued for possession and arrears of rent and claimed damages amounting to £150. The action was brought in the High Court and ROWLATT, J., made an order for possession and granted damages amounting
G to £12 10s. 0d. The matter came before the Court of Appeal which decided that the case fell within s. 17 (2) of the Act of 1920 and could have been brought in the county court, and, on that ground held that the plaintiff was not entitled to recover costs. It is true that they gave an alternative ground in that more had been paid into court than the £12 10s. 0d. which was recovered, but I think that it is clear that the court was making s. 17 (2) one of
H its grounds and that that was part of the *ratio decidendi*. Counsel for the tenant, however, said, quite properly, that in that case it was by no means clear that there had been a breach of any contractual obligation. Having regard, he said, to the fact that only £12 10s. 0d. was recovered, it might be a reasonable inference that in that case the breach relied on was purely of the obligation arising by reason of s. 15 (1). In the present case, he argued on the pleadings, the breach relied on occurred entirely under the contractual tenancy, or, if not entirely, there had been no increased damage alleged which had

occurred since the end of the contractual tenancy. In those circumstances, he submitted that the decision of HILBERY, J., in *Smith (A. J.) & Co., Ltd. v. Kirby* (2) was in point.

In that action the landlord had claimed as arrears of rent under a lease a sum well over the amount of the county court jurisdiction and claimed recovery of composite premises which were within the Rent Restrictions Acts. Judgment was given for the plaintiff, and the question arose whether, since the action was brought in the High Court, the plaintiff was entitled to recover costs in view of the provisions of s. 17 (2) of the Act of 1920. The learned judge decided that he was, saying ([1947] 1 All E.R. 460):

"The claim for possession was a claim which the county court could have entertained, and which the county court alone should have entertained if it had stood alone, but the action was for arrears of rent and, in the second place, for possession, and, although the premises are within the Act, and, therefore, the claim in respect of the possession arises out of the Act, yet, as the claim for the rent arises out of the lease, the whole action is not one to which s. 17 (2) applies."

That case, I think, amounts to a decision that, if any part of the claim is one which could not be within the jurisdiction of the county court, the fact that another part could have been brought in the county court instead of in the High Court does not prevent the court awarding costs in respect of the whole proceeding. That conclusion derives some support from the contrast between the early words of s. 17 (2), which deals with jurisdiction and enables the county court to deal with "any claim or other proceedings," and the words in the last part which merely prohibit the awarding of costs if proceedings are taken in the High Court, which, I think, means the whole proceedings which could have been taken in the county court. Therefore, with that part of the decision I do not see any reason to quarrel.

A more difficult question, however, arises with which counsel for the tenant invited us to deal, and that is whether or not the learned judge in *Smith (A. J.) & Co., Ltd. v. Kirby* (2) was right in saying that the claim for rent could not have been brought in the county court. In that case, as I read the report, the claim was in respect of the contractual obligation. If, in the present case, the claim had been in respect of the contractual obligation, it would have been necessary for us to deal with this, as I think, difficult point which counsel has raised, but, as I read his pleadings, he is not relying on a breach of a contractual obligation. In his particulars of claim he sets out the material parts of the agreement of Dec. 31, 1943. Section 15 (1) of the Act of 1920 makes the terms and conditions of the contractual tenancy those of the statutory tenancy so far as they are consistent with the provisions of the Act. Then he sets out the notice to quit and he alleges that the tenant is a statutory tenant. He states as a matter of fact, but not as a measure of his claim, that he had delivered a schedule of repairs required to be done to the demised premises, and I think that is intended to refer to the work that was required to be done rather than to the amount specified in the schedule against those particular items. *Non constat* that an item of work which cost a certain sum in 1948 when the notice was delivered could have been performed for the same sum when the claim came to be assessed in 1950. In para. 7 he says:

"The [tenant] has failed to carry out the repairs specified in the said schedule or any part of them."

That seems to me to be alleging a breach as at Nov. 2, 1948. Breach of a repairing covenant is a continuing breach, and I think the right way in which to approach this question is to say that on each day on which the premises remained unrepaired a fresh breach occurred. That being so, it seems to me that when

he alleges failure to carry out the repairs he is alleging that on Nov. 2, 1948, there was a breach of covenant by reason of the fact that on that date the premises were not in the state of repair required by the lease.

A That being so, it seems to me that the learned judge was quite right when he said that this case was not distinguishable in principle from *Lee v. Roberts* (1) and that he was bound by that case, and that *Smith (A. J.) & Co., Ltd. v. Kirby* (2) did not apply. True, that the measure of damages may be the same when the tribunal comes to assess them as they would have been if the landlord had chosen to rely on the breach which was committed on some date immediately before the end of the contractual tenancy, but, if he sues, as I think he was entitled to sue, solely for a breach of the statutory covenant to repair, I do not think it can be properly said that the question is outside the jurisdiction of the county court. If that be so, s. 17 (2) seems to me to be of great importance, B because it would involve that, had the landlord sued in the High Court, it might have been said against him that he could have taken proceedings in the county court. For these reasons I think the learned judge's conclusion was right and that the appeal should be dismissed.

C TUCKER, L.J.: I have felt considerable doubt during the argument in this appeal whether or not the contention of counsel for the tenant that the county court had no jurisdiction with regard to this claim was well founded. He pointed out with force that those parts of the particulars of claim which referred to the rateable value of the premises and the fact that the tenant is a statutory tenant were relevant only to the landlord's claim for possession, and that, so far as the point with which we are concerned arises, one has only to look at para. 1 (which sets out the agreement), para. 6 (which sets out the particulars of want of repair) and para. 7 (which alleges failure to carry out the repairs set out in the schedule), and it is with that claim alone that we are concerned. None the less, I am not prepared to dissent from the view expressed by COHEN, L.J., that, looking at the particulars of claim as a whole and bearing in mind that breach of a covenant to repair over a period of time involves a fresh breach from day to day, the true view of these particulars of claim is that they contain a claim for breach of the statutory obligation to comply with the terms of the original tenancy, and that, so construed, the case comes within the decision of this court in *Lee v. Roberts* (1). I would only add that I find it unnecessary to express any view whether or not *Smith (A. J.) & Co., Ltd. v. Kirby* (2) was rightly decided. I am not to be taken to be expressing any view E adverse to that decision. It may be necessary, and very desirable, that at some future date the whole position be re-considered, including the correctness or otherwise of that decision, for the assistance of practitioners in county courts. I would only observe for future reference that we have been told that as a result of further research, namely, a report in the ESTATES GAZETTE, dated Feb. 22, 1947, it has been ascertained that the subject-matter of *Smith (A. J.) & Co., Ltd. v. Kirby* (2) was a lease for twenty-one years from Sept. 29, 1928, so that it is clear that in that case the court was dealing with a claim under a contractual tenancy and not a claim to recover related to a statutory tenancy. For these G reasons I agree that this appeal fails.

Appeal dismissed with costs.

Solicitors: *Freeman, Son & Curry* (for the tenant); *Eland, Nettleship & Butt* (for the landlord).

[Reported by J. D. PENNINGTON, ESQ., Barrister-at-Law.]

GRAHAM AND OTHERS *v.* DUNCAN.

[KING'S BENCH DIVISION (Lord Goddard, C.J., Hilbery and Byrne, JJ.), July 14, 1950.]

Shipping—Passenger steamer—Fishing vessel used for pleasure trip—Need for certificate as to survey—Merchant Shipping Act, 1894 (c. 60), s. 267, s. 271 (1).

On June 12, 1949, two ships, classified as fishing boats for the purpose of the Merchant Shipping Acts, carried more than twelve persons from the quay at Berwick-on-Tweed on a pleasure trip to view one of H.M. ships which was anchored off the mouth of the river. No certificate from the Board of Trade as to survey had been issued in respect of either ship. On the question whether an offence had been committed against the Merchant Shipping Act, 1894, s. 271 (1),

HELD: the expression "passenger steamer" in s. 271 (1) meant either a steamer constructed to carry passengers or one either habitually or substantially used for carrying passengers. Consequently, the fishing vessels were not "passenger steamers" within the meaning of the section, and no offence had been committed.

[AS TO DEFINITION OF "PASSENGER" AND "PASSENGER STEAMER," see HALSBURY, Hailsham Edn., Vol. 30, p. 624, para. 785; and FOR CASES, see DIGEST, Vol. 41, pp. 671, 672, Nos. 5032-5036.]

Cases referred to:

- (1) *Kiddle v. Kidston*, (1884), 14 L.R. Ir. 1; 18 I.L.T. 9; 41 Digest 672 *a*.
- (2) *Hedges v. Hooker*, (1889), 60 L.T. 822; 53 J.P. 613; 41 Digest 672, 5034.
- (3) *Yeudall v. Sweeney*, *Yeudall v. Lynn*, 1922 S.C. (J.) 32; 59 Sc. L.R. 299; [1922] S.L.T. 278; 41 Digest 672 *e*.
- (4) *Young v. Docherly*, *Young v. Kyle*, 1929 S.C. (J.) 57; Digest Supp.
- (5) *R. v. Fox*, (1925), 21 Lloyd L.R. 72.

CASE STATED by the recorder of Berwick-on-Tweed.

On Sept. 15, 1949, at a court of summary jurisdiction sitting at Berwick-on-Tweed, informations were preferred by the appellant, a senior marine surveyor employed by the Ministry of Transport, against the respondents, the owners of two ships and the master of one of them, charging them with having carried passengers in the ships at Berwick-on-Tweed when the ships had not been surveyed and certified by the Board of Trade, contrary to the Merchant Shipping Act, 1894, s. 271 (1), and the Merchant Shipping Act, 1906, s. 21. The respondents were convicted and each of them was fined £10 and ordered to pay £1 5s. costs. The respondents appealed to quarter sessions contending, *inter alia*, that the ships in question were not "passenger steamers" within the meaning of s. 267 and s. 271 (1) of the Act of 1894 and that, accordingly, they had not been guilty of any offence. At the hearing of the appeal it was admitted or proved that the ships in question were motor fishing vessels, that on June 12, 1949, each vessel had carried more than twelve members of the public from the quay at Berwick-on-Tweed on a pleasure trip to view H.M.S. Diadem, then lying off the river mouth, and that no payment was made in relation to the journeys by any of the persons carried. The learned recorder allowed the appeals and quashed the convictions, holding that the vessels were not "passenger steamers" within the meaning of s. 267 and s. 271 (1) of the Act of 1894 and that the persons carried were not "passengers" within the meaning of s. 267. The appellant appealed.

Pearson, K.C., and *J. P. Ashworth* for the appellant.

Hinchcliffe, K.C., and *J. H. Robson* for the respondents.

LORD GODDARD, C.J.: This is a Case stated by the learned recorder of the borough of Berwick-on-Tweed before whom appeals were brought by

the respondents against convictions by the justices of the borough for offences against s. 271 (1) of the Merchant Shipping Act, 1894.

A On June 12, 1949, one of His Majesty's ships was visiting the neighbourhood of Berwick-on-Tweed and was anchored somewhere off the mouth of the river. A large number of people desired to see her, including the sheriff of the city and county, and two fishing vessels were put at their disposal without charge. The vessels used were classified as fishing vessels to which certain sections in the Act of 1894 do not apply. The information which was laid against the first respondent alleged that she

"being the owner of a ship called the Tweed did carry passengers thereon at Berwick-on-Tweed when the same had not been surveyed or certified by the Board of Trade contrary to the Merchant Shipping Act, 1894, s. 271, and the Merchant Shipping Act, 1906, s. 21."

B Informations in similar terms were preferred against the other respondents, being the master and owners respectively of a ship called the Dolly Graham. I do not think that those informations were properly framed, but the material sections show what the substance of the alleged offence was.

C Section 267 of the Merchant Shipping Act, 1894, is the first section in Part III of that Act, and is the starting point of the group of sections headed "Passenger and Emigrant Ships." The section provides:

"For the purposes of this Part of this Act—The expression 'passenger' shall include any person carried in a ship other than the master and crew, and the owner, his family and servants; and the expression 'passenger steamer' shall mean every British steamship carrying passengers to, from, or between any places in the United Kingdom . . ."

D In s. 743 of the Act of 1894 there is a provision that a ship that is propelled by mechanical power is included in the expression "steamship", so a motor ship is a steamship for the purposes of the Act. Section 271 (1) provides:

E "Every passenger steamer which carries more than twelve passengers shall—(a) be surveyed once at least in each year in the manner provided in this Part of this Act; and (b) shall not ply or proceed to sea or on any voyage or excursion with any passengers on board, unless the owner or master has the certificate from the Board of Trade as to survey under this Part of this Act, the same being in force, and applicable to the voyage or excursion on which the steamer is about to proceed."

F The learned recorder has found that the Dolly Graham and the Tweed were not passenger steamers within the meaning of the sections. He has also found that the one hundred or so persons who were carried in these vessels on the day in question paid no fare and gave no remuneration to anybody, though, in the view I take of this case, that is not the material point.

G It is said here, and at first, I confess, I was attracted by the argument of counsel for the appellant, that once one shows that there are passengers on board the ship, she thereby becomes a passenger ship, and an offence is committed if she goes to sea with more than twelve passengers on board without the certificate of the Board of Trade which is mentioned in s. 271 (1). The argument of counsel for the respondents, however, has satisfied me that the first opinion I formed was wrong, and I am now convinced that the learned recorder was right in the judgment he gave.

H It seems to me that, considering that s. 267 deals with passenger and emigrant ships, and provides that the expression "passenger steamer" shall mean "every British steamship carrying passengers," the court must first apply its mind to the question whether the ship can properly be called a passenger ship. The words are "carrying passengers," and that seems to point to the fact that the ship must be one that is either constructed to carry passengers

or is used for the carriage of passengers, not a ship which may, although a cargo ship or a fishing vessel, on some particular occasion take somebody for a trip down the river. When one comes to s. 271, one finds the words:

"(1) Every passenger steamer which carries more than twelve passengers shall—(a) be surveyed once at least in each year in the manner provided in this Part of this Act; and (b) shall not ply or proceed to sea or on any voyage or excursion with any passengers on board . . ."

unless the owner or master has this certificate. Counsel for the appellant invited us to say that that was a piece of careless drafting, and that what it meant was that no steamer should go to sea with more than twelve passengers on board without a certificate, but that is not what the section says. The section begins:

"Every passenger steamer which carries more than twelve passengers . . . shall not ply or proceed to sea or on any voyage or excursion with any passengers on board . . ."

without a certificate. That seems clearly to point to the fact that the first thing to find out is whether the ship is a passenger steamer carrying more than twelve passengers, not a steamer which is carrying more than twelve passengers on some particular day. She has to be a passenger steamer, and that may be shown by evidence either that she is a steamer constructed to carry passengers, like an excursion steamer, or that she is a steamer which is ordinarily and habitually engaged in carrying people from place to place.

This point is not without authority. The first case to which our attention was called is *Kiddle v. Kidston* (1), an Irish case, decided in 1884, but which cannot be regarded as a wholly satisfactory authority. It was a decision of two judges against one. O'BRIEN, J., delivered a very strong dissenting judgment, and, although there are many passages in his judgment with which I should find it difficult to agree, I think the weight of his argument was much on the lines of the argument of counsel for the respondents before us to-day. That case was considered by this court in 1889 in *Hedges v. Hooker* (2), a case which is singularly like the present. In that case more than twelve persons were taken on board a steamer for an excursion down the River Orwell to Felixstowe and back. No charge was made for the use of the steamer, but a gratuity was given to the master and crew. The ship had been lent to take a choir for an outing, and LORD COLERIDGE, C.J., in giving his judgment, did not rely entirely, as did HAWKINS, J., on the fact that it could not be said the vessel was plying for hire. LORD COLERIDGE, C.J., said (60 L.T. 823):

"The justices set out all the facts, and then say that these persons were passengers within the meaning of s. 303 of the Merchant Shipping Act, 1854. It is impossible to define exactly what constitutes a passenger steamer. Each case must stand on its own circumstances. For instance, take the case where a gentleman takes a party on his steam yacht up and down a river. I should say that such a case was too clear for argument. In the present case the respondents are the owners of a steamer on which they take a number of boys and girls who form a choir down the river for a trip and bring them back again, and they charge nothing for the use of the steamer. The question in the case is, whether the vessel was a passenger steamer, and these persons who were on board were passengers within the meaning of the Merchant Shipping Act, 1854, s. 303, which says that 'the word "passengers" shall be held to include any persons carried in a steamship other than the master and crew, and the owner, his family and servants; and the expression "passenger steamer" shall be held to include every British steamship carrying passengers to, from, or between any place or places in the United Kingdom, excepting steam ferry boats working in chains, commonly called steam bridges.' I think the

sort of thing done here was not pointed at by the Act of Parliament, and that it would be straining the Act to include it."

A He goes on to say that they were not plying, and approves the judgment of O'BRIEN, J., in *Kiddle v. Kidston* (1). It will be observed that the learned Lord Chief Justice was clearly indicating that the first consideration to which one must apply one's mind is whether the vessel could be called a passenger steamer, and that not merely by a narrow reference to the definition section, which speaks of every British steamship carrying passengers to, from, or between any places in the United Kingdom. As HILBERY, J., pointed out in the course of the argument, the participle "carrying" is used for an express purpose as showing that it is a vessel the business or habitual use of which is for the carriage of passengers.

B There were two cases in the Court of Justiciary to which we have been referred. The first is *Yeudall v. Sweeney*, *Yeudall v. Lynn* (3). In that case it was held that the word "carries" does not mean "is fitted to carry" but "in fact carries"; and, accordingly, that a complaint which merely set forth that a passenger steamer, for which no certificate had been obtained, had, on a specified occasion, carried more than twelve passengers was relevant. I do not propose to deal with the judgments at length in that case because I do not think they were really aimed at the point we are now considering.

C A case much nearer to the present one is *Young v. Docherly* (4). There the use of an ordinary motor boat had been granted to some sea cadets to proceed from Greenock to Rosneath. The ship had not got the necessary certificate, and the boys paid 1d. towards the cost of the fuel, although no consideration was paid for the use of the boat. The sheriff-substitute dismissed the charge and that decision was upheld by the court. The LORD JUSTICE-GENERAL (LORD CLYDE) said (1929 S.C. (J.) 61):

E "I am not prepared, on the facts before us in these cases and on the arguments presented, to lay it down either expressly or by implication that, if the owner of a pleasure steam vessel asks a party of friends, numbering more than twelve, to join him in a trip on the Clyde—say, from Greenock and back—his vessel becomes a 'passenger steamer' and his friends 'passengers' within the meaning of the Act, to the effect of requiring him to qualify and apply for the statutory certificate. But this would be the result of affirming the prosecutor's bare argument on the terms of the Act . . . For these reasons I think the sheriff-substitute was right in thinking that there were not sufficient materials before him to entitle him to hold that the motor boats in question were 'passenger steamers' within the meaning of s. 271 . . ."

G No doubt there were in that case, exactly as there were in the present case, persons on board who could be called passengers, but evidently, in the opinion of the LORD JUSTICE-GENERAL, that was not enough, and it had to be shown that the vessel was a passenger steamer properly so-called. LORD SANDS said (*ibid.*):

H "And in order that the prosecutor may succeed in this case it is necessary that he should show that the vessels here in question were passenger steamers. Now, to succeed in that contention he must show that the clause may be thus paraphrased: 'The expression "passenger steamer" shall mean every British ship having for the time being on board, even incidentally, one person who is other than the master and crew or the owner and his family and servants on its way to or from places in the United Kingdom.' Now, that is a construction which would lead to results so extravagant that one would hesitate to adopt it unless one were constrained to do so. I do not think we are so constrained. I think that, when we have regard to the whole context of the Act and the scope of its

different parts and provisions, we may fairly read the definition 'passenger steamer shall mean every British steamship carrying passengers to, from, and between any places in the United Kingdom' as meaning that every passenger steamer shall mean every British steamship carrying passengers to, from, and between any places in the United Kingdom as a matter of business either usually or on a particular occasion, and that the mere incidental presence on board a ship on a particular voyage of one person, or it may be more than one person, other than those excepted in the clause dealing with 'passenger,' does not make a ship a passenger steamer."

Contrast that case with the one to which counsel for the appellant called our attention—*R. v. Fox* (5). That was a case in which Messrs. Fox & Co., a well-known firm of shipping agents in Falmouth and agents to the Canadian Pacific liners, had been using the Durgan, a tug of their own, to convey from the shore to the ships members of the crews of the liners when in Falmouth harbour. The Board of Trade took the view that they were contravening s. 271 (1) of the Act of 1894 because the tug was not certified as a passenger steamer. On Mar. 18, 1924, the Durgan was noted to have on board to take back to the Empress of Scotland fifty-one or fifty-two members of the crew in addition to the tug crew, and, accordingly, there was a summons. It was clear that the vessel had been habitually used to take members of the crews of Canadian Pacific ships out to the ships lying in the Carrick Roads. The justices dismissed the summons for reasons which are not clearly stated, but this court reversed their decision, LORD HEWART, C.J., saying (21 Lloyd L.R. 72):

"That section [*i.e.*, s. 267 of the Act of 1894] provides that for the purpose of Part III of the Act the expression 'passenger' shall include any passenger carried in a ship other than the master and crew and the owner, his family and servants. It is quite obvious that that means other than the master and crew of that ship; so that it does not mean that a person who is a member of the crew of one ship is thereby prevented from being a passenger upon any other ship."

Then he goes on to deal with the argument that those persons were not passengers but crew, and says (*ibid.*):

"Some doubt seems to have been thrown on the matter by the decision in *Hedges v. Hooker* (2), but that decision turned on the special facts of the case."

The special facts in *Hedges v. Hooker* (2) seem very near the special facts in the present case.

I have come to the conclusion without any hesitation that one cannot make sense of s. 271 (1) unless one reads the words: "Every passenger steamer which carries more than twelve passengers" as meaning that the steamer first has to be a passenger steamer, *i.e.*, one that is either used habitually, or, at any rate, substantially, for carrying passengers, or is constructed as a passenger steamer. When the sub-section says: "Every passenger steamer which carries more than twelve passengers . . . shall not . . . proceed to sea . . . with any passengers . . .", it seems to me clearly that it has to be shown that the vessel is a passenger steamer quite apart from whether she has more than twelve persons on board. She is to be, first, a passenger steamer. Then, if she has more than twelve persons on board she must not go to sea without a certificate. But she must be a steamer constructed or used to carry passengers. In the present case the learned recorder has found—and it was clearly open to him to find whether this ship was a passenger steamer or not—that she was a fishing boat. In so holding, I think he came to the same conclusion as did the Court of Justiciary in *Young v. Docherly* (4), and, therefore, I feel that it is impossible to interfere with this finding, and this appeal fails.

HILBERY, J.: I was at first, I must say, attracted by the argument for the appellant, but, like my Lord, I am unable to make sense of s. 271 (1) unless that construction is given to the meaning of the words "passenger steamer" which my Lord has said is the proper construction. I agree with the judgment which my Lord has given.

BYRNE, J.: I agree.

A

Appeal dismissed with costs.

Solicitors: *Treasury Solicitor* (for the appellant); *Hyde, Mahon, & Pascall*, agents for *Keenlyside & Forster*, Newcastle-upon-Tyne (for the respondents).

[*Reported by F. A. AMIES, ESQ., Barrister-at-Law.*]

B

NOTE.

C

BEALE v. BEALE.

[COURT OF APPEAL (Bucknill, Somervell and Denning, L.JJ.), June 19, 20, 21, 1950.]

Divorce—Cruelty—Condonation—Revival of cruelty—Inference that conditional forgiveness has become absolute after lapse of time—Cruelty committed from 1930–38—Alleged revival after 1945.

D

The husband presented a petition for divorce on the ground of his wife's cruelty, and in her answer the wife asked for a decree on the ground of the husband's cruelty. Each relied on incidents alleged to have taken place between 1930 and 1938 and after 1945. Between 1938 and 1945, it appeared, the parties lived a normal married life. It was contended by each party that, if the earlier acts of alleged cruelty had been condoned, they had been revived by the later incidents which, it was alleged, amounted to matrimonial offences even if they did not constitute cruelty in law. The learned commissioner by whom the petition was heard was not satisfied that cruelty in law had been committed by either party in the period before 1938, and in regard to the events after 1945 he found that the matters of complaint could not be treated as cruelty by one spouse to the other or as reviving previous cruelty, had there been any, and, accordingly, he dismissed the petition and rejected the prayer in answer. Both parties appealed.

E

HELD [*per* BUCKNILL and SOMERVELL, L.JJ.]: on the evidence, the learned commissioner was justified in coming to the conclusion that no cruelty had been proved by either party in respect of either of the two periods.

G

Cases referred to:

(1) *Beard v. Beard*, [1945] 2 All E.R. 306; [1946] P. 8; 114 L.J.P. 33; 174 L.T. 65; 2nd Digest Supp.

(2) *Richardson v. Richardson*, [1949] 2 All E.R. 330; [1950] P. 16.

APPEAL by the husband and cross-appeal by the wife from an order of Mr.

H

COMMISSIONER GRAZEBROOK, K.C., dated Mar. 7, 1950.

Petrie and Arnold-Baker for the husband.

D. Loudoun for the wife.

Per DENNING, L.J.: I am prepared to assume that the episodes which took place twelve years ago or more amounted to cruelty, but, even so, I do not think that they can be made a ground for divorce. *Beard v. Beard* (1) and *Richardson v. Richardson* (2) establish the proposition that condonation is

conditional forgiveness, the condition being that the guilty party should henceforward behave properly. He is, so to speak, taken back on probation. The probationary period does not, however, necessarily last for life, and a point may be reached where, by his good behaviour, the guilty party has proved himself worthy of the trust and confidence of the other. The further that past offences recede into the distance, so much the more does it become difficult to revive them, and the time may come when the proper inference is that the forgiveness is no longer conditional but has become absolute. This view seems to me to meet the objections so forcibly expressed by VAISEY, J. ([1945] 2 All E.R. 318), in his dissenting judgment in *Beard v. Beard* (1). It is also in accord with what BUCKNILL, L.J., said ([1949] 2 All E.R. 332), in *Richardson v. Richardson* (2):

"... I cannot believe that, if adultery has been condoned, say for seven years, a wife is entitled to say it is revived because the husband has on one occasion slapped her face."

Applying this principle, it appears that from January, 1938, to December, 1945, the parties lived a normal married life without untoward incidents. In those circumstances the violent episodes which, I assume, had taken place in the early years of the marriage must be regarded as having been forgiven by both sides absolutely and not conditionally, and they cannot be revived by the events after December, 1945. [His LORDSHIP held that the events after 1945 did not amount to cruelty by either party, and agreed that the appeals should be dismissed.]

Solicitors: *J. E. Lickfold & Sons* (for the husband); *Crossman, Block & Co.* (for the wife).

C.N.B.

Re PRATT. *Ex parte* INLAND REVENUE COMMISSIONERS *v.* PHILLIPS (TRUSTEE IN BANKRUPTCY).

[CHANCERY DIVISION (Romer and Harman, JJ.), June 19, July 17, 1950.]

Bankruptcy—Preferential claim—Assessed tax—Excess profits tax in respect of a chargeable accounting period other than last completed period before bankruptcy—Bankruptcy Act, 1914 (c. 59), s. 33 (1) (a).

On Apr. 23, 1948, a receiving order was made against the debtor, and he was adjudicated bankrupt on May 3. On July 27, 1949, an assessment of £5,000 was made on him in respect of excess profits tax for the chargeable accounting period of twelve months ended Dec. 31, 1944, and on Sept. 7, 1949, the Crown claimed preferential payment of this sum under the Bankruptcy Act, 1914, s. 33 (1) (a).

Held: (i) on the true construction of s. 33 (1) (a) the Crown's right to priority in respect of an assessed tax was confined to the year of assessment which immediately preceded the bankruptcy, and, therefore, the Crown was not entitled to preferential payment of the £5,000 in respect of excess profits tax for the chargeable accounting period ended Dec. 31, 1944.

Gowers v. Walker ([1930] 1 Ch. 262), and *Re Cockell* ([1932] W.N. 172), not followed.

(ii) the reference to Apr. 5 in s. 33 (1) (a) of the Act of 1914 merely denoted the end of a period, *i.e.*, the fiscal year, and, therefore, in cases of excess profits tax there should be substituted for "Apr. 5" whatever might be the

date which marked the end of the chargeable accounting period of any particular trade or business.

[EDITORIAL NOTE. As from July 5, 1948, para. (d) of s. 33 (1) of the Bankruptcy Act, 1914, is repealed by the National Insurance (Industrial Injuries) Act, 1946, s. 89, and sched. IX, and para. (e) by the National Insurance Act, 1946, s. 65, and sched. IX, and a new paragraph, para. (f), has been added to s. 33 (1) of the Act of 1914 by the joint effect of the two Acts of 1946 in respect of "all amounts due, in respect of contributions payable during the twelve months before the date of the receiving order, by the bankrupt as the employer of any persons under the National Insurance (Industrial Injuries) Act, 1946, or, either as the employer of any person or as a self-employed or non-employed person under the National Insurance Act, 1946."

AS TO PREFERRED DEBTS, see HALSBURY, Hailsham Edn., Vol. 2, pp. 289-291, para. 385; and FOR CASES, see DIGEST, Vol. 4, p. 474, Nos. 4277-4283.]

Cases referred to:

- (1) *Gowers v. Walker*, [1930] 1 Ch. 262; 99 L.J.Ch. 138; 142 L.T. 404; 15 Tax Cas. 165; Digest Supp.
- (2) *A.-G. v. Jackson*, [1932] A.C. 365; *sub nom.*, *Re Cockell*, 101 L.J.Ch. 186; 146 L.T. 450; 16 Tax Cas. 681; *subsequent proceedings, sub nom.*, *Re Cockell*, [1932] W.N. 172; 16 Tax Cas. 681, 721; Digest Supp.
- (3) *Re Campbell*, (1923), 10 Tax Cas. 585; Digest Supp.
- (4) *Re Winget, Ltd.*, [1924] 1 Ch. 550; 93 L.J.Ch. 286; 131 L.T. 240.
- (5) *A.-G. v. Irish Steel, Ltd.*, (1948), Irish Tax Cases, No. 67.

APPEAL by the Crown from an order of His Honour JUDGE TUDOR REES, made at Brentford County Court on Apr. 26, 1950, on a motion by the Crown asking for the reversal of a decision of the debtor's trustee in bankruptcy rejecting the Crown's claim to rank as a preferential creditor in respect of the sum of £5,000 excess profits tax for the chargeable accounting period of twelve months ended Dec. 31, 1944.

A receiving order was made against the debtor on Apr. 23, 1948. On May 3, 1948, he was adjudicated bankrupt. On July 27, 1949, an assessment of £5,000 in respect of excess profits tax for the chargeable accounting period of twelve months ended Dec. 31, 1944, was made on him. On Aug. 13, 1949, it was issued. On Sept. 7 the Crown claimed preferential payment under the Bankruptcy Act, 1914, s. 33 (1) (a), in respect of this sum and also in respect of income tax and sur-tax to which the debtor had been assessed for the year 1944/1945. The trustee in bankruptcy admitted the claim in respect of the income tax and sur-tax, but rejected the claim in respect of the excess profits tax on the ground that the Crown's preferential claim in respect of income tax, sur-tax and excess profits tax should be limited to precisely the same period in each case. The learned county court judge upheld the trustee's decision and dismissed the motion. The Crown appealed, and, during the hearing of the appeal, it appeared to the Divisional Court sitting in bankruptcy, that the real question in the case was whether the Crown was entitled to claim preference for an assessed tax in respect of a period other than the last completed period before the bankruptcy.

W. A. Bagnall for the Crown.

C. H. Duveen for the trustee in bankruptcy.

Cur. adv. vult.

July 17. ROMER, J., read the following judgment of the court. This is an appeal from an order of His Honour JUDGE TUDOR REES in the Brentford County Court, made on Apr. 26, 1950, whereby he dismissed a motion by the Crown asking for the reversal of a decision of the debtor's trustee in bankruptcy rejecting the claim of the Crown to rank as a preferential creditor in respect of the sum of £5,000 excess profits tax for the chargeable accounting period "year to Dec. 31, 1944."

A receiving order was made against the debtor on Apr. 23, 1948, and he was adjudicated bankrupt on May 3. The Crown lodged proofs for the following sums owing to it by the debtor, namely:

	£	s.	d.
Excess profits tax: chargeable accounting period ended			
Dec. 31, 1944	£5,000	0	0
Excess profits tax: chargeable accounting period ended			
Dec. 31, 1945	222	0	0
Sur-tax, 1943/1944	139	15	9
Sur-tax, 1944/1945	792	4	0
Sur-tax, 1944/1945 (additional assessment, reduced from £712 3s.)	704	9	0
Income Tax Sched. D: 1943/1944	291	10	0
Income Tax Sched. D: 1944/1945	1,156	0	0

By letter, dated Sept. 7, 1949, the Crown claimed the sum of £7,652 13s. for payment preferentially, being in the whole (as it said) an amount not exceeding one year's assessed taxation. This amount was made up as follows:

	£	s.	d.
Excess profits tax: chargeable accounting period ended			
Dec. 31, 1944	£5,000	0	0
Sur-tax, 1944/1945	1,496	13	0
Income Tax Sched. D: 1944/1945	1,156	0	0

The sum of £653 5s. 9d., being the balance of the amounts for which the Crown proved, was claimed non-preferentially to rank with the other unsecured creditors.

The trustee in bankruptcy admitted the Crown's claim to rank preferentially under s. 33 (1) (a) of the Bankruptcy Act, 1914, in respect of the sur-tax and income tax to which the debtor had been assessed for the year 1944/1945, but with regard to the excess profits tax assessed for the chargeable accounting period ended Dec. 31, 1944, he communicated the following views to the Crown by a letter, dated Oct. 13, 1949:

"So far as I am concerned it is my contention that the revenue's preferential claim in respect of income tax and sur-tax and excess profits tax must be limited to precisely the same period in each case. In those circumstances I would be prepared to consider the admission preferentially of approximately three quarters of the item of £5,000 excess profits tax, i.e., that portion which refers to the same period as the other preferential claims."

By notice, dated Feb. 23, 1950, the trustee rejected the Crown's claim to preference for the £5,000 excess profits tax on the ground that preferential treatment had already been claimed and conceded in respect of claims covering a different period. In support of its notice of motion to the county court in which the Crown sought a reversal of this decision, it filed an affidavit by an Assistant Solicitor of Inland Revenue which stated:

"Excess profits tax is not computed upon the 'fiscal year' beginning Apr. 6 in one year and ending on Apr. 5 in the following year, as is the case with income tax and sur-tax. It is chargeable upon a 'chargeable accounting period,' which normally is a period of twelve months in respect of which the accounts of a trade are made up and during which the tax is exigible, in the present case a period of twelve months ending on Dec. 31, 1944. This period is unrelated to the fiscal year and falls in fact partly within the fiscal year 1943/1944 and partly within the fiscal year 1944/1945 in the present case."

The affidavit went on to urge that the assessment was, nevertheless, one "not exceeding in the whole one year's assessment," as required by s. 33 (1) (a) of the Bankruptcy Act, 1914. When the matter came before the learned county court judge, he said that he understood it was probably going to a higher court and,

therefore, thought no good purpose would be served by his giving a reasoned judgment. He, accordingly, merely stated that, on consideration of the relevant statutes and of the cases cited to him, he thought that the trustee's decision was right, and he, therefore, dismissed the appeal. When the present appeal was opened before us, the main purpose of counsel for the Crown was to negative the view of the trustee, as communicated to the Crown, to the effect that taxes, in respect of which preferential payment is claimed, must be taxes which are assessed for one and the same period. It appeared to us, however, that the real question in the case was different from this, and that it was doubtful whether it was open to the Crown to claim preference for an assessed tax in respect of a chargeable accounting period other than the last completed period before the bankruptcy. An inquiry, accordingly, developed into this view of the matter, in the course of which certain other points, which we shall have occasion to mention later, also emerged.

Excess profits tax was first charged by Part III of the Finance (No. 2) Act, 1939. The chargeable accounting period of a trade or business for the purposes of the tax could end on Apr. 5 of any year, or it might end on some other date. Debts in respect of this tax were given preferential treatment in the following manner. Section 21 of the Act of 1939 provides:

"(1) Excess profits tax shall be assessed and collected by the commissioners, and shall be due and payable at the expiration of one month from the date of assessment, and shall be recoverable as a debt due to His Majesty from the person on whom it was assessed. (2) The provisions of sched. V to the Finance Act, 1937 . . . including the provisions therein enabling the commissioners to make regulations, shall have effect with respect to excess profits tax as they have effect with respect to the national defence contribution."

The Finance Act, 1937, sched. V, Part III, para. 5, provides:

"In a bankruptcy . . . the same priority shall be given to the national defence contribution as is, by the enactments relating to bankruptcy . . . required to be given to income tax."

The Bankruptcy Act, 1914, s. 33 (1), states what that priority is:

"In the distribution of the property of a bankrupt there shall be paid in priority to all other debts (a) all parochial or other local rates due from the bankrupt at the date of the receiving order, and having become due and payable within twelve months next before that time, and all assessed taxes, land tax, property or income tax, assessed on the bankrupt up to Apr. 5 next before the date of the receiving order, and not exceeding in the whole one year's assessment."

This, then, is the degree of priority to which excess profits tax was entitled, and the Crown claims this priority for the £5,000 excess profits tax which is the subject of the present appeal.

There was handed up in the course of the hearing before us a copy of the assessment in respect of this £5,000. The assessment was made on July 27, 1949, and was issued on the following Aug. 13, and it was in respect of the chargeable accounting period of twelve months ended Dec. 31, 1944. At first sight, and having regard to the date of the receiving order in this case, *viz.*, Apr. 23, 1948, this assessed tax would not appear to be within the category of taxes on which priority is conferred by s. 33 (1) (a) of the Bankruptcy Act, 1914, in that the assessment bears no relation either to Apr. 5 or to the chargeable accounting period next before the date of the receiving order. It is the contention of the Crown that it is not necessary for its purpose that the assessment should bear any such relation, and that it is entitled to priority for each assessed tax covering any one year of assessment earlier in date than the receiving order if the tax, when assessed for that year (whether before or after the receiving order), remains

unpaid. The Crown contends that this has been the long established practice in bankruptcy matters and that it is supported by authority. The preferential treatment of tax was considered by EVE, J., in *Gowers v. Walker* (1) in relation to the Companies (Consolidation) Act, 1908, s. 209 (1) (a), which is in substantially the same terms as s. 33 (1) (a) of the Bankruptcy Act, 1914. In that case a receiver was appointed of the defendant company on Nov. 15, 1927, under a power contained in an instrument of charge which the company had effected. On May 1, 1928, the Special Commissioners made assessments to income tax on the company in respect of tax deducted from loan interest in each of the fiscal years 1922/1923 to 1926/1927 inclusive. The Commissioners of Inland Revenue, who were the plaintiffs in the action, claimed one year's assessment of income tax for the year 1923/1924 (that being the year in respect of which the largest amount of tax was due), to be paid by the receiver as a preferential debt. The receiver disputed the Crown's claim to preference, not on the ground that the year selected by the Crown for preference was not the year immediately preceding the receivership, but solely on the ground that the liability for income tax was not a debt which could be sued for when the receiver went into possession, as there had not, at that date, been an assessment. EVE, J., in a reserved judgment, after describing the receiver's point as being that the expression "income tax assessed on the company up to Apr. 5" must be read as referring to tax actually assessed before the date mentioned, and not as extending to tax for the period up to that date if assessed subsequently to that date, said ([1930] 1 Ch. 267):

"This contention seeks to impose on the expression 'up to Apr. 5' a construction equivalent to that which it might bear if the word 'before' were substituted for the words 'up to.' I can see no good grounds for supporting this view. The expression 'up to' is a well known one in accountancy, and when books are said to be written up, balances to be struck, and accounts to be vouched up to a particular date, no implication arises that any of the operations were completed before or even on the particular date, the true meaning being that the particular date is the one up to which the state of account has been ascertained. So here income tax assessed up to a particular date is not, in my opinion, confined to the tax actually assessed before that date, but includes all assessed tax up to that date, whether the assessment was made before or after the date. Nor can I see anything in the provisions of s. 209 to lead to the conclusion that anything else was intended. The section is an exhaustive enumeration of preferential payments, qualified in each case by reasonable limitations on the quantitative amount that is to be preferred."

Then, after referring to some of the other debts in respect of which priority was given by the section, the learned judge continued (*ibid.*, 268):

"The income tax is the only item in the ascertainment of which a special date is substituted for the relevant date, and the reason for this is obviously to avoid all necessity for apportionment. Except the statutory limitation, I can detect in the section nothing which reduces the rights of priority in respect of income tax to income tax actually assessed before the date up to which it is to be assessed . . ."

and the learned judge decided in favour of the plaintiffs accordingly.

In *Re Cockell* (2), the headnote (16 Tax Cas. 681) is as follows:

"The sole executrix and universal legatee under the will of a testator who died on June 19, 1929, claimed that she was entitled to retain out of the estate, which was insolvent, sums in respect of debts due to her. A preferential claim for arrears of the deceased's income tax and super-tax for the fiscal year 1920/1921 had been made on behalf of the Crown under the Bankruptcy Act, 1914, s. 33. The amount of the executrix's claim was such that, if it were met, the Crown's claim could not be satisfied. The

executrix took out an originating summons to have it determined: (1) Whether her right of retainer could be maintained against the Crown's claim under s. 34 (1) of the Administration of Estates Act, 1925, and s. 33 (1) (a) of the Bankruptcy Act, 1914. (2) Whether the Crown's preferential claim for income tax could be made only for tax assessed for the year ending on Apr. 5 next before the testator's death or for any year before the testator's death."

A The first question went eventually to the House of Lords, which held that the executrix could not exercise her right of retainer in priority to the Crown's preferential claim. After this decision the summons came on again before BENNETT, J., for determination of the second question. It appears that counsel for the executrix, in contending that s. 33 (1) of the Bankruptcy Act did not give the Crown the right to choose any one year, but that it was obliged to claim in respect of the year immediately preceding the bankruptcy, referred to *Gowers v. Walker* (1) and to a *dictum* of ROMER, J., in *Re Campbell* (3), and said that, although there was no reasoning in either decision, the learned judge might feel that in view of these cases he could not decide in favour of the executrix. BENNETT, J., did take that view, and said (16 Tax Cas. 722):

C "I have indicated nothing. I will say nothing more than I have said. I simply follow EVE, J.'s decision."

D In *Re Campbell* (3) the point did not in any sense arise. After the death on Oct. 4, 1920, of an insolvent person who owed sums for super-tax in respect of each of the years 1916/1917 to 1919/1920 inclusive, the Crown claimed priority in respect of the year 1919/1920, *viz.*, the year ending on Apr. 5 immediately preceding the debtor's death. The whole question before ROMER, J., related to a sum which the trustees of a settlement (under which the debtor had a life interest) had raised as an advancement for payment of the debtor's debts, including his arrears of super-tax. The amount raised had been, in part, applied in payment of his other debts, but not in payment of the super-tax, and the debtor's administratrix claimed to be entitled to appropriate the unapplied balance to payment of the super-tax owing for the year 1919/1920. ROMER, J., rejected this claim and held that the Commissioners of Inland Revenue were entitled to appropriate the balance in the manner that they desired to do, *viz.*, to payment in full of the assessed super-tax for the three years ending on Apr. 5, 1919, and as to the remainder on account of the assessed super-tax for the year 1919/1920. At the end of his judgment ROMER, J., said that he was not quite sure that the question of appropriation had any real materiality in it and, after some discussion, said (10 Tax Cas. 593):

G "If [counsel for the Crown] claims preference for one year, and it turns out that he has claimed preference for a year in respect of which he has been paid *aliunde*, I should have thought he would have a right of preference in the next biggest year. However, I do not know that it matters."

There the matter was left.

H In *Re Winget, Ltd.* (4) the question at issue was whether corporation profits tax was an "assessed tax" within the meaning of s. 209 of the Companies (Consolidation) Act, 1908. The tax in question had been assessed for the accounting period of twelve months ending Mar. 31, 1921, and a receiver of the company's undertaking was appointed on Apr. 27, 1923. The Crown claimed priority of payment for the tax on the footing that it was an "assessed tax" and this was the only question argued or decided in the case. RUSSELL, J., held that it was and made an order under which the tax in question was accorded the priority conferred by s. 209 of the Act. The question whether it was open to the Crown to claim priority for a tax assessed for a year other than the accounting period ended Mar. 31, 1923, was not raised in the case,

The only other case which was cited to us on the point now under consideration was *A.-G. v. Irish Steel, Ltd.* (5), an Irish decision. In that case the defendant company was assessed to income tax amounting to £2,578 2s. 6d. for the year ended Apr. 5, 1946, and to corporation profits tax amounting to £6,377 18s. for the year ended Mar. 31, 1945. In January, 1947 (while these amounts were still unpaid), a receiver was appointed of the company's property by the debenture holders. The Attorney-General, on behalf of the Minister for Finance, claimed payment preferentially of the two above-mentioned amounts under s. 107 and s. 209 of the Companies (Consolidation) Act, 1908. The defendant company contended that the Minister was entitled to preferential payment of only one of the two amounts, at his election. It further contended that, if preference extended to more than one tax, it must be in respect of one and the same year, *i.e.*, a year with the same *termini a quo* and *ad quem*. It lodged in court with its defence the total amount claimed for corporation profits tax, *viz.*, £6,377 18s., being the larger of the two amounts claimed. The Irish Supreme Court, reversing the decision of the High Court, held that the Minister for Finance was entitled to preferential payment of both the income tax and the corporation profits tax. It will be observed that the defendant company did not take the point that the Minister was not entitled to preference for tax assessed for any year other than the year ended Apr. 5, 1946. The point was not, indeed, open to it, for it had paid into court the amount of the corporation profits tax assessed for the year ended Mar. 31, 1945. In the course of his judgment in the Supreme Court, however, MURNAGHAN, J., did refer indirectly to this aspect of the matter, saying (Irish Tax Cases No. 67, p. 5):

“ ‘ In the whole ’ means, I think, when added up; but the limitation to one year's assessment means one year's assessment of any particular tax, and in case of arrears of any tax extending over a number of years, means a maximum amounting to one year's assessment.”

O'BYRNE, J., agreed with this view (*ibid.*, p. 7).

So far as authority goes, then, the matter stands thus. The orders made in *Gowers v. Walker* (1), *Re Winget* (4) and *A.-G. v. Irish Steel, Ltd.* (5) all proceeded on the footing that preferential payment of tax is not confined to tax assessed for the year ending on Apr. 5 immediately preceding a bankruptcy, winding-up or receivership (as the case may be), but is accorded also to tax assessed for any previous fiscal year. Observations by MURNAGHAN, J., and O'BYRNE, J., in the Irish case support this view, as also does the *dictum* of ROMER, J., in *Re Campbell* (3), and BENNETT, J., decided in favour of the view in *Re Cockell* (2), though he expressed no opinion of his own on the point, which appears, indeed, not to have been seriously argued. There is, therefore, no decision which is binding on this court, and, having given the matter very careful consideration, we have arrived at the conclusion that the contention of the Crown in support of the view cannot be sustained.

The question turns entirely on the construction of s. 33 (1) of the Bankruptcy Act, 1914. This sub-section has nothing whatever to do with the proof of debts—a consideration which cannot too clearly be borne in mind. All creditors who have proved their debts are entitled to have the debtor's assets distributed proportionately amongst them (s. 62 and s. 33 (7)). Certain creditors, and they alone, are entitled to preferential treatment, *viz.*, they are to be paid certain debts in priority to the other creditors of the bankrupt. These privileged debts are specified in paras. (a), (b), (c), (d), and (e) of s. 33 (1). Leaving out of account, for the moment, the question of taxes, the feature that is common to all these debts (except para. (d), which was repealed by the National Insurance (Industrial Injuries) Act, 1946, and to which special considerations apply) is that they should have become due during a period immediately preceding the bankruptcy. Rates, wages or salary of clerks or servants, wages of labourers or workmen, and contributions under the National Insurance Act, 1911, and under the National

Insurance (Industrial Injuries) Act, 1946, are all characterised by the common requirement that they should have become due during the period that immediately preceded the bankruptcy. In the case of rates, the language of the section is express on the point. In the case of wages, salary and insurance contributions under the Act of 1911, the point is all the stronger for being left to implication. The same qualification is attached to purchase tax by s. 20 (1) of the Finance Act, 1942. The reason for this pre-requisite is, we think, reasonably clear and arises from the fact that the various privileged creditors may not have had time to get in the moneys owing to them before disaster overtook the debtor. Turning, now, to the assessed taxes, it is a mere matter of construction to see whether they are immune from the quality which attaches to the other debts referred to in the sub-section. The first thing that is noticeable is that they are included in the same paragraph as rates and that the only rates to which priority is accorded by that paragraph are those which have "become due and payable within twelve months next" before the date of the receiving order. The next thing one sees is that the taxes are linked with rates by the word "and," which is indicative of similarity of characteristic, and not by the word "but," which would be indicative of differentiation. Accordingly, one approaches the reference to taxes in the expectation that one will find continuity, rather than diversity, of treatment. That reference is to all assessed taxes, etc.:

"... assessed on the bankrupt up to Apr. 5 next before the date of the receiving order, and not exceeding in the whole one year's assessment."

When it is appreciated that periods of assessment consist in general of one year ending on Apr. 5, then, surely, this language, even if read alone, ought to relate to taxes assessed for the fiscal year which preceded the bankruptcy, for, had it been intended to include earlier assessments, it would have been sufficient to say "assessed on the bankrupt before the date of the receiving order." The language, however, is not to be read in isolation, but it is to be read in conjunction with, and in the light of, the other considerations to which we have referred, and, when so read, it appears to us that the case for confining tax priority to the year of assessment which immediately preceded the bankruptcy is strong indeed. The only argument based on construction which was urged in favour of the contrary view was that this interpretation gives no effect to the concluding words "and not exceeding in the whole one year's assessment." It was contended that, if the only relevant taxes are those assessed for the fiscal year which preceded the bankruptcy, no effect can be attributed to these words inasmuch as, on this hypothesis, it would be impossible for the one year's assessment to be exceeded. We think, however, that these words can be explained by the possibility of income or profits for a period exceeding one year being included in one and the same assessment. Be that as it may, the presence of these words, in our judgment, is insufficient to displace a conclusion founded on all the considerations to which we have referred.

We are conscious that, in arriving at this conclusion, we are giving effect to a view contrary to that which appears to have been acted on in the cases which we have cited. In only one of those, however, was the point decided, namely, in *Re Cockell* (2), and in that case counsel appear to have invited the judge, and he seems to have agreed, to express no opinion of his own, but merely to follow the order made by EVE, J., in *Gowers v. Walker* (1)—a case in which the particular question was (according to the report) neither argued by counsel nor considered by the learned judge. In these circumstances we are free to give effect to what we believe to be the true meaning of s. 33 and to hold, as we do, that the Crown is not entitled to priority for an assessment made for a period which ended over three years before the receiving order. Inasmuch as the contrary view would entitle the Crown to claim priority in respect of taxes assessed, say, fifteen years before the receiving order and still remaining unpaid, and, accordingly, to appropriate, possibly, the whole of a bankrupt's assets to the exclusion of all

his ordinary creditors, we cannot say that we have arrived at our conclusion with regret. The Crown would, undoubtedly, be entitled to prove in respect of such arrears, however dilatory it might have been in taking steps to collect them, but there can be little justification, either in logic or in reason, in conferring on a claim so long outstanding a priority over the general body of creditors.

It is not necessary, having regard to the conclusion which we have expressed, to deal at any length with the other matters which were discussed in argument before us. One was the difficulty which arises in cases, such as the present, where a chargeable accounting period ends on some date other than Apr. 5. On a strict reading of s. 33 (1) (a), taxes assessed for such a period would either not qualify at all, or, alternatively, would only partially qualify for priority, because the period would not have the requisite *terminus ad quem*. On the other hand, it was the intention of the legislature, as expressed by the statutory provisions to which we have earlier referred, that excess profits tax should have "the same priority" in bankruptcy as income tax. In our opinion, this intention can only be achieved by applying this priority to excess profits tax *mutatis mutandis*, in other words, by treating the reference to Apr. 5 as merely denoting the end of a period, *i.e.*, the fiscal year and, accordingly, substituting for it, in cases of excess profits tax, whatever may be the date which marks the end of the chargeable accounting period of any particular trade or business. Accordingly, in the present case the Crown would, in our judgment, have been entitled to priority in respect of income tax assessed for the year Apr. 6, 1947, to Apr. 5, 1948, and of any excess profits tax (had it still been assessable) assessed for the chargeable accounting period ended on Dec. 31, 1947.

Then the question was discussed whether EVE, J., was right in *Gowers v. Walker* (1) in holding that the Crown is entitled to priority in respect of tax which had not been assessed at the date of a receiving order but is assessed subsequently. The trustee's argument before us that the Crown is not so entitled was necessarily alternative to his main argument which we have already accepted, *viz.*, that priority is only accorded to taxes assessed for the financial year or for the chargeable accounting period, as the case may be, immediately anterior to the bankruptcy; for, if priority is so limited and a receiving order was made, say, on Apr. 7 of any particular year, it is clear that the priority would be wholly defeated in respect of the previous year's income tax unless the Crown could rely on an assessment subsequently made. In the circumstances, we express no definite view on a point which would only have become material had we arrived at a different conclusion on the question which we have already decided. We think that there is force in the suggestion that s. 33 (1) of the Bankruptcy Act only confers priority on debts that are due and payable at the date of a receiving order and that tax is neither due nor payable until it has been assessed. However, the exact point was decided in the contrary sense by EVE, J., in *Gowers v. Walker* (1) and we do not wish to cast doubt on the accuracy of the decision of the learned judge when it is in no way necessary for our decision so to do. The grounds on which we have based our conclusion in this case necessarily involve that the trustee's concession of priority in favour of the Crown in respect of the income tax and sur-tax for the financial year 1944/1945 ought not to have been made. With this, however, we are not directly concerned and the trustee will, presumably, take such steps with regard to these assessments as he may be advised. The appeal will be dismissed with costs.

Appeal dismissed with costs.

Solicitors: *Solicitor of Inland Revenue* (for the Crown); *M. A. Jacobs & Sons* (for the trustee in bankruptcy).

[Reported by R. D. H. OSBORNE, Esq., Barrister-at-Law.]

BANQUE DES MARCHANDS DE MOSCOU (KROUPETSCHESKY)
(In liquidation) v. KINDERSLEY AND ANOTHER.

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Singleton and Jenkins, L.J.J.),
June 23, 26, 27, July 14, 1950.]

*Company—Winding-up—Jurisdiction—Company not carrying on business in
England, but having substantial assets here—Companies Act, 1929 (c. 23),
s. 338 (1), (2).*

*Company—Winding-up—Election—Application for order that winding-up invalid
—Previous application for leave to appeal out of time against rejection of
proof—Consent to adjournment of application for leave pending decision on
application for order that winding-up invalid.*

In 1932 a Russian bank, which had been dissolved by decree of the Soviet regime in 1918, and which, while it had not a specific place of business in England, had transacted business here through a representative and had large assets here, was wound-up by an order of the Chancery Division under the Companies Act, 1929, s. 338 (1). In 1943 K., on behalf of a partnership firm, which had been dissolved and of which he had been a partner, sought to prove on behalf of the partnership firm in the liquidation against the bank for a sum which he alleged was the balance due to the firm from the bank. In 1949 the liquidator of the bank, by leave of the registrar under s. 191 of the Act of 1929, issued the writ in the present action against the surviving partners of the partnership firm claiming payment of a consolidated balance of moneys alleged to be due to the bank on various accounts. On Jan. 9, 1950, the liquidator served notice on the said defendants rejecting the proof which K. had put forward in 1943. On Jan. 25, 1950, the defendants applied for leave to appeal out of time against the rejection of the proof, but the hearing of an appeal to the judge against the dismissal of the application by the registrar was by consent adjourned pending the determination of the present application. On Mar. 8, 1950, the defendants issued this summons for an order dismissing or staying the action or to have the name of the bank struck out on the ground that the bank was non-existent and that the action had been commenced without authority. The defendants argued that the winding-up was a nullity because the bank had never had a place of business nor carried on business in England except through agents.

HELD: (i) by applying for leave to appeal out of time against the rejection of their proof in the winding-up and having the appeal to the judge on that question adjourned until the outcome of the present proceedings was known, the defendants had not made any such election as would be inconsistent with and preclude their asserting in the present proceedings that the winding-up order was invalid.

Evans v. Bartlam ([1937] 2 All E.R. 646), *applied*.

(ii) as the bank had assets in England and there were persons submitting to the jurisdiction who were interested in the proper distribution of the assets and there was no machinery under Russian law for the due distribution of the English assets, the primary conditions for the exercise by the court of its discretionary winding-up jurisdiction under s. 338 (1) (d) (i) of the Act of 1929 existed; that jurisdiction was not limited by s. 338 (2) of the Act, which must be regarded as expository only; and it was not also necessary to show that the bank carried on business directly and from some established, or specified, place or places in England.

Re Lloyd Generale Italiano (1885) (29 Ch.D. 219), *explained*.

Russian and English Bank and Florance Montefiore Guedalla v. Baring Bros. & Co., Ltd. ([1936] 1 All E.R. 505), and *Re Russian and English Bank* ([1932] 1 Ch. 663), *applied*.

Dictum of COHEN, J., in Re Tovarishstvo Manufactur Liudvig-Rabenek ([1944] 2 All E.R. 560), considered.

Decision of HARMAN, J. (ante p. 105), affirmed.

[AS TO COMPANIES WHICH CAN BE WOUND-UP UNDER THE COMPANIES ACT, 1929, see HALSBURY, Hailsham Edn., Vol. 5, pp. 844-848, paras. 1461-1467; and FOR CASES, see DIGEST, Vol. 10, pp. 816, 817, 1206-1208, Nos. 5317-5324, 8535-8553.]

Cases referred to:

(1) *Smith v. Baker*, (1873), L.R. 8 C.P. 350; 42 L.J.C.P. 155; 28 L.T. 637; 37 J.P. 567; 5 Digest 905, 7428.

(2) *Ex parte, Robertson, Re Morton*, (1875), L.R. 20 Eq. 733; 44 L.J.Bey. 99; 32 L.T. 697; 4 Digest 24, 193.

(3) *Evans v. Bartlam*, [1937] 2 All E.R. 646; [1937] A.C. 473; 106 L.J.K.B. 568; 157 L.T. 311; Digest Supp.

(4) *Public Trustee v. Pearlberg*, [1940] 2 All E.R. 270; [1940] 2 K.B. 1; 109 L.J.K.B. 597; 164 L.T. 114; 2nd Digest Supp.

(5) *Re Tovarishstvo Manufactur Liudvig-Rabenek*, [1944] 2 All E.R. 556; [1944] Ch. 404; 113 L.J.Ch. 250; 171 L.T. 66; 2nd Digest Supp.

(6) *Re Lloyd Generale Italiano*, (1885), 29 Ch.D. 219; 54 L.J.Ch. 748; 10 Digest 1208, 8549.

(7) *Re Russian and English Bank*, [1932] 1 Ch. 663; 101 L.J.Ch. 226; 147 L.T. 57; Digest Supp.

(8) *Russian and English Bank and Florance Montefiore Guedalla v. Baring Bros. & Co., Ltd.*, [1936] 1 All E.R. 505; [1936] A.C. 405; 105 L.J.Ch. 174; 154 L.T. 602; Digest Supp.

APPEAL by the defendants from an order of HARMAN, J., dated May 17, 1950, and reported *ante*, p. 105.

In an action by the Banque des Marchands de Moscou, in liquidation, the defendants applied by summons for an order dismissing the action, or an order that all further proceedings in the action be stayed, or that the name of the alleged plaintiff be struck out so as to bring the action to an end, on the ground that the alleged plaintiff was non-existent and that the action had been commenced without authority. HARMAN, J., dismissed the application.

Russell, K.C., and *R. Gwyn Rees* for the defendants, the surviving partners of the firm of Lazard Bros. & Co.

Upjohn, K.C., and *Raymond Walton* for the plaintiff, the Banque des Marchands de Moscou (in liquidation).

Cur. adv. vult.

July 14. The following judgment of **SIR RAYMOND EVERSHED, M.R.**, was read by SINGLETON, L.J. This is an action for £28,990 11s. 1d., money alleged to be due to the plaintiffs (hereafter called "the plaintiff bank") from the defendants, who were the partners at the material date of the firm of Lazard Bros. & Co. The moneys are alleged to be due on an account of long standing between the plaintiff bank and Lazard Bros. & Co. After close of pleadings, the defendants applied by summons in the action that the name of the plaintiff bank be struck out of the action on the ground that the plaintiff bank was, at the date of the writ, a non-existent entity and that the solicitors, who appear on the record as solicitors for the plaintiff bank, had and could have had no authority whatever to issue the writ in the plaintiff bank's name. The application was refused by HARMAN, J. The present appeal is from that refusal.

The plaintiff bank is, or is said to be, in liquidation. The name "Banque des Marchands de Moscou (Koupetschesky)" is a French transliteration of the Russian name of a corporation formed in 1866 under the laws of the then Russian Empire for the purpose of carrying on in Moscow and elsewhere in Russia the business of banking. As part of its business the plaintiff bank financed, for

or on behalf of customers in Russia, the purchase in England from English cotton brokers or others of raw cotton, and the account with Lazard Bros. & Co. is said to have arisen out of or in the course of such business. It is now conceded that, as a result of decrees recognised as effective for the purpose in Russia, the plaintiff bank was dissolved, and altogether ceased as an entity to exist, in Russia at some date about and not later than January, 1918, but on May 30, 1932 (at which time the effect and dates of the relevant Russian decrees had not been established in the English courts), EVE, J., purporting to act in exercise of the jurisdiction conferred by the Companies Act, 1929, s. 338 (1) (d) (i), made in respect of the plaintiff bank a winding-up order. The present liquidator of the plaintiff bank is Mr. Owen Furnival Jones.

The defendants allege (as appears from their defence in the present action) that the account between the plaintiff bank and Lazard Bros. & Co. in truth shows that, so far from there being any moneys due from Lazard Bros. & Co., the balance is the other way and that Lazard Bros. & Co. are now creditors of the plaintiff bank for a substantial sum. In accordance with this allegation on Sept. 23, 1943, a proof was lodged by the first defendant on behalf of Lazard Bros. & Co. in the liquidation of the plaintiff bank; but this proof was rejected by the present liquidator on Jan. 9, 1950. The writ in the present action is dated Sept. 9, 1949, and the defendants' application, which is the subject of the present appeal is dated Mar. 8, 1950. On Jan. 25, 1950, Lazard Bros. & Co. had applied for leave to appeal out of time from the liquidator's rejection of their proof, and, the registrar having refused to grant leave, the defendants have now appealed to WYNN-PARRY, J. (the judge having jurisdiction in companies winding-up). By consent of both parties that appeal has been adjourned until after the determination of the present application.

It is not disputed that the appropriate leave was given by the court having jurisdiction in the winding-up to the liquidator, Mr. Furnival Jones, to institute the present proceedings. But the defendants by their summons challenge the validity of the winding-up order itself, which, though made eighteen years ago, and since substantially acted on, is (they say) not binding on them, the defendants. The ground of their challenge is this. They say that in order to give to the English court jurisdiction to wind-up a foreign corporation which has (like the plaintiff bank) been dissolved and extinguished by the law of its place of origin, it must be shown that such corporation had a branch in England or carried on in England directly by its agents and at or from some established, specified or identifiable place or places in England an English business; that EVE, J. (accepting this requirement) based his jurisdiction (as in fact he did) on evidence given before him on the part of a Mr. Czamanski to the effect that, purporting to act as servant or agent of the plaintiff bank and with its authority, in the early part of 1920 he had, pursuant to the Companies (Consolidation) Act, 1908, s. 274, filed particulars of the English business of the plaintiff bank, giving as its registered address No. 38, Lime Street in the city of London, which particulars remained on the register until their removal by Mr. Czamanski in March 1921; and that, as now appears and is conceded, the plaintiff bank having ceased to exist some time prior to the date of registration, Mr. Czamanski could then have had no authority from the plaintiff bank, with the result that such registration, on which EVE, J., exclusively relied, is now shown to have had no force and effect whatever, and that there was and is no evidence of such a carrying on of an English business by the plaintiff bank at any time as is required to support the validity of the winding-up order. The defendants also relied below on the circumstance that there had been no proper service of the winding-up petition. That objection is not, however, now pursued and may be disregarded.

The answer of the plaintiff bank or its liquidator to this challenge is of a twofold character. First, it says that the defendants, having sought to prove in the winding-up and persisting in that claim by their application for leave to appeal out of time against the rejection of their proof, cannot in these pro-

ceedings now be heard to impugn the validity of the winding-up proceedings. Secondly, it is said that although the particular matter on which EVE, J., relied in 1932 is now shown to be a broken reed, nevertheless, if there was such a condition as above mentioned to the jurisdiction to wind-up the plaintiff bank, there was, and is, sufficient evidence, apart from the purported registration in 1920, to satisfy the requirement, but that, in any case, where, as in the present case, there are (and were in 1932) substantial assets in England to administer, both in the form of cash and in the form of English debtors to the plaintiff bank and also English creditors of the plaintiff bank, there is in law no other condition required to found the jurisdiction to wind-up the dissolved plaintiff bank. More particularly, in such a case as the present it is not necessary to prove that the plaintiff bank had ceased to have an English business, as commonly understood; still less that there was some established, specified or identifiable place or places in England from which that business was conducted.

The main ground on which HARMAN, J., rested his decision was that first above-mentioned, viz., that the defendants are pursuing at one and the same time two inconsistent or incompatible courses of action. In these proceedings they are challenging the validity of the winding-up order and all the steps taken in the winding-up consequent thereon: at the same time they are seeking to assert a right to prove in the winding-up and thereby to take the benefit of the winding-up order. The judge said (*ante*, 109):

“This is an attitude of which I cannot approve, nor do I think that in law the defendants are entitled to adopt it. They are, as the Scottish lawyers have it, approbating and reprobating, or, in the more homely English phrase, blowing hot and cold.”

The phrases “approbating and reprobating” or “blowing hot and cold” are expressive and useful, but if they are used to signify a valid answer to a claim or allegation they must be defined. Otherwise the claim or allegation would be liable to be rejected on the mere ground that the conduct of the party making it was regarded by the court as unmeritorious.

From the authorities cited to us it seems to me to be clear that these phrases must be taken to express, first, that the party in question is to be treated as having made an election from which he cannot resile, and, secondly, that he will not be regarded, at least in a case such as the present, as having so elected unless he has taken a benefit under or arising out of the course of conduct which he has first pursued and with which his present action is inconsistent. These requirements appear to me to be inherent, for example, in *Smith v. Baker* (1), and *Ex parte Robertson, Re Morton* (2). See also in *Evans v. Bartlam* (3) the speech of LORD ATKIN ([1937] 2 All E.R. 649):

“I find nothing in the facts analogous to cases where a party, having obtained and enjoyed material benefit from a judgment, has been held precluded from attacking it while he still is in enjoyment of the benefit. I cannot bring myself to think that a judgment debtor, who asks for and receives a stay of execution, approbates the judgment, so as to preclude him thereafter from seeking to set it aside, whether by appeal or otherwise. Nor do I find it possible to apply the doctrine of election.”

and the speech of LORD RUSSELL OF KILLOWEN (*ibid.*, 652):

“The doctrine of approbation and reprobation requires for its foundation inconsistency of conduct, as where a man, having accepted a benefit given him by a judgment, cannot allege the invalidity of the judgment which conferred the benefit.”

Counsel for the plaintiff bank referred to the decision of this court in *Public Trustee v. Pearlberg* (4). In that case, a vendor had issued a writ claiming, exclusively, specific performance of his contract and damages in addition or substitution. While his action was still pending the vendor proceeded, pursuant

to the terms of the contract, to give to the purchaser a notice making time of the essence of the contract and intimating that unless the purchase were then completed he would rescind the contract. It was held that so long as his claim for specific performance remained outstanding the vendor could not assert an inconsistent claim to rescind. In my judgment, that case provides no analogy to, or guide in, the circumstances of the present appeal. The vendor in *Public Trustee v. Pearlberg* (4), so long as he claimed, and claimed only, in his action specific performance of the contract or damages, was necessarily asserting his willingness to perform it according to its terms, and was, moreover, inviting the court by its order to determine the date for actual completion. It followed that by maintaining his action and, at the same time, by asserting a right to state his own and a shorter time for completion, and also to rescind, the vendor was seeking to affirm and disaffirm the same contract, or to assert under the same contract two inconsistent remedies. Counsel sought to say that in like manner in the present case the defendants were seeking at the same time to affirm and disaffirm the same instrument, namely, the winding-up order. But, in my judgment, this is not so.

What are the defendants doing in this case? In one respect it is to be noted that they have, by their counsel, made clear in this court a qualification of the course of conduct which offended the learned judge. According to his judgment it appears that in the court below the defendants claimed to be entitled, even if they succeeded on their present application and could thereby successfully resist any claim by the liquidator to recover sums owing on the alleged account by the defendants, they would nevertheless still be entitled in the winding-up to prove for sums standing to their credit in the same account. It is not surprising that such an assertion was obnoxious to the judge or that he indicated the impossibility of such a position. It is, to my mind, quite clear—and counsel for the defendants has plainly so conceded—that if the defendants should succeed on their present summons and take the benefit as a consequence of having disabled the plaintiff bank from suing to recover their claims, the defendants would indubitably have elected against the winding-up and could not be allowed to prove in the liquidation. But it does not, in my judgment, follow because the defendants have sought unsuccessfully to prove and are now seeking to keep alive, pending the present appeal, their right to appeal against the rejection of their proof, that they cannot in the present proceeding seek to defeat the liquidator's claim *in limine* by challenging his right to sue. As I have just stated, if the defendants succeed in this application, that will be an end of any claim on their part in any circumstances to enjoy the benefit of the winding-up. If, however, they should fail in their present application, but succeed on the merits of their defence, I can see no ground in principle or in law why they should not then persist in their assertion of a right to be creditors in the liquidation, and to prove accordingly. The substantial case between the parties is one which depends on the proper result, as I understand it, of a complex account between them, each alleging that on a true view of it the balance is in their favour. If the plaintiff bank were not in liquidation, the defendants would, no doubt, add a counterclaim to their defence. But since the plaintiff bank is in liquidation, the only way whereby one who seeks to rank as a creditor can recover is by way of proof. It is admitted that if the defendants had been willing to accept as final the liquidator's rejection of their proof, there could be no objection on the ground under discussion to their present summons. The fact of proving, therefore, cannot constitute the alleged election. If election there has been, it must consist in their seeking to appeal out of time against the rejection, and being parties to the adjournment of such application until after the present hearing. But I cannot see that such a proceeding, merely keeping alive whatever right they may have, when the matter is heard, to appeal against rejection of their proof, can amount to an election sufficient for present purposes, or can constitute or be taken to confer a benefit, the

retention of which is inconsistent with their present application. If benefit there be, it is one derived from the rules of the court and not, as it seems to me, from the winding-up order, and brings the case by way of analogy more closely in line with the circumstances in *Evans v. Bartlam* (3).

In the ordinary case, where one party is seeking to pursue at the same time inconsistent courses of conduct, the other may be seriously embarrassed thereby, for by resisting one he may find himself inferentially conceding the other. There is in the present case plainly no such embarrassment, and I derive some support for my conclusion from the second of the grounds for rejection of proof put forward by the liquidator, namely, that the effect of the Russian Revolutionary Decrees in and after 1918 was to vest in Russian authority any claim against the plaintiff bank which the defendants might have. In my judgment, both parties to the present proceedings have made it plain that they are relying, as I think they are entitled to rely, on all defences they may have against claims on the part of the other. I, therefore, have reached a different conclusion on this matter from that of the learned judge below.

HARMAN, J., however, also expressed the opinion that the winding-up order of EVE, J., could be supported notwithstanding that, as now appears, the steps taken to effect registration of a business in this country by Mr. Czamanski, purporting to act on behalf of the bank, were taken too late, that is, at a time when his principal had ceased to exist. And on this point I agree with the learned judge. Counsel for the defendants accepted—as plainly he had to—the onus of showing, in the first instance, that the ground on which EVE, J., had relied for jurisdiction was unsound. But having so done the onus, according to counsel, then shifted; for, says he, it would be an absurd and impossible task for him to show that at no time since 1866 had the plaintiff bank ever had an English business. However that may be, I think that in a case such as the present, where the order impugned has stood for eighteen years and the rights of many people have been affected in proceedings taken on the assumption of its validity, and where, moreover, there are very substantial assets (there is a large sum of cash now held for the liquidator), numerous persons claiming as creditors and no other means of administering the affairs of the plaintiff bank in England, the court should not be slow to draw the necessary inferences from such facts as are available.

The evidence is, no doubt, somewhat slender. That is natural enough, for it is now 1950 and Mr. Czamanski, who could undoubtedly have given much information, died some time ago. HARMAN, J., said that the evidence before him was not sufficient to satisfy him that the plaintiff bank had ever in fact carried on business in England, but added that he was far from saying that such fact could not have been proved in 1932. In my judgment, and having regard to the circumstances to which I have just alluded, the necessary inference—and I am assuming that it is necessary—can and should be drawn. The evidence, in addition to the facts of the existence of assets and creditors, consists of an affidavit of this same Mr. Czamanski sworn in February, 1932. The affidavit was not sworn in the winding-up proceedings, and it was directed to a purpose wholly unconnected with the present question. The deponent's signature has, however, been identified in these proceedings and the affidavit has, pursuant to the Evidence Act, 1938, or otherwise, been accepted as admissible. Paragraphs 2 and 3 are as follows:

“(2) Prior to the revolution in Russia in 1917 I was for many years associated with the banking industry in that country, and in the year 1912 I was offered and accepted a post with the above named defendant company. The post involved my having charge of what was known as the goods section of the bank. This was the department that dealt with the financing of the bank's customers' purchases of goods from foreign countries, and some very large transactions were entered into in this connection particularly

with regard to the purchases of cotton through English merchants. This necessitated my visiting England on behalf of the bank on various occasions to conduct negotiations with firms dealing in cotton in London, Liverpool and elsewhere. In the year 1916 I was elected by a general meeting of shareholders one of the five members of the board of the Moscow Merchants Bank. The bank was incorporated under the laws of the old Russian Empire, and it had a very large business. Its head office was at Ilkina, Moscow. It had branches in Petrograd, Kieff, Kharkoff, Rostov-on-Don and Kokand. Prior to the revolution it had no branches outside Russia, and conducted its business with various foreign countries through various agents. (3) After the revolution took place in Russia the whole of the bank's assets in Russia were seized by the Soviet authorities, and it was impossible to continue to carry on business there. I and my fellow directors had to escape from Russia as best we could. I succeeded in reaching England in November, 1918, and on doing so considered what steps I could take to preserve the assets of the defendant bank in the interests of its creditors and shareholders. In consequence of my being acquainted with a number of influential English firms as a result of the business conducted by me, as set out in para. 2 of this my affidavit, I thought the best method to adopt would be to start a branch of the bank in England. At that time, I, in common with many other people, thought that the disturbances in Russia were only of a temporary character, and that ultimately the old state of affairs would be restored. It was, of course, within my knowledge that the Midland Bank had in London a very substantial amount standing to the credit of the defendant bank. I was advised by English solicitors, who were then acting for me, Messrs. Roney & Co., of New Broad Street, London, to effect the registration of the defendant company as a company carrying on business in England. I understand that the necessary steps were taken by them and that the registration was, in fact, effected. The address registered was 38, Lime Street in the city of London where it was my intention to carry on the business of the bank."

In my judgment, the proper inference from para. 2 is that from 1912 onwards Mr. Czamanski was doing business, in the ordinary acceptation of that phrase, on behalf of his principal, the plaintiff bank, in England with persons resident here, and although there is no evidence on the point one way or the other it seems to me impossible to resist the conclusion that in some degree the assets now available and the creditors now claiming to participate in the winding-up should be attributed to this business conducted in England. I cannot attach to the fact that (as stated by him) Mr. Czamanski's "business" is described as "conducting negotiations with English firms" or to the statement that, prior to the revolution, the plaintiff bank conducted its business with foreign countries "through" as distinct from "by" various agents, the significance, as counsel for the defendants would have me do, that the plaintiff bank had not itself and directly any "business" in England at all. It seems to me that the references in para. 3 to the steps taken by Mr. Czamanski "to preserve the assets" of the plaintiff bank and to his acquaintance with influential English firms "as a result of the business conducted by me" point strongly in the other direction, and go far to show that the use Mr. Czamanski sought to make (futile as it now turns out) of the Companies (Consolidation) Act, 1908, s. 274, was with a view to maintaining and "preserving," until (as he thought) better days should come, a goodwill and business connection belonging to the plaintiff bank which already existed. It is true that there is no evidence of the establishment, prior to 1918, of anything in the nature of a "branch" or any specific or regular "place" of business in this country. But, if I am right in concluding that Mr. Czamanski on the occasion of his visits to this country did in fact transact the business of the plaintiff bank, then he must have done so at or

from some "place." In circumstances not dissimilar, COHEN, J., held in the *Rabenek* case (*Re Tovarishestvo Manufactur Liudvig-Rabenek* (5)), that, assuming a specific or identifiable "place" of business was requisite, the Midland Hotel, Manchester (where the Rabenek company's agents stayed when visiting England on their principal's business) sufficiently answered the description: and counsel for the defendants did not challenge the correctness of COHEN, J.'s decision. Mr. Czamanski may have varied his patronage; but whether or not he did, there must, in my opinion, have been a "place" or "places" of business in this country as a matter of principle no less satisfactory than was the Midland Hotel, Manchester, in the *Rabenek* case (5).

I, therefore, am of opinion that, if proof of the conduct of business in England by the plaintiff bank is a condition necessary to the existence of jurisdiction in the English courts to wind-up the plaintiff bank, that condition is, on the evidence, satisfied. I agree, however, with HARMAN, J., that in the case of a foreign corporation (such as the plaintiff bank) which has, *ex hypothesi*, been dissolved and extinguished in the country where it was established, it is not necessary, as a statutory condition of jurisdiction in the English courts to wind it up, to prove that it had, prior to its dissolution, established at some place in England a branch or other business and that such business had ceased.

The winding-up order made in the present case was made (as already stated) in pursuance—or purported pursuance—of sub-s. (1) (d) (i) and not under sub-s. (2) of s. 338 of the Act of 1929 (now respectively ss. 399 (5) (a) and 400 of the Act of 1948): and so far as I am aware all winding-up orders in like cases have been similarly made. It will be convenient to deal first with the scope of, and jurisdiction conferred by, sub-s. (1) (d) (i) without regard to the effect on the construction of the section of sub-s. (2) which, having been first enacted as s. 91 of the Companies Act, 1928, was introduced by the consolidating Act of 1929 into our winding-up legislation. Section 338 (1) of the Act of 1929 provided:

"(d) The circumstances in which an unregistered company may be wound-up are as follows:—(i) If the company is dissolved, or has ceased to carry on business, or is carrying on business only for the purpose of winding-up its affairs . . ."

This form of words is substantially identical with that which has consistently appeared in all the relevant legislation since the Act of 1848 (11 and 12 Vict., c. 45). As a matter of language it is plain that the three conditions named are independent and not cumulative. Assuming, therefore, in the case of a foreign corporation, which has by its local law been extinguished, that it is covered by the words "is dissolved"—which words must, as it is conceded, be taken to mean "has been dissolved"—it would appear from the language used that no other condition has to be fulfilled in order to confer on the English court jurisdiction to wind it up.

As a matter of general principle, our courts would not assume, and Parliament should not be taken to have intended to confer, jurisdiction over matters which naturally and properly lie within the competence of the courts of other countries. There must be assets here to administer and persons subject, or at least submitting, to the jurisdiction who are concerned or interested in the proper distribution of the assets. And when these conditions are present the exercise of the jurisdiction remains discretionary. *Prima facie*, if the local law of the dissolved foreign corporation provided for the due administration of all the property and assets of the corporation wherever situate among the persons properly entitled to participate therein, the case would not be one for interference by the machinery of the English courts. In the present case; there are substantial assets standing in the name of the plaintiff bank or its liquidator, and there are persons within the jurisdiction having claims to participate in the distribution of those assets. At the same time, by reason of the total extinction

A in Russia of the plaintiff bank and the absence of any machinery under Russian law for the due distribution of the assets among the persons regarded as properly having claims on them, the result is that, unless the machinery of winding-up under the Companies Act is available, no means of any kind exist for the administration of the English assets. The existence of assets here, the presence here of persons claiming as creditors of the plaintiff bank or said to be indebted to it, seem to constitute at least the *indicia* of a business in some sense formerly conducted here. Where, therefore, the circumstances exist which, on the general principle above referred to, would make the case appropriate for the exercise by our court of its winding-up jurisdiction, it would appear that the question whether the foreign corporation carried on business in this country would generally be academic unless it is also necessary to show that such business was carried on directly and from some established, or specified, place or places in this country.

B The question was considered by COHEN, J., in the *Rabenek* case (5). In that case, it was not disputed that the dissolved Russian company had formerly carried on business in England; but it was argued for the Crown (who appeared on the petition) that it was necessary to show, in order to found jurisdiction to wind-up the company, that the company had had an office or other established place of business in this country. The learned judge, in my opinion rightly, rejected that argument. But the learned judge was also of opinion that the dissolved foreign or unregistered corporation must have had a "place" of business in this country of some kind. The learned judge said ([1944] 2 All E.R. 560):

D " . . . the provisions of s. 338 (1) in my opinion make it clear that an unregistered company cannot be wound-up under Part X of the Act unless it has a place, not an established place, of business in Great Britain, for unless it has such a place of business, no question can arise as to whether the place of business in England or the place of business in Scotland is the principal place of business."

E In the case before him the learned judge was able to surmount the difficulties in the petitioner's way by arriving at the somewhat artificial conclusion that the Midland Hotel, Manchester (where the company's agents were proved to have stayed when visiting England and transacting business) must be treated as having been the company's "place" of business in England, and I have already given my reasons for thinking that, if this requirement must be satisfied in the present case, then, since Mr. Czamanski has stated that he visited England from time to time on the business of the plaintiff bank and must, on such occasions, have stayed somewhere in England, it is sufficient that the place or places (though unspecified) where he stayed constituted the plaintiff bank's place or places of business in England. But, in my judgment, it is not necessary, F in order to found jurisdiction, to prove that the dissolved foreign corporation had any specified or identifiable "place" or "places" of business in England. G It is true that in paras. (a) and (b) of s. 338 (1) reference is made to the consequences which follow "if it has a principle place of business" in England or Scotland or both. But it does not, in my judgment, follow that the courts in England (or Scotland) have no jurisdiction to wind-up a dissolved foreign corporation if it is not shown to have had a principal or any place of business H in either.

In the *Rabenek* case (5), COHEN, J., referred to *Re Lloyd Generale Italiano* (6), and quoted at length the judgment in that case of PEARSON, J. That judgment, and more particularly this sentence in it (29 Ch.D. 220):

"I am decidedly of opinion that the Act is confined to English companies, and foreign companies carrying on business in England with, so to speak, a residence of their own—a branch office—in this country,"

has constituted the authority for the view expressed by the textbook writers, that the existence of such a "residence" was necessary to found the jurisdiction of our courts to wind-up a dissolved foreign corporation. Thus it is, for example, stated in *BUCKLEY ON THE COMPANIES ACTS*, 7th ed. (1897), edited by the author, at p. 466, that:

"... there is no jurisdiction to wind-up a company established in a foreign jurisdiction which has no office or branch in this country but which carries on business here by means of agents."

And (to take a modern example) in *PALMER'S COMPANY LAW*, 15th ed. (1933), edited by JUDGE TOPHAM and A. M. R. TOPHAM, at p. 473, occurs the sentence:

"Before 1929 a company which had been carrying on business in England through an agent but without any branch in this country, could not be wound-up in England, though it was being wound-up abroad."

In both cases the sole authority for the view expressed is *Re Lloyd Generale Italiano* (6). As observed by COHEN, J., not only in the case cited had there been no place of business of any kind in England, but there were no assets in England—nothing which the English court could in any case administer. In my judgment, *Re Lloyd Generale Italiano* (6) ought not to be regarded as an authority for the view that proof of the existence of a "place" of business in England, whether established or otherwise, is a condition to the existence of jurisdiction in the English court to wind-up a dissolved foreign corporation.

I have so far discussed the matter by reference only to sub-s. (1) of s. 338 and without regard to sub-s. (2). The latter sub-section provides:

"Where a company incorporated outside Great Britain which has been carrying on business in Great Britain ceases to carry on business in Great Britain, it may be wound-up as an unregistered company under this Part of this Act, notwithstanding that it has been dissolved or otherwise ceased to exist as a company under or by virtue of the laws of the country under which it was incorporated."

There can be no doubt, having regard to the history of the sub-section, that it was enacted with particular reference to the problems which arose as a result of the Russian revolutionary legislation affecting Russian corporations. And, if the matter were free from authority, there would, as it seems to me, be much to be said for the argument that, sub-s. (2) having been introduced into the section, that sub-section and sub-s. (1) must be read and construed together, with the result that, notwithstanding the wide and general terms of sub-s. (1) (d) (i), all cases (and particularly the Russian cases) falling within the terms of sub-s. (2) must be treated as governed exclusively by that sub-section, and subject, therefore, to the limitation (whatever might be its effect) of the phrase "which has been carrying on business in Great Britain, etc." When *Re Russian and English Bank* (7) came before BENNETT, J., that learned judge was of opinion that the words "ceases to carry on business in Great Britain" must be strictly construed to refer only to the future. He held, therefore, that the sub-section could have no application to a case where the Russian company concerned had long since ceased to carry on such business, and, treating the sub-section as not intended to alter the existing law, made a winding-up order under sub-s. (1) (d) (i), a precedent which appears, as I have said, to have since been consistently followed. The latter part of BENNETT, J.'s conclusion (though not the former) was accepted by COHEN, J., in the *Rabenek* case (5), and has also received support in the House of Lords in *Russian and English Bank and Florance Montefiore Guedalla v. Baring Bros. & Co., Ltd.* (8) in which it was decided that where a winding-up order has been made in regard to a dissolved Russian corporation, and the necessary leave has been obtained (as in the present case) from the registrar in companies winding-up, the liquidator can bring an action

in the name of the foreign corporation notwithstanding that it is a mere *nominis umbra*, and has altogether ceased as an entity to exist.

Before referring to the speeches in the *Baring Bros.* case (8), I would observe that the construction placed on sub-s. (2) by BENNETT, J., seems to involve the notion that a foreign corporation which has been "dissolved or otherwise ceased to exist as a company" may still be regarded as carrying on business in this country. And, as JENKINS, L.J., stated during the course of the argument, A having regard to the uncertainty which existed in 1928 and 1929 as regards the effect of the Russian revolutionary decrees, it may not be irrational to suppose that Parliament was intending to provide that for the purposes of winding-up jurisdiction, steps taken to establish and register businesses in this country in the names of Russian corporations should not be treated as ineffective on the ground merely that such corporation and the authority purported to be B exercised on their behalf had already ceased to exist. On that view of the sub-section, the winding-up order of EVE, J., in 1932 could not be impeached on the ground that Mr. Czamanski in 1920 had, as now appears, no authority to do what he then did. It is, in my judgment, unnecessary to pursue these matters further.

I turn first to the speech in the *Baring Bros.* case (8) of LORD BLANESBURGH. C After referring to the view of BENNETT, J., of the meaning to be attributed to the phrase in s. 338 (2) of the Companies Act, 1929, "ceases to carry on business in Great Britain" LORD BLANESBURGH said ([1936] 1 All E.R. 510):

"My Lords, I am not prepared, as at present advised, to take so strict a view of the sub-section. I can see no reason, in principle, for a line of demarcation so arbitrary: nor am I forgetful, although its effectiveness was D thereby held in reserve, that the sub-section had appeared in the Act of 1928. It must also be remembered in relation to a measure of pure consolidation like the Act of 1929, that normally the date of its commencement is, subject, of course, to any unambiguous direction in any particular instance, the most irrelevant of dates for any effective purpose."

E From LORD ATKIN's speech, I venture to quote at greater length. Referring to the Russian revolutionary legislation he said (*ibid.*, 515):

"The material date is said to be some time in the year 1918. The resulting position was embarrassing. There were what appeared to be assets in this country, some doubtless acquired during the period of trading by the nonentity: there were creditors of the pre-dissolution and post-dissolution period. The obvious course was to wind-up the companies, F if that could be done. By the Companies Act, 1862, s. 199, there was power to wind-up unregistered companies 'whenever the company is dissolved or has ceased to carry on business or is carrying on business only for the purpose of winding up its affairs.' Under this provision it was accepted law that the courts could order a winding-up of a company G incorporated abroad which had carried on business in this country. But there had been no decision as to the power to wind-up an incorporated company which had in fact been dissolved though there may have been a very occasional order made in such cases without any direct notice of the point. It was in these circumstances, and I have no doubt with direct reference to the difficulties as to the Russian banks disclosed by the litigation to which I have referred, that the legislature in the Companies Act, H 1928, an amending Act, s. 91, provided: 'where a company incorporated outside Great Britain which has been carrying on business in Great Britain ceases to carry on business in Great Britain it may be wound-up as an unregistered company . . . notwithstanding that it has been dissolved or otherwise ceased to exist as a company under or by virtue of the laws of the country under which it was incorporated.' The section is now found in the Companies Act, 1929, the consolidation Act, in Part X, entitled

'Winding-up of unregistered companies' as sub-s. (2) of s. 338. Section 338 (1) enacts: 'Subject to the provisions of this Part of this Act, any unregistered company may be wound-up under this Act, and all the provisions of this Act with respect to winding-up shall apply to an unregistered company.' . . . Sub-section (1) (d), repeating the provisions of the Act of 1862, s. 199, and the similar s. 268 of the Act of 1908, provides: '(d) the circumstances in which an unregistered company may be wound up are as follows:—(i) if the company is dissolved, or has ceased to carry on business, or is carrying on business only for the purpose of winding-up its affairs'. I for myself come to the conclusion that s. 91 of the Act of 1928 was introduced as s. 338 (2) into the Act of 1929 for the removing of doubts and to make it clear that the words 'if the company is dissolved' were meant to apply to an incorporated company dissolved according to the law of its constitution, and not intended to give a new enabling power only applicable to a company which should cease to carry on business after the passing of the Act. Such a construction would in fact in reference to the Russian banks have defeated the immediate object of the legislature."

As regards the "doubts" which LORD ATKIN thought were intended to be removed by what became sub-s. (2) of s. 338 of the Act of 1929, it is to be remembered that the word "dissolved", which, as I have already observed, has consistently appeared in all our legislation for the winding-up of companies since 1848, took its rise from the old partnership conception, and might, therefore, reasonably be taken to refer to the step or process of dissolution as understood in partnership affairs as distinct from the final extinction of the corporate entity. I refer finally to the speech of LORD MACMILLAN in the *Baring Bros.* case (8) (*ibid.*, 525):

"Now the purpose of pronouncing a winding-up order is to secure the collection and distribution of the assets of the company to which it relates. The logical inquirer may ask how a company which has ceased to exist can have any assets. But when the legislature authorized the making of a winding-up order in the case of a dissolved company, it must be presumed to have intended such order to be effective and to result in the collection and distribution of assets. To hold that the legislature has authorised the collection of the assets of a dissolved company, but has withheld the power of recovering these assets, would be to attribute a singular ineptitude to Parliament."

In the light of the judicial pronouncements to which I have referred in the House of Lords, and also by COHEN, J., and BENNETT, J., Parliament re-enacted in ss. 399 and 400 of the Companies Act, 1948, the exact language of sub-ss. (1) and (2) of s. 338 of the Act of 1929. It follows, in my judgment, that sub-s. (2) of s. 338 must be regarded as expository only, and as not having been intended to give jurisdiction to wind-up dissolved foreign corporations (such as the plaintiff bank) subject to special limiting conditions not applicable to the more general jurisdiction conferred by sub-s. (1); and that by the opening words in sub-s. (2) "where a company incorporated outside Great Britain which has been carrying on a business in Great Britain" and so on is intended (subject to the suggestion of JENKINS, L.J.), no more than a reference to the fact that some commercial subject-matter on which a winding-up order can operate is a natural and necessary requisite for the exercise of winding-up jurisdiction.

In my judgment, therefore, the language of sub-s. (2) does not qualify the conclusion which I have reached on sub-s. (1). I think that in circumstances such as exist in the present case it is unnecessary as a foundation for a winding-up order to prove that the plaintiff bank had any branch or office in England or carried on its business operations in England from some established or specific

or identifiable place of business, and that EVE, J., had jurisdiction to make the order which he did make in May, 1932, apart from the matter on which he expressly relied. It follows from the *Baring Bros.* case (8)—and it is not disputed—that the present liquidator was entitled to institute the action in the name of the plaintiff bank, and that the defendants' application fails.

A I refer in conclusion to one other matter. On the hearing in 1932 of the winding-up petition by EVE, J., the Crown was represented as interested in *bona vacantia*. I asked during the hearing of the appeal whether the Crown desired again to be represented. Counsel for the plaintiff bank read to us a letter from the Treasury Solicitor stating that the Crown did not desire to appear separately, but was content that the matter should be argued by counsel for the liquidator. For the reasons I have given, I think the appeal should be dismissed.

B SINGLETON, L.J.: I agree with the judgment of the Master of the Rolls and I do not wish to add anything.

JENKINS, L.J.: I also agree and have not anything to add.

Appeal dismissed with costs.

C Solicitors: *Linklater & Paines* (for the defendants); *Slaughter & May* (for the plaintiff).

[Reported by F. GUTTMAN, ESQ., Barrister-at-Law.]

D

MOORE v. RAY AND ANOTHER.

[KING'S BENCH DIVISION (Lord Goddard, C.J., Hilbery and Byrne, JJ.), July 20, 21, 1950.]

E *Food and Drugs—Proceedings against third party—Information by retailer against supplier—Need for retailer to prove contravention of Act by supplier—Food and Drugs Act, 1938 (c. 56), s. 83 (1).*

Food and Drugs—Selling to the prejudice of the purchaser—Information—Validity—Charge of selling milk “not of the nature, substance, and quality” of the article demanded—Food and Drugs Act, 1938 (c. 56), s. 3 (1).

F The first respondent was summoned under s. 3 (1) of the Food and Drugs Act, 1938, for selling “a certain article of food, namely milk, which was not of the nature, substance and quality of the article demanded by the purchaser.” Under s. 38 (1) of the Act the first respondent laid an information against the second respondents who had supplied him with the milk. It was proved that water had been added to the milk, but the justices were of opinion that there was a reasonable doubt who had added the water and acquitted both respondents.

G HELD: although the justices found that the first respondent had not added water to the milk he was not entitled to be acquitted under s. 83 (1) unless he proved that the contravention of the Act charged was due to the act or default of the second respondents or their servant, and also that he (the first respondent) had used due diligence to secure compliance with the provisions of the Act, and, if he failed to do this, he must be convicted of an offence under s. 3 (1).

H *Per curiam*: The charge that a certain article of food was sold which was “not of the nature, substance and quality of the article demanded,” disclosed more than one offence, and was, therefore, bad as being contrary to s. 10 of the Summary Jurisdiction Act, 1848.

Bastin v. Davies ([1950] 1 All E.R. 1095), *applied*.

[FOR THE FOOD AND DRUGS ACT, 1938, s. 3 and s. 83, see HALSBURY'S STATUTES, Second Edn., Vol. 10, p. 386 and p. 458, respectively.

AS TO CONTENTS OF INFORMATION AS TO OFFENCES, see HALSBURY, Hailsham Edn., Vol. 21, p. 599, para. 1044; and FOR CASES, see DIGEST, Vol. 33, pp. 322, 323, Nos. 367-381.]

Cases referred to:

(1) *Bastin v. Davies*, [1950] 1 All E.R. 1095; 114 J.P. 302.

CASE STATED by Lancashire justices.

On Mar. 15, 1950, at a court of summary jurisdiction sitting at Warrington, an information was referred by the appellant, a sampling officer, against the first respondent, David Ray, that he did through his servant and agent unlawfully sell to the prejudice of the appellant a certain article of food, namely, milk, which was not of the nature, substance and quality demanded by the purchaser, contrary to s. 3 (1) of the Food and Drugs Act, 1938. Availing himself of the defence provided by s. 83 (1) of the Act the first respondent laid an information against the second respondents, Percy L. Rigby & Sons, Ltd., the suppliers of the milk, alleging that the contravention of the Act was due to the act or default of them or their servants. At the hearing it was proved that the sample contained added water and that the milk had not been interfered with while it was in the possession of the first respondent. The second respondents called evidence to show that water could not have got into the milk at their factory, but that a lorry driver had loaded the milk in cans which were not locked on a lorry which he had left unattended in the open near his home all night, and had delivered the milk to the first respondent on the following morning. For the appellant it was contended that, as the milk contained extraneous water, one of the respondents must be held responsible under the Act. For the first respondent it was contended that the extraneous water could not have got in the milk while in his possession, that the contravention was due to the act or default of the second respondents, and that he had used all due diligence to secure compliance with the provisions of the Act. The justices, being of the opinion that there was a reasonable doubt as to who was responsible for the presence in the milk of the extraneous water, dismissed both informations.

Cantley for the appellant.

Stenham for the first respondent.

The second respondents did not appear.

LORD GODDARD, C.J.: The first respondent was summoned for an offence under s. 3 (1) of the Food and Drugs Act, 1938, and he availed himself of the provisions of s. 83 (1) of the Act and laid an information against the second respondents, alleging that they were the persons responsible for the contravention in respect of which he was summoned. That sub-section provides:

"A person against whom proceedings are brought under this Act shall, upon information duly laid by him and on giving to the prosecution not less than three clear days' notice of his intention, be entitled to have any person to whose act or default he alleges that the contravention of the provisions in question was due brought before the court in the proceedings, and, if, after the contravention has been proved, the original defendant proves that the contravention was due to the act or default of that other person, that other person may be convicted of the offence, and, if the original defendant further proves that he has used all due diligence to secure that the provisions in question were complied with, he shall be acquitted of the offence."

So, two people can be convicted—the original defendant, if he has not used all due diligence, and the person guilty of the actual contravention—or the original defendant can escape conviction and (if the original defendant has used all due diligence) the person who is responsible for the contravention alone can be convicted.

The justices in the present case found that the first respondent did not add the water, but I do not know whether they appreciated that, unless he could prove that the second respondents were guilty of the contravention, he must be convicted, because he did, in fact, sell an article to the prejudice of the purchaser. It may be that the justices thought that they had to find either that the first respondent or that the second respondents had added water by one of their servants. That, however, is not what the Act provides. Even if the justices
A did not think that the first respondent added water, he had no defence under s. 83 (1) to this prosecution unless he could also show, not only that he acted with all due diligence, but that the second respondents had committed the offence. I think, therefore, this case must go back to the justices with the direction that, if they cannot find that the first respondent has proved that the contravention was due to the act or default of the second respondents or their servant, they
B must convict the first respondent. If they find that he has satisfied them that the contravention was due to the act or default of the second respondents or their servant and that he (the first respondent) used all due diligence to secure that the provisions of the Act were complied with, they should convict the second respondents and not the first respondent. The costs of this Special Case ought to depend on the result. Whoever is ultimately convicted should pay the costs of
C this appeal.

There is another thing I must say about this case. It has for many years been common form to lay informations under the Food and Drugs Acts as they were laid in this case, i.e., to charge "unlawfully selling to the prejudice of the purchaser a certain article of food which was not of the nature, substance and quality of the article demanded by the purchaser." Section 3 (1) is in these words:

D "If a person sells to the prejudice of the purchaser any food or drug which is not of the nature, or not of the substance, or not of the quality, of the food or drug demanded by the purchaser . . ."

he shall be guilty of an offence. He may be guilty of an offence if he sells something which offends against the statute in any one of three different respects or
E in all of those respects, but, as we pointed out in *Bastin v. Davies* (1), there are three separate offences, and the defendant is entitled to know in which respect he is said to have offended against the section—whether the article sold is alleged to have been not of the nature, or not of the substance, or not of the quality, demanded. In *Bastin v. Davies* (1) an information was preferred against the respondent charging him with having sold "to the prejudice of the purchaser . . .
F a certain article of food . . . which was not of the nature or not of the substance or not of the quality demanded . . ." We held that the information disclosed more than one offence, and, therefore, was bad as being contrary to s. 10 of the Summary Jurisdiction Act, 1848. I think the same objection applies if the word "and" is used instead of the word "or," because the section does not say "which is not of the nature, and not of the substance, and not of the quality." It says: "not of the nature, or not of the substance, or not of the quality."
G In future clerks to magistrates, sampling officers, and inspectors should know that they must state in which respect it is alleged that the offence has been committed. If they are in doubt, they can lay more than one information. As that point is not taken to-day, we do not give a formal ruling on it. I merely state that for the guidance and information of these inspectors and clerks to
H magistrates.

HILBERY, J.: I agree.

BYRNE, J.: I agree.

Case remitted.

Solicitors: *Norton, Rose, Greenwell & Co.*, agents for *Sir R. H. Adcock*, Preston (for the appellant); *Bentleys, Stokes & Lowless*, agents for *Steels*, Warrington (for the respondents).

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

LEGGATE v. BROWN.

[KING'S BENCH DIVISION (Lord Goddard, C.J., Hilbery and Byrne, JJ.), July 19, 1950.]

Street Traffic—Driving uninsured motor vehicle—Validity of policy—Policy covering facts constituting offence against Road Traffic Acts—Use of tractor with two trailers covered—Road Traffic Act, 1930 (c. 43), s. 18 (1), s. 35 (1).

An insurance policy indemnified the appellant "against liability at law for compensation and claimant's costs and expenses in respect of (1) death of or bodily injury to any person caused by or arising out of the use of" his tractor, and it was expressly declared to be operative while the tractor was drawing two trailers. The tractor was on a highway drawing two trailers which were both laden, in contravention of the Road Traffic Act, 1930, s. 18 (1). The owner was convicted under s. 35 (1) of the Act for using the vehicle on a highway without there being in force in relation to its user such an insurance policy or security against third party risks as complied with Part II of the Act, on the ground that the indemnity contained in the policy was against the consequences of an illegal act, and was, therefore, void as being against public policy.

HELD: the policy was valid because it insured the appellant, not against the consequences of the illegal user of the tractor, but against the consequences of its being negligently driven.

[AS TO THE COMPULSORY INSURANCE OF MOTOR VEHICLES, see HALSBURY, Hailsham Edn., Vol. 18, pp. 560-562, paras. 907-909; and FOR CASES, see Digest Supp.]

Cases referred to:

- (1) *Burrows v. Rhodes*, [1889] 1 Q.B. 816; 68 L.J.K.B. 545; 80 L.T. 591; 63 J.P. 532; 42 Digest 980, 112.
- (2) *Tinline v. White Cross Insurance*, [1921] 3 K.B. 327; 90 L.J.K.B. 1118; 125 L.T. 632; 29 Digest 408, 3214.
- (3) *James v. British General Insurance Co.*, [1927] 2 K.B. 311; 96 L.J.K.B. 729; 137 L.T. 156; Digest Supp.
- (4) *Haseldine v. Hosken*, [1933] 1 K.B. 822; 102 L.J.K.B. 441; 148 L.T. 510; Digest Supp.
- (5) *Askey v. Golden Wine Co., Ltd.*, [1948] 2 All E.R. 35; 2nd Digest Supp.

CASE STATED by Lincoln (Parts of Holland) justices.

The respondent, an inspector of police, preferred an information against the appellant, a farmer, charging him with having, on Feb. 15, 1950, at Fishtoft in the Parts of Holland, unlawfully used a motor tractor on a road, there not being in force in relation to the user of the vehicle a policy of insurance or such a security in respect of third party risks as complied with the requirements of the Road Traffic Act, 1930, contrary to s. 35 (1) of that Act. The information was heard by a court of summary jurisdiction sitting at Boston on Mar. 15 and 29, 1950. It appeared that the insurance policy held by the appellant permitted two loaded trailers to be attached to the vehicle, but it was contended by the respondent that, as the appellant was using his tractor in an illegal manner by towing two loaded trailers on the highway in contravention of s. 18 (1) (b) of the Road Traffic Act, 1930, he was not covered in respect of such user by his insurance policy, since an indemnity against the consequences of an illegal act was void as being contrary to public policy. For the appellant it was contended that he was covered by the policy when two loaded trailers were attached to the tractor, that a third party suffering injury while the tractor was being so used would have been entitled to recover damages from the insurers under the Road Traffic Act, 1934, s. 10 (1), and that an indemnity against the consequences of an unlawful user of the tractor was not contrary to public policy because it was the intention of the Road Traffic Acts that insurance cover should be provided in respect of all third

party risks arising out of the use of vehicles on highways. The justices found the offence proved and imposed a fine of £3. The appellant appealed.

Niall MacDermot for the appellant.

T. R. F. Butler for the respondent.

LORD GODDARD, C.J.: This is a Case stated by justices for the county of Lincoln (Parts of Holland) who convicted the appellant of driving a motor vehicle without a policy against third party risks being in force in respect of that vehicle. In the opinion of the court, the justices were wrong, but I hope they will not think it is any reflection upon them when I say that. All courts go wrong at times. In many cases arising under s. 35 (1) of the Road Traffic Act, 1930, justices are faced with questions of insurance law, and some ingenious advocate takes a point which is often well calculated to confuse justices who are not trained lawyers. Points which might properly be discussed in the commercial court are discussed in a court of summary jurisdiction, and justices are asked to decide questions of first importance in insurance law.

An ordinary policy of insurance was issued to the appellant in respect of his tractor, insuring him, as the Act requires, against the consequences of the negligent driving of the tractor. So far as a third person was concerned, the insurers under the policy undertook to indemnify the appellant

“against liability at law for compensation and claimant’s costs and expenses in respect of (1) death of or bodily injury to any person caused by or arising out of the use of any vehicle described in the schedule hereto (including the loading and/or unloading of such vehicle).”

There was an endorsement on the policy which enabled the tractor to be used with two trailers.

It is an offence against the Road Traffic Act, 1930, s. 18 (1), for a trailer to draw two laden trailers. When this vehicle was being driven on the road and was stopped by the police it was drawing two trailers and they were both laden. The policy says nothing about laden trailers. It simply allows the vehicle to be used with two trailers, and, whatever else this policy does, it certainly does not insure the appellant against the consequences of using the tractor in that manner. If the policy had insured him against using the tractor illegally, to that extent it would have been ineffective, but I am far from saying that such a term would have vitiated the whole policy. There may be more than one insurance contained in a policy, and if it were possible to imagine an insurance company insuring a person against the consequences of a breach of the Road Traffic Acts—which has nothing to do with injury to third persons—I daresay that that part of the policy would be void. This, however, is an insurance against the consequences that may arise owing to the negligent driving of the vehicle, because a third party can only claim if there has been negligent driving. If there has been negligent driving, it matters not whether there were two trailers behind the tractor or whether there were no trailers behind it. If a tractor is driven negligently, an injured person has a right to compensation, and under this policy the insurance company promise to indemnify the appellant. This is nothing more than a policy which insures the appellant against the consequences of negligent driving. There is nothing illegal in that, and, in my opinion, this conviction should be quashed.

HILBERY, J.: I agree.

BYRNE, J.: I agree.

Appeal allowed with costs.

Solicitors: *Lee, Bolton & Lee*, agents for *Roythorne & Co.*, Boston (for the appellant); *Theodore Goddard & Co.*, agents for *Dyer, Marris & Frost*, Boston (for the respondent).

[Reported by F. A. AMIES, Esq., Barrister-at-Law.]

LONDON GENERAL CAB CO., LTD. v. INLAND REVENUE COMMISSIONERS.

[CHANCERY DIVISION (Vaisey, J.), July 12, 13, 1950.]

Profits Tax—Exemption—Statutory undertaker—“Authorised person” limited by enactment as regards charge for service—Carriage of passengers by road—Taxi-cab proprietors—Cabs licensed under statute—Maximum fares prescribed—Relationship between driver and company that of bailee and bailor of cab—Finance Act, 1937 (c. 54), s. 19 (5).

The Finance Act, 1937, s. 19 (1), as amended by the Finance Act, 1946, s. 44, provides for the imposition of profits tax on the trading profits of all trades and businesses of any description carried on in the United Kingdom. Sub-section (5) of s. 19 exempts from the tax, *inter alia*, the profits of a trade or business carried on by statutory undertakers and consisting wholly or mainly in the rendering of any of the various services therein set out, including the carriage of passengers by road, the expression “statutory undertakers” being defined as meaning “any local or public authority authorised by or by virtue of any enactment to render any of the services aforesaid . . . and any other person so authorised who is precluded by or by virtue of any enactment from charging any higher price for those services than that authorised by or by virtue of the enactment . . .”

The taxpayers, a company who carried on the business of taxi-cab proprietors, owned a fleet of some four hundred cabs which were licensed to ply for hire by the Commissioner of Police under s. 6 of the Metropolitan Public Carriage Act, 1869, and the London Cab Order, 1934 (S.R. & O., 1934, No. 1346), and the maximum fares which could be charged were thereby prescribed. The cabs were driven by licensed drivers who were not engaged under any contract of employment, but drove the cabs under an arrangement whereby they paid to the taxpayers a proportion of the money received by them as fares from passengers. The taxpayers bore the expenses of supplying, maintaining, insuring and running the taxi-cabs, and they also prescribed the hours of work of the drivers and had power to prescribe the district in which they were to work. It was admitted that for certain purposes the relationship between the taxpayers and the drivers was that of bailors and bailees. The taxpayers claimed that they, being the owners of registered and licensed vehicles, the fares of which were authorised by an enactment, were statutory undertakers in the trade or business of rendering the service of carriage of passengers by road, and that, as such undertakers, they were exempt from profits tax.

HELD: it being admitted that for certain purposes the relationship between the taxpayers and the drivers was that of bailor and bailee, if the service of carriage of passengers by road was being rendered at all, it was the drivers, and not the taxpayers who rendered it; but, even assuming that the taxpayers were rendering the service, they were not statutory undertakers within the meaning of the Finance Act, 1937, s. 19 (5), since the “authorisation” under s. 6 of the Metropolitan Public Carriage Act, 1869, and the London Cab Order, 1934, was not the kind of authorisation envisaged by s. 19 (5).

[FOR THE FINANCE ACT, 1937, s. 19 (5), as amended by the Finance Act, 1946, s. 44, THE FINANCE ACT, 1947, s. 30 (1) (b), and THE FINANCE (No. 2) ACT, 1947, s. 7 (1), see HALSBURY'S STATUTES, Second Edn., Vol. 12, pp. 375, 749, 774, 822.

AS TO COMPARISON OF MASTER AND SERVANT WITH OTHER RELATIONSHIPS, see HALSBURY, Hailsham Edn., Vol. 22, pp. 113-118, paras. 192-197; and FOR CASES, see DIGEST, Vol. 34, pp. 28-36, Nos. 64-130.]

Cases referred to:

- (1) *Smith v. General Motor Cab Co., Ltd.*, [1911] A.C. 188; 80 L.J.K.B. 839; 105 L.T. 113; 34 Digest 35, 115.
- (2) *Gates v. Bill (R.) & Son*, [1902] 2 K.B. 38; 71 L.J.K.B. 702; 87 L.T. 288; 34 Digest 35, 119.
- (3) *Powles v. Hider*, (1856), 6 E. & B. 207; 25 L.J.Q.B. 331; 27 L.T.O.S. 77; 21 J.P. 4; 119 E.R. 841; 34 Digest 34, 112.
- (4) *Keen v. Henry*, [1894] 1 Q.B. 292; 63 L.J.Q.B. 211; 69 L.T. 671; 58 J.P. 262; 34 Digest 35, 118.

CASE STATED by General Commissioners of Income Tax under the Finance Act, 1937, sched. V, Part II, para. 4, and the Income Tax Act, 1918, s. 149.

The taxpayers, the London General Cab Co., Ltd., appealed against an assessment to profits tax for the chargeable accounting period ending Dec. 31, 1947, in an estimated sum on which the profits tax payable was £8,000. The taxpayers contended that, since their business consisted wholly or mainly in the rendering of the service of the carriage of passengers, they were "statutory undertakers" within the meaning of s. 19 (5) (i) of the Finance Act, 1937, and the profits from their business were, therefore, not chargeable to profits tax. The general commissioners, on the facts found by them, and on the taxpayers' admission that for certain purposes the relationship between them and their licensed drivers was that of bailors and bailees of the taxi-cabs, were of opinion that the case was governed by *Smith v. General Motor Cab Co., Ltd.* (1) (a case in which the House of Lords refused to set aside a finding of fact of the county court judge that the relationship between the owners of taxi-cabs, which they let out to licensed drivers, and one of their drivers was that of bailors and bailee of the taxi-cab). Accordingly, the commissioners took the view that the taxpayers did not themselves render the service of carrying passengers and they confirmed the assessment. The facts are fully set out in the judgment.

Cyril King, K.C., and *Tribe* for the taxpayers.

C. N. Shawcross, K.C., and *R. P. Hills* for the Crown.

VAISEY, J.: The taxpayers are the London General Cab Co., Ltd., who were assessed to profits tax for the chargeable period ending on Dec. 31, 1947, in a sum on which the tax payable amounted to some £8,000. The substantial point which arises is as to the construction and effect, regard being had to the circumstances of this particular case, of s. 19 (5) of the Finance Act, 1937. The taxpayers appealed to general commissioners against that assessment, and their appeal was dismissed and the assessment confirmed.

The facts are all agreed, and are set out in the Case. The taxpayers were incorporated as a company in 1928, when they took over the undertaking of another company. The objects for which the company was incorporated were stated in a comprehensive and wide form in its memorandum. They included the carrying on of the business of taxi-cab, omnibus, cab, fly and other public or private conveyance and garage proprietors, and the carrying on within the city and county of London and elsewhere of the business of running motor and taxi-cabs of all kinds, the transport of passengers and goods, and so forth. At all material times the business which the taxpayers carried on is found in the Case to have been the business of taxi-cab proprietors and not any other business, and it is found that their taxi-cabs ply for hire in various parts of the metropolitan police area. The profits of the company appear to be derived, with the exception of a comparatively small amount which it receives for advertisements, from the moneys which are paid to it by the drivers of its taxi-cabs in respect of the fares received by them from the public, who are also, by a somewhat curious use of language, themselves described as the "fares." If a driver has a bad day and takes up no passengers, the company gets nothing so far as regards the taxi-cab driven by that driver, and it, there-

fore, depends on the success of each driver in his plying for hire whether the company makes a profit from its business. All the taxi-cabs belonging to the taxpayers are licensed by the Commissioner of Police under the Metropolitan Public Carriage Act, 1869, s. 6, and under the provisions of the London Cab Order, 1934 (S.R. & O., 1934, No. 1346). The applications for those licences are made by the taxpayers to the Commissioner of Police, and specimen forms of such applications, and of the licence itself, form part of the Case. A

The taxpayers own some 400 taxi-cabs, and they employ, or use—the word in the Case is not “employ” but “use”—some six hundred taxi-cab drivers and a number of employees, such as mechanics and clerical staff. There appear to be no written agreements between the taxpayers and their drivers, but the terms which subsist between them may be briefly summarised in this way. The taxpayers bear the expense of the cab, pay for it, keep it in repair, insure it and maintain it, and pay for its garaging. They also provide the taximeter, and fix the hours of work in the case of each driver who takes out one of the cabs. Each driver must have a cab driver's licence under s. 8 of the Act of 1869. The driver usually takes the same cab every day, and there is the further provision that the taxpayers can prescribe the territory in which the driver is to work, although in practice the driver can choose his own “pitch.” The division of the takings between the taxpayers and the driver appear to be, or was at the time at which the point arose, two-thirds to the taxpayers and one-third to the driver, and the driver retained any tips and extra charges, such as charges for luggage and passengers beyond two. For the purpose of the National Insurance Act, 1946, the drivers are treated as being in the category of persons gainfully occupied under an employment, that is to say, employed under a contract of service, but no one has suggested, and I certainly should be very slow to accept the suggestion, that that is necessarily conclusive of the relationship between the taxpayers, on the one hand, and their drivers, on the other. There is nothing like the wearing of livery by the drivers, or anything of that kind, and, in contrast to the assumed position under the National Insurance Act, 1946, it has been agreed between the parties that the taxpayers have never included their drivers in any return of employees, nor have they ever deducted income tax from the proportion of money retained by the drivers. There is no doubt that, as owners of these taxi-cabs, the taxpayers are under a number of obligations. They are deemed to be the licensees of each taxi-cab. They must keep their taxi-cabs in good order, under the London Cab Order, 1934, art. 14 (j), and they must also produce the driver before a magistrate, in certain circumstances, if required to do so. They are also liable to pay compensation and costs in the case of the misbehaviour of any driver. These facts are said to be admitted and there follows this paragraph: B C D E F

“It was admitted on behalf of the company that for certain purposes the relationship between the company and its drivers was that of bailor and bailee of the cab.” G

Section 19 (1) of the Finance Act, 1937, charged on the profits arising from certain trades or businesses a tax which was originally called the national defence contribution [but was re-named the profits tax by the Finance Act, 1946, s. 44] of an amount of five per cent. of the profits in a case where the trade or business was carried on by a body corporate, and four per cent. of the profits in any other case. That fiscal provision continued, save that, by the Finance Act, 1947, s. 30 and s. 47, as amended by the Finance (No. 2) Act, 1947, s. 7, the rate of profits tax was increased to twenty-five per cent. with respect to any chargeable accounting period falling after the end of the year 1946. Section 19 (1) of the Finance Act, 1937, attaches this charge to the profits arising from any trade or business to which the section applies, and sub-s. (5) of the section specifies certain trades or businesses to which it is not H

to apply. The claim which is put forward in the present case is that the business of the taxpayers is within the exceptions provided for in sub-s. (5) which provides:

"This section shall not apply to any trade or business carried on by statutory undertakers and consisting wholly or mainly in the rendering in the United Kingdom . . . of any of the following services, namely:—

A

(a) the supply of water, gas, electricity or hydraulic power; (b) the provision or maintenance of a canal or other inland waterway, or a harbour, dock, quay, pier, road, bridge, ferry or tunnel; (c) the conservancy of a river; (d) the carriage of goods or passengers by railway, or the carriage of passengers by road, or the carriage of goods by canal or inland navigation."

That sub-section exempts from the provisions of the Act any trade or business carried on by statutory undertakers rendering in the United Kingdom the service of (isolating the material words) the carriage of passengers by road, and the point which I have to decide is whether the business of the taxpayers is a business carried on by them as statutory undertakers for the carriage of passengers by road. In passing, I am bound to say that it is a little surprising to find that a business which consists of the running of taxi-cabs in any form, or of any kind, should be regarded as a business of a statutory undertaker.

C

Sub-section (5) goes on to define what is meant by "statutory undertakers" as follows:

"(i) The expression 'statutory undertakers' means any local or public authority authorised by or by virtue of any enactment to render any of the services aforesaid in the United Kingdom . . . and any other person so authorised who is precluded by or by virtue of any enactment from charging any higher price for those services than that authorised by or by virtue of the enactment or, in the case of a body corporate, is either so precluded or precluded by or by virtue of any enactment from paying a dividend at any higher rate . . ."

D

The submissions which were made on behalf of the taxpayers were that the company are "statutory undertakers" within the meaning of sub-s. (5). They emphasised that submission by contending that the trade or business of the company consists, mainly, in the rendering in the United Kingdom of the service of the carriage of passengers by road. Then they submitted that by virtue of the section profits tax is not chargeable on their profits, and that the assessment ought to be discharged. On the other hand, the Crown contends that the company do not render the service of the carriage of passengers by road, but that they merely let out taxi-cabs to individual drivers who are independent contractors; secondly, that the company is not precluded by or by virtue of any enactment from charging more than a specified price for letting the taxi-cabs to the drivers; and, thirdly, that the company are not statutory undertakers within the meaning of the sub-section, and that, accordingly, s. 19 does apply to the taxpayers' trade or business, and that the assessment appealed against was rightly made.

F

G

The only reported decision to which the Case refers is *Smith v. General Motor Cab Co. Ltd.* (1), a decision of the House of Lords, and with regard to that the finding of the commissioners was :

"The commissioners who heard the appeal considered that on the facts agreed and proved as above, viz., paras. 1 to 7, the Case was governed by the decision in *Smith v. General Motor Cab Co., Ltd.* (1), and confirmed the assessment, subject to the ascertainment of the correct figures."

H

Then the figures were stated to be agreed, and the assessment of £8,000 was reduced to £7,679 2s.; and this appeal is brought by the taxpayers from that decision of the commissioners.

A great deal of discussion has taken place as to the precise relationship which subsists normally and in particular circumstances between the man who owns

a taxi-cab, the man who drives the taxi-cab, and the man who is called the "fare" or the hirer of the taxi-cab, and members of the public who may be affected by the use or misuse of the vehicle. Having listened to the authorities I have come to the conclusion that I can adopt, with great respect, the observation of VAUGHAN WILLIAMS, L.J., in *Gates v. Bill (R.) & Son* (2) ([1902] 2 K.B. 41):

"I cannot say that I consider the decisions [*i.e.*, the decisions on the rights of the proprietor, the driver, and the fare] which have been given on this subject altogether satisfactory."

I think that a good deal of ground may still remain to be explored, this being one of those cases in which a quite simple, ordinary, every-day relationship, contractual or quasi-contractual, is found on examination to be, from the legal point of view, of an extremely complicated, and in some respects ambiguous, character. I have formed the conclusion that the authorities are not altogether easy to reconcile, and every case, no doubt, will have to be considered in the light of its own particular circumstances. It may well be that in one case the driver is the agent of the owner, in another case he may be the servant of the owner, and a third case may be one of a simple bailment. I also think that it may be two or more of those classes of association when viewed from different angles, that is to say, the driver may be, for the purpose of the National Insurance Act, 1946, a servant of the owner, and for the purpose of the returns of income tax he may be regarded as an independent contractor. Indeed, I am disposed to think that this very peculiar relationship, in which the owner, the driver, the fare, and the cab itself seem to be described in almost interchangeable terms, is, or may be in certain circumstances, a sort of association which is in some senses, perhaps, *sui generis*, and that it is very difficult to ascertain in any set terms and as a matter of general principle what the relationship may be. It may be very difficult to predicate that the relationship is for all purposes (whatever it may be for some purposes) within any one of the categories which I have suggested. It is curious that it is not the driver who plies for hire, but the cab. No doubt, the driver may in some contexts and in some circumstances be only another name for the owner, but the position is anomalous, and in some respects very difficult to define.

An interesting case, decided by LORD CAMPBELL, C.J., in 1856, was *Powles v. Hider* (3), where a cab plying in the streets of London was hired by Mr. Powles to carry his luggage and the luggage was lost owing to the fault of the driver. On the cab there was the name of Mr. Hider, who was not the driver but the proprietor, and the man who was driving the cab was a licensed driver. Mr. Powles, desiring to get some compensation for the loss of his luggage, sued Mr. Hider on the basis that there had been a contract between them for the carriage of Mr. Powles' luggage, and Mr. Hider denied liability. In that case there was very much the same arrangement, it appears, as between the driver and Hider, the owner of the cab, as the arrangement which exists in the present case. The driver each day paid a sum of money to Hider for the use of the cab and two horses, he deposited his licence with Hider before he took the cab out, in compliance with the Metropolitan Hackney Carriage Acts, and the driver made what he could by the use of the cab and horses. It was held that for that purpose the driver must be taken to be the agent of Hider, with the result that he had authority to make contracts for the employment of the cab on his (Hider's) account, and that the action for the loss of the luggage was rightly brought against the proprietor. That case has been observed on, followed and approved on many occasions, and, no doubt, for the purposes for which the action was brought, it is a case which still has authority.

In *Keen v. Henry* (4) the headnote reads ([1894] 1 Q.B. 292):

". . . so far as the public is concerned, the registered proprietor of a hackney carriage is responsible for the acts of the driver whilst he is plying

for hire, as if the relationship of master and servant existed between them, even though it does not in fact exist."

I mention that to show the strange position which arises in this curious relationship, that for some purposes the relationship may be one thing and for some other purposes it may be something different.

In *Smith v. General Motor Cab Co., Ltd.* (1), the headnote begins by the statement ([1911] A.C. 188):

"The findings of fact by a county court judge sitting as an arbitrator under the Workmen's Compensation Act, 1906, cannot be set aside if there was evidence to support the findings. The question whether there was evidence is a question of law."

Then we come to the facts (*ibid.*):

"The respondents let out a taxi-cab to the appellant, who was injured by an accident while he was driving the cab. Upon an application for compensation under the Act there was evidence that the relation of the respondents to the appellant was that of bailor and bailee of the taxi-cab, and the county court judge found as a fact that that was the true relation and that there was no contract of service."

It was held that the finding could not be set aside, and from the judgment of the county court judge this statement is taken (*ibid.*, 189):

"I should describe the drivers as clients of the company and bailees of the cabs."

LORD ATKINSON, in his opinion, said (*ibid.*, 191):

"The facts relied upon by the respondents were undoubtedly evidence of a bailment of the cab, upon which the county court judge could properly act; those relied upon by the appellant may have been evidence, strong evidence if you will, that the driver was the respondents' servant, but if so, the finding of the county court judge that the appellant was a bailee was a finding on conflicting evidence on an issue of fact. So that the appellant is driven to this position, that he must contend that, had the case been tried before a judge and jury, the judge would have been bound to direct the jury to find a verdict for the plaintiff, on whom the burden of proof of service lay, a contention absolutely unsustainable."

When I look at the Case Stated in the present case, I find these two passages which I desire to put side by side. Paragraph 7:

"It was admitted on behalf of the company that for certain purposes the relationship between the company and its drivers was that of bailor and bailee of the cab."

Paragraph 10:

"The commissioners who heard the appeal considered that on the facts agreed and proved as above, *viz.*, paras. 1-7, the case was governed by the decision in *Smith v. General Motor Cab Co., Ltd.* (1) and confirmed the assessment, subject to the ascertainment of the correct figures."

Looking at that admission, that the relationship between the taxpayers and their drivers was that of bailor and bailee of the cab, coupled with the finding that on the facts agreed this case was governed by *Smith v. General Motor Cab Co., Ltd.* (1), it seems to me that what the commissioners have really done is this. It being agreed or admitted on behalf of the company that for some purposes the relationship of bailor and bailee subsisted between the owners and the drivers, the only construction which I can give to the finding that the decision in *Smith v. General Motor Cab Co., Ltd.* (1) governed this case is that the commissioners found that that relationship did subsist for the purpose of deciding the appeal which was before them.

I do not see my way to disturb the finding of the commissioners. It seems to me that they have found, in effect, that the admitted bailment was the material matter for them to take into consideration, that there was not the relationship between the company and its drivers of principal and agent, or master and servant, and that the people who were really carrying on the trade or business, whatever it may be, or however one may describe it, were not the company, but the drivers who were the bailees under the arrangement which the commissioners found existed between the parties.

I do not think that the taxpayers were in fact "rendering a service" within the meaning of s. 19 of the Act. It is true that there was no obligation on them to do anything, but I do not think that that necessarily is material. This was not the rendering of the service of carrying passengers by road in the sense in which one would have expected that expression to be used in conjunction with the preceding headings in the Act, the supply of water, gas or electricity, the provision or maintenance of a canal, the conservancy of a river, or the carriage of goods or passengers by railway. If such a service was being carried on (which I do not decide, and as to which I express no final opinion) I do not think it was being carried on by the taxpayers. If it was being carried on, and if such services were being rendered, they were being rendered by those to whom the cabs were bailed; and further, on the question whether this company are statutory undertakers within the meaning of the section, I think they are a long way off from bringing themselves within the definition contained in the proviso to s. 19. In a sense they were authorised to render the service (assuming that they were rendering a service) by the Metropolitan Public Carriage Act, 1869, and by the London Cab Order, 1934, but just in the same way as many persons who are the subjects of His Majesty are authorised to do things under the provisions of Acts of Parliament, and I do not think that this is the kind of authorisation to which, in its context, that proviso was looking forward. I feel bound to dismiss this appeal with costs.

Appeal dismissed with costs.

Solicitors: *White & Co.* (for the taxpayers); *Solicitor of Inland Revenue* (for the Crown).

[Reported by C. N. BEATTIE, ESQ., Barrister-at-Law.]

Re MANOR FARM, KYTES HARDWICK. *ACHESON v.* RUSSELL AND OTHERS.

[CHANCERY DIVISION (Vaisey, J.), July 19, 20, 1950.]

Will—Disposition of entailed interest—“Devise referring specifically to the property” —Law of Property Act, 1925 (c. 20), s. 176 (1).

By his will, dated Dec. 31, 1941, a testator, who died on Jan. 25, 1947, provided: "I give devise and bequeath all my one third share and all other my estate and interest in the family property at K.H. and in the proceeds of sale thereof to" M.R. absolutely. Both at the date of his will and at the date of his death the testator was entitled to a freehold farm at Kytes Hardwick (sufficiently described as "the family property at Kytes Hardwick") as to one equal undivided third share thereof in fee simple and as to the other two equal undivided third shares thereof as tenant in tail general in possession.

HELD: the words of the will were "a devise or bequest referring specifically to the property" within the Law of Property Act, 1925, s. 176 (1),

so as to be effective to dispose of the two equal undivided third shares of which the testator was tenant in tail at his death.

[AS TO DISPOSITION OF ENTAILED INTEREST BY WILL, see HALSBURY, Hailsham Edn., Vol. 27, pp. 694, 695, paras. 1191-1194; and FOR CASES, see DIGEST, Vol. 44, pp. 185, 186, Nos. 138-141.]

A Cases referred to:

(1) *Roberts v. Roberts*, (1884), 13 Q.B.D. 794; 53 L.J.Q.B. 313; 50 L.T. 351; 7 Digest 37, 194.

(2) *Campbell's Trustees v. Adamson*, 1936 S.C. (H.L.) 31.

ADJOURNED SUMMONS to determine whether on the death of John Sheen Downes, who died on Jan. 25, 1947, (a) the defendant, Marjorie Chernocke Russell, became entitled under the joint effect of the will, dated Dec. 31, 1941, of the said John Sheen Downes and the Law of Property Act, 1925, s. 176 (1), or otherwise, to two undivided third shares in certain trust funds (being the proceeds of sale of Manor Farm, Kytes Hardwick, Warwickshire), to which the said John Sheen Downes was at his death beneficially entitled as tenant in tail in possession, or (b) whether the said two third shares devolved on certain other trusts.

K. J. T. Elphinstone for the plaintiff, one of the trustees of the trust funds.

H. A. Rose for the first defendant, Marjorie Chernocke Russell.

J. A. Brightman for the second and third defendants, who claimed as trustees of a settlement dated Apr. 3, 1922, to be entitled on the failure or determination of the estate tail.

Cur. adv. vult.

July 20. VAISEY, J., read the following judgment. This is a short point, on which there appears to be as yet no direct authority. A testator, John Sheen Downes, at the date of his will (Dec. 31, 1941) and also at the date of his death (Jan. 25, 1947) was entitled to a freehold farm known as the Manor Farm at Kytes Hardwick, in the county of Warwick, as follows:—As to one equal undivided third share thereof in fee simple in possession and as to the other two equal undivided third shares thereof as tenant in tail general in possession. By his said will the testator disposed or attempted to dispose of the said farm in the following words:

F “I give devise and bequeath all my one third share and all other my estate and interest in the family property at Kytes Hardwick and in the proceeds of sale thereof to”

the first defendant, Marjorie Chernocke Russell (therein called Marjorie Russell), absolutely. There is no doubt that “the family property at Kytes Hardwick” sufficiently describes the said farm. The question is whether the will effectively disposed of the two third shares under and by virtue of the Law of Property Act, 1925, s. 176 (1).

G That section provides:

H “A tenant in tail of full age shall have power to dispose by will, by means of a devise or bequest referring specifically either to the property or to the instrument under which it was acquired or to entailed property generally—(a) of all property of which he is tenant in tail in possession at his death; and (b) of money (including the proceeds of property directed to be sold) subject to be invested in the purchase of property, of which if it had been so invested he would have been tenant in tail in possession at his death; in like manner as if, after barring the entail, he had been tenant in fee simple or absolute owner thereof for an equitable interest at his death, but, subject to and in default of any such disposition by will, such property shall devolve in the same manner as if this section had not been passed.”

Since the death of the testator the trustees for sale under the statutory trusts affecting the property have sold it for a net sum of £5,882 6s. 10d. One-third of that sum, namely, £1,960 15s. 7d., has been paid to and received by the first defendant as representing the one-third share to which the testator was absolutely entitled, and the remaining two-thirds thereof, namely, £3,921 11s. 3d., is retained and held by the trustees pending the decision of the present question. By the Law of Property (Entailed Interests) Act, 1932, the last-mentioned sum is deemed to be held for an entailed interest corresponding to the former interest in the said two-thirds of the property itself.

The question is, I think, this: Does the devise in the testator's will "refer specifically" (within the meaning of s. 176 (1)) to the property of which the testator was tenant in tail in possession at his death? Now "the property" must, I think, for this purpose be, not the Manor Farm, but two undivided third shares in the Manor Farm. Can it be said that those two undivided shares are "specifically referred to"? The argument for a negative answer to that question points out that the first-mentioned "one-third" is obviously the one-third in which the testator's interest was absolute—I agree with that—and that the "other estate and interest" is not quantified, and, therefore, not specified or specifically referred to. It was admitted, however, that if it had been quantified incorrectly—*e.g.*, by being called nine-fifteenths instead of ten-fifteenths—the case might have been treated as one of a false demonstration. In my judgment, however, the reference is, in fact, specific. The testator refers to his "other estate and interest," and note that the words are in the singular, not the plural. *Id certum est quod certum reddi potest*, and it is a matter of no difficulty to render certain the "other estate and interest" of the testator in the property. I am not sure that the reference to the family property itself might not be sufficient, for the object of the section and of the form in which it is cast must surely be to avoid any risk of a disentail being effected by inadvertence or involuntarily. A specific reference need not, in my judgment, be a completely accurate and detailed description. Indeed, there is little difference between reference and allusion. What the testator is, in effect, saying is: "I own one-third of the property, and I have also another estate and another interest in it. I am now disposing of the entirety." The other view, that the reference is not specific, seems to pay too little regard, not only to the expressed intention of the testator, but also to the probable intention of the Act, and to be of too technical a nature to commend itself to me.

I was referred to two reported cases. In *Roberts v. Roberts* (1) it was held that the chattels in a bill of sale are not "specifically described" as required by the Bills of Sale Act, 1878, s. 4, unless there is something in the nature of an inventory of them, but I think that a specific description requires far more particularity than a specific reference. *Campbell's Trustees v. Adamson* (2), in the House of Lords, decided that general words of disposition in a will do not cover property which has to be "expressly bequeathed." There again the words are different. Neither of these authorities seems to me to be really in point. I will make the declaration confirming the title of the defendant, Marjorie Chernocke Russell.

Order accordingly. Costs of all parties to be taxed as between solicitor and client and raised and paid out of the sum representing the two-third shares.

Solicitors: *Reynolds & Co.*, agents for *R. Hobourn & Co.*, Woburn, Beds. (for the plaintiff); *Reed & Reed*, agents for *Large & Major*, Leamington Spa (for the first defendant); *Barnett, Tison & Co.* (for the second and third defendants).

[Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.]

RUGMAN v. DROVER.

[KING'S BENCH DIVISION (Lord Goddard, C.J., Hilbery and Byrne, JJ.), July 18, 1950.]

Young Person—Approved school order—Order against young person aged sixteen—Appeal by parent to quarter sessions—Young person over seventeen when appeal heard—Jurisdiction to hear appeal—Children and Young Persons Act, 1933 (c. 12), s. 62 (1) (a).

On Oct. 13, 1949, a girl who was born on Nov. 22, 1932, and, therefore, was then under seventeen years of age, was ordered by a juvenile court to be sent to an approved school. Her father appealed. When the appeal came before quarter sessions, the girl had attained the age of seventeen, and quarter sessions held that they had no jurisdiction to entertain the appeal or make an order that a person over seventeen be sent to an approved school.

HELD: the appeal to quarter sessions was by way of re-hearing, but when quarter sessions re-heard the case they did so as in the same state of affairs as that in which the justices below had heard it; the juvenile court had had jurisdiction to make the order; and, therefore, quarter sessions had jurisdiction to hear the appeal.

[FOR THE PROVISIONS OF THE CHILDREN AND YOUNG PERSONS ACT, 1933, s. 61 and s. 62, see HALSBURY'S STATUTES, Second Edn., Vol. 12, pp. 1015, 1016; and FOR THE SUMMARY JURISDICTION (APPEALS) ACT, 1933, s. 1, see HALSBURY'S STATUTES, Vol. 26, pp. 546, 547, 548.]

CASE STATED by the appeal committee of the county of Southampton quarter sessions.

On Oct. 13, 1949, an order under the Children and Young Persons Act, 1933, s. 62 (1) (a), that one M.D., then aged sixteen years and ten months, should be committed to an approved school until she attained the age of nineteen years as being a young person in need of care or protection within the meaning of s. 61 (1) (a) of the Act was made by the Ryde juvenile court on the application of the appellant, a police inspector. The order further provided that the respondent, the father of M.D., should pay 23s. a week towards her maintenance. The respondent appealed to quarter sessions against the order, and before the appeal came on for hearing M.D. attained the age of seventeen years. The respondent contended that where a person's age was relevant to found jurisdiction or allow the court to make a particular order, that age must be determined as at the date of the hearing at which the order was made, and that at the date of the hearing of the appeal M.D. was no longer a "young person" within the Act of 1933. The appellant contended that, as M.D. was a young person at the time of the order of the juvenile court, the appeal committee could only reverse the order on the ground that it was defective in law when made or on the merits. The appeal committee, being of opinion that M.D. was no longer a "young person," allowed the respondent's appeal, and quashed the order. The appellant appealed to the Divisional Court.

Robert Hughes for the appellant.

Fay for the respondents.

LORD GODDARD, C.J.: This is a Case stated by quarter sessions for the county of Southampton. A girl was brought before the Ryde juvenile court on an application by the appellant, a police inspector, for an order under s. 61 and s. 62 of the Children and Young Persons Act, 1933, on the ground that she had a parent "not exercising proper care and guardianship" and was "exposed to moral danger," and that, therefore, she was in need of care or protection. At that time the girl was aged sixteen years and ten months, and the court made an order sending her to an approved school and directing her father

to contribute 23s. a week towards her maintenance. The father lodged an appeal to quarter sessions. By the time the appeal committee sat the girl had become seventeen. The order of the juvenile court was that she should go to an approved school and, under s. 71 (1) of the statute, she would have to stay there till she was nineteen. It was, therefore, a continuing order. Objection was taken that quarter sessions could not hear the appeal because the girl had become seventeen. Quarter sessions gave effect to that contention.

That seems to me to be completely wrong. An appeal to quarter sessions is an appeal by way of re-hearing, but that is only a procedural matter, there being no formal record of proceedings in a justices' court. When a case goes to quarter sessions it is re-heard and the person seeking an order must prove the case over again. That means that the appeal committee takes the place of the petty sessions, but it is none the less an appeal, and the order appealed from was properly made so far as jurisdiction was concerned at the time it was made. Quarter sessions have to re-hear the case as in the same state of affairs as those in which the justices below heard it. If the matter could be made any clearer, it seems to me it is only necessary to look at the Summary Jurisdiction (Appeals) Act, 1933, which, in s. 1, substitutes for s. 31 of the Summary Jurisdiction Act, 1879, an amended section which provides:

"(viii) Quarter sessions may by their order confirm, reverse or vary the decision of the court of summary jurisdiction, or may remit the matter with their opinion thereon to a court of summary jurisdiction acting for the same petty sessional division or place as the court by whom the decision appealed against was given, or may make such other order in the matter as they think just, and by such order exercise any power which the court of summary jurisdiction might have exercised; and any order made by quarter sessions shall have the like effect and may be enforced in the like manner as if it had been made by the court of summary jurisdiction . . ."

The court of summary jurisdiction had jurisdiction to entertain this application. The basic requirement then was that the girl should be under seventeen, and she was under seventeen when the order was made. That order was perfectly good from that point of view, but quarter sessions said they could not hear the appeal. In my opinion, they were wrong, and the case must go back to quarter sessions to be heard.

HILBERY, J.: I agree.

BYRNE, J.: I agree.

Case remitted.

Solicitors: *F. C. Green & Son* (incorporating *Crump, Sprott & Co.*), agents for *C. Merrill, Ryde* (for the appellant); *Speechly, Mumford & Craig*, agents for *Lampart, Bassitt & Hiscock*, Southampton (for the respondents).

[Reported by **F. GUTTMAN, Esq.**, *Barrister-at-Law.*]

YATES v. MORRIS.

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Singleton and Jenkins, L.J.J.), July 14, 1950.]

Rent Restriction—Possession—Nuisance—Suffering premises to be used for immoral purposes—Order for possession suspended indefinitely—Right of landlord to immediate possession—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (c. 17), s. 5 (2) (as substituted by Rent and Mortgage Interest Restrictions Act, 1923 (c. 32), s. 4)—Rent and Mortgage Interest Restrictions (Amendment) Act, 1933 (c. 32), s. 3 (1), sched. I, para. (b).

The landlord of a house which was subject to the Rent Restrictions Acts sought possession under the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, s. 3 (1), and sched. I, para. (b), on the ground that the tenant had suffered the premises to be used for immoral purposes. The county court judge found that the offence was proved and that the landlord was entitled to possession, and he ordered possession in twenty-eight days, but, taking the view that the tenant was largely innocent of the use which was being made of the premises by her sub-tenants or lodgers, he suspended the order for possession "provided no further nuisance occurs." On an appeal by the landlord,

HELD: (i) there was a difference between a case where relief against forfeiture was sought under the Law of Property Act, 1925, s. 146 (2), and a case arising under sched. I, para. (b), to the Act of 1933, in that, in the former class of case, the landlord had forfeited the lease and the question was whether the court, in the exercise of its discretion, should relieve the tenant against forfeiture, while, in the latter class of case it had to be shown, first, that an event had occurred which gave the court jurisdiction to make an order for possession, and the court had then to decide whether it was reasonable to make the particular order which it was about to make; but, notwithstanding this difference, when the discretion in each kind of case came to be exercised, it was proper that considerations which were applicable in the one case should *prima facie* be applicable in the other. The protection given by the Rent Restrictions Acts was not intended to apply where premises were being used for immoral purposes, and, therefore, the principle, which applied in cases under s. 146 (2) of the Act of 1925, that the discretion would not be exercised in favour of a tenant who suffered the premises to be used for immoral purposes, was one that should be applied in cases under the Rent Restrictions Acts, and, in a case such as this, *prima facie* there should be an order for immediate possession.

(ii) the judge, however, had discretion, under the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 5 (2), as substituted by the Rent and Mortgage Interest Restrictions Act, 1923, s. 4, or otherwise, to make an order for possession which was suspended indefinitely, and, as he was not shown to have misdirected himself, the order was not open to review by the Court of Appeal.

Sheffield Corpn. v. Luxford ([1929] 2 K.B. 180), distinguished.

[AS TO DISCRETION OF THE COURT TO ORDER POSSESSION OF PREMISES WITHIN THE RENT RESTRICTIONS ACTS, see HALSBURY, Hailsham Edn., Vol. 20, pp. 329, 330, paras. 392, 393; and FOR CASES, see DIGEST, Vol. 31, pp. 576-579, Nos. 7256-7278, and Supplements.]

Cases referred to:

- (1) *Borthwick-Norton v. Romney Warwick Estates, Ltd.*, [1950] 1 All E.R. 798.
- (2) *Sheffield Corpn. v. Luxford*, *Same v. Morrell*, [1929] 2 K.B. 180; 98 L.J.K.B. 512; 141 L.T. 265; 93 J.P. 235; Digest Supp.

APPEAL by the landlord from an order of His Honour JUDGE DRUCQUER, at Westminster County Court, dated May 24, 1950, in an action claiming possession

of premises to which the Rent Restrictions Acts applied, on the ground that the tenant had been guilty of conduct which was a nuisance or annoyance to adjoining occupiers, within the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, sched. I, para. (b), in that she had suffered the premises to be used for immoral purposes.

There was some complaint in 1945 in regard to the user of the premises by a sub-tenant or lodger of the tenant, and in 1948 the tenant was warned by the police on behalf of the Westminster City Council. In September, 1949, the police kept observation on the house for three days, and on each day a woman named Clarke, to whom the tenant had given a sub-tenancy of a room in the house, and who was a known prostitute, was seen taking different men into the premises, sixteen men being taken at different times. A police sergeant gave evidence that the tenant spoke to or saw Clarke at various times when she was going in or out of the premises with men. This evidence was corroborated by another police officer, but denied by the tenant. After this matter was brought to the tenant's attention, she ended Clarke's sub-tenancy. She then gave a key of the house to a friend, Sally Waters, and in April, 1950, after the action was commenced, the police, who again kept observation on the house for a period of three days, saw Waters take twelve men into the house during that time, but there was no evidence that the tenant was seen with Waters on these occasions. The learned county court judge found that the landlord was entitled to possession, and made an order for possession in twenty-eight days, but suspended the order "provided no further nuisance occurs." In the Court of Appeal it was contended *inter alia* on behalf of the landlord that the learned judge had no jurisdiction to suspend the order which he had made, or, if he had the jurisdiction, he should not have suspended the order.

C. G. A. Cowan for the landlord.

Power for the tenant.

SIR RAYMOND EVERSHED, M.R.: This case has, I confess, caused me very considerable anxiety. To put it briefly, the landlord of premises comprised within the ambit of the Rent Restrictions Acts has sought an order for possession against the tenant, who is, admittedly, a statutory tenant, on the ground, stated in the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, sched. I, para. (b), that

"... the tenant or any person residing or lodging with him or being his sub-tenant has been guilty of conduct which is a nuisance or annoyance to adjoining occupiers ..."

The particular acts relied on are that on certain dates persons, who were lodgers or sub-tenants of rooms by arrangement with the tenant, were using their respective rooms for immoral purposes, *viz.*, the exercise of their trade as prostitutes.

In cases arising under the Law of Property Act, 1925, s. 146 (2), similar problems have recently come before the court—similar, because in those cases the question was: If there had been a breach of covenant not to use or permit premises to be used in the way which I have indicated, could the tenant, when the landlord had forfeited the lease, obtain relief against forfeiture? The problems were, as I have said, similar, but, in my judgment, they were not the same. In forfeiture cases the position is that the tenant has committed a breach of contract entitling the landlord, according to the contract, to forfeit, the landlord has forfeited, and the lease has ended. The question then is: Should the court in its discretion relieve the tenant against the forfeiture? It has been laid down many times that such relief will not be granted if the breach is not capable of remedy. In the present case, the emphasis is, I think, somewhat different. In the case of a rent controlled house, where there is a statutory tenant as occupant, the court cannot order possession at the suit of the landlord, save in certain circumstances. First, it must be shown that some one of the

events enumerated in sched. I to the Act of 1933 has occurred which gives the court jurisdiction to make an order under s. 3 (1) of the Act, and, secondly, the court must come to the conclusion that it is reasonable to make the particular order for possession which it is about to make. There is, therefore, I think, a difference in emphasis. Nevertheless, it is also, to my mind, true to say that, when the discretion in each kind of case comes to be exercised, it is proper that considerations which are applicable in the one case should *prima facie* be applicable in the other. Thus, in *Borthwick-Norton v. Romney Warwick Estates, Ltd.* (1) LORD GODDARD, C.J., delivering the leading judgment of the Court of Appeal, said ([1950] 1 All E.R. 801):

"The discretion which is given by s. 146 (2) of the Act of 1925 is not to be exercised in favour of people who suffer premises to be used as a brothel, and the learned judge, having found that the defendant company was suffering these premises to be used as a brothel, was justified in refusing to exercise discretion in their favour."

In that case HILBERY, J., had refused to exercise discretion in the tenants' favour, and this court was asked to overrule the exercise of his discretion.

I have read that passage, and I have made those observations, because, to my mind, if premises within the Rent Restrictions Acts are proved to be used to the knowledge of the tenant for purposes of this kind, *prima facie* I think the court ought not to refrain from making an order for possession. The Rent Restrictions Acts were designed to protect persons in the occupation of their homes at a time of housing shortage, and, if a statutory tenant is shown to be suffering the premises to be used for immoral purposes, then it seems to me *prima facie* that the case is not one which could be within the protection intended by Parliament. Therefore, I think that, had I been trying this case, I should have been less charitable to the tenant than was the learned judge below, but, of course, I did not see her, and in any question of discretion the importance of having seen the witness cannot, I think, be too strongly emphasised.

[HIS LORDSHIP stated the facts and continued:] The relevant part of the learned county court judge's reasons for his judgment is as follows. He said that he had grave doubts whether he should exercise his discretion, but he had been

"... moved to do so by the following considerations. I am satisfied that when complaint was made in 1948 and 1949, the [tenant] immediately evicted the offending person. I accept the evidence of Mrs. Baylis that there were grounds of complaint in 1945, but apart from that there is not much, if any, evidence that the neighbourhood was disturbed by the conduct of the house. I think the [tenant] did her best to prevent the nuisance. As regards Waters, [the tenant] said she knew nothing about her conduct, but it cannot be overlooked that she allowed her a key of the house. With the consent of Mr. Bond, a surveyor and estate agent [and the predecessor in title of the appellant], [the tenant] had permission to sub-let her rooms to provide a living for herself, she invested her all in the premises, a sum of £300 or £400 she states, in improving the premises for that purpose. Since 1944 Mr. Bond had been from time to time on the premises. He had no ground for complaint against her. The names of her sub-tenants have been disclosed to the [landlord]. Some have been there since 1944, and no complaint has been received from any of them. I am prepared to give her another chance, but it is a very serious case, and unless she looks after the property properly she will have to go. I shall allow her to stay, but it is a very extreme case."

I read those findings as amounting to this, that, though the judge thought that the tenant had not been careful or astute in her observation, he was not prepared to disbelieve her evidence that she was innocent of the use being made of the premises by persons to whom she had let rooms, or whom she had admitted as lodgers. I think that he was also influenced by the fact

that Mr. Bond, the predecessor in title of the landlord, had frequently been on the premises and had made no complaints against the tenant. I mention these facts because counsel for the landlord has said that, since his client is the present head lessee, and is subject to a covenant in the head lease in regard to user, justice requires that he should be protected by an immediate order for ejectment against the tenant, although there is no suggestion that he himself is using or suffering a user of the premises for immoral purposes. It seems to me quite plain that on those facts the head lessee would be protected by the courts if there was any attempt to forfeit by his landlord. A

To return to the subject-matter of the user of the premises, I think that in cases of this kind the court should be ready to make immediate orders for possession. As I have said, I cannot think that, where user of this kind is proved, the premises were intended by Parliament to be within the protection of the Acts. It is, however, a matter of discretion. The learned judge who tried the case is a judge of great experience. I am not persuaded that, either in regard to his consideration of the *Borthwick-Norton* case (1) or on any other ground, the judge is shown to have misdirected himself, or to have so exercised his discretion as to give rise to an injustice against the landlord, or otherwise not to have exercised his discretion judicially. I do not, therefore, on the whole, think that it would be right for this court to interfere. B C

Another point was taken by counsel for the landlord. He contended that the judge, having first by the terms of his order said that possession must be given, then had no jurisdiction to suspend the order conditionally, in effect, on the tenant taking proper steps to see that there is no further improper use of any room, or, if he had the jurisdiction to suspend the order, he ought not to have suspended it. So far as jurisdiction is concerned, I do not think the point is open to counsel. It was not taken below, and I do not think it is among the grounds of appeal. In any case, I think that there is jurisdiction, either under the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 5 (2), as substituted by the Rent and Mortgage Interest Restrictions Act, 1923, s. 4, or otherwise, to make an order in this form in a case arising under the Rent Restrictions Acts. Whether it is a very convenient form is perhaps another matter. The intention of the order clearly is that, should there be any ground for saying that the immoral user of these premises is continuing, then (on application to the court, if necessary), the suspension would immediately cease. It would terminate automatically. It is, perhaps, right to state that, as I read the judgment, it would be no answer on the tenant's part to say that she did not know. She has been told to manage her premises properly. That being the intention of the order, I do not think there would be any practical difficulty in giving effect to it if occasion should arise, and for the reasons I have indicated I think that there was jurisdiction. The case is quite different from *Sheffield Corpn. v. Luxford* (2), in which the premises were not within the Rent Restrictions Acts. The plaintiff in that case proved that the lease had determined, and that he was entitled to immediate possession. The question there arose because, under the County Courts Act, 1888, s. 138, there was a general power for the court to suspend the operation of its order, but, where there is an absolute right to possession, that discretion, if it be exercised judicially, can only be exercised so as to give reasonable opportunity to the trespassing tenant to remove himself and his belongings from the premises. People cannot be expected, or reasonably asked, to go at two minutes' notice, but, for no particular reason to give a suspension of as long as twelve months could not have been judicially to exercise the discretion. That seems to me to be quite different from the present case where the making of an order for possession, whether an immediate one, or in six months' time, or suspended indefinitely, is wholly in the discretion of the judge. Although I am clear in my mind that *prima facie*, in cases such as this, there should be immediate orders for possession, in the particular circumstances here proved I am not D E F G H

prepared to say that we ought to interfere with the discretion exercised by the learned county court judge.

SINGLETON, L.J.: I, too, have been greatly troubled by this case. I have felt considerable doubt whether the learned county court judge had the power to make an order in the terms in which he made it. He found that

“ . . . the [landlord] is entitled to possession on these grounds, and I, accordingly, order possession in twenty-eight days and give judgment for the rent due up to Mar. 25, 1950.”

Later in his judgment, having considered the facts further, the learned county court judge said: “ Judgment for possession in twenty-eight days suspended provided no further nuisance occurs.” The result of that is to make an order for possession in twenty-eight days, but to grant an indefinite suspension of it, so that the latter part of the order stultifies and renders of no effect the former part of it. I confess I have doubts whether such an order can be properly made, but I agree, if I may say so respectfully, with that which my Lord has said, that the matter was not pointed out to the learned county court judge on the hearing of the action, and the notice of appeal does not appear to cover that point. So that it may well be that it is not open to this court to interfere on that ground. If that ground goes, the matter becomes more simple.

Assuming that the county court judge had power to make an order of this kind, I think it is a question for his discretion. The only consideration which enables me to say that, in my opinion, this court ought not to interfere, is that in virtually every case the county court judge is entrusted with the decision, and final decision, of questions of fact. If there was evidence on which he could decide such a question as he did, this court would not interfere. If this had been a case in which forfeiture was claimed for breach of a covenant under the Law of Property Act, 1925, s. 146, there would, in a case of this kind, have been no question of relief, as the decision in *Borthwick-Norton v. Romney Warwick Estates, Ltd.* (1) shows. This is not a case under the Act of 1925. It is a case under the Rent Restrictions Acts, and, though the wording of the various Acts bring into play somewhat different considerations, I should not like to think that the practice is wholly different.

[His LORDSHIP reviewed the evidence and said:] I think it is almost unconceivable that the tenant did not know what was going on. The learned county court judge has taken a charitable view of her behaviour. I confess I could not have looked on the matter in the same light as he appears to have done. The tenant had been warned, but she continued in the same way. I recognise, however, that the learned county court judge is a judge of fact, and this court is bound by the findings of fact if there is any evidence on which he could so find. That is the reason which allows me to say that I agree that the appeal should be dismissed.

JENKINS, L.J.: I also agree that for the reasons stated by the Master of the Rolls this appeal should be dismissed. The tenant, in my judgment, has been extremely lucky and, as at present advised, so far as I can judge from the notes of the evidence, as opposed to seeing and hearing the witnesses, I would not myself, if I had been dealing with the matter at first instance, have been disposed to grant a similar indulgence. The question, however, whether any, and, if so, what, suspension of the order should be granted was essentially a matter for the discretion of the learned county court judge, and, although he had certainly taken a very lenient view, I cannot find that in so doing he has committed any error in law such as would make his order properly open to review in this court. Accordingly, I agree that the appeal fails.

Appeal dismissed with costs.

Solicitors: *Wontner & Sons* (for the landlord); *Piper, Smith & Piper* (for the tenant).

[Reported by F. GUTTMAN, ESQ., Barrister-at-Law.]

DAVIES v. DE HAVILLAND AIRCRAFT CO., LTD.

[KING'S BENCH DIVISION (Somervell, L.J., sitting as an additional Judge of the King's Bench Division), July 5, 6, 1950.]

Factory—Safe means of access to place of work—Maintenance of floors and passages—Passage leading to canteen—Rainwater collected on floor of passage—Factories Act, 1937 (c. 67), s. 25 (1), s. 26 (1).

Master and Servant—Provision of safe place for servant to work—Rainwater on floor of passage leading to canteen—Workman slipping and suffering injury.

The plaintiff, who was employed by the defendants at their factory, was walking along a passage at the factory on his way to the canteen during a morning break, when, on turning a corner, he slipped on a patch of oil or of water in which some mud or oil might have been present and which had accumulated, possibly in a depression, on the concrete floor. He caught his foot between some machine tools standing nearby, and was injured. On a claim by him for damages for breach of the defendants' duties under the Factories Act, 1937, s. 25 (1) and s. 26 (1), and at common law,

HELD: (i) section 26 (1) had no application to the facts because at the time of the accident the plaintiff was using the passage as a means of access to the canteen and not to go to any place at which any person had to work.

(ii) the existence of an unexplained patch of oil or of a patch of water on the passage did not amount to a failure properly to maintain the floor and the passage as required by s. 25 (1).

(iii) in the circumstances there was no failure by the defendants to take reasonable care to protect those employed from unnecessary risk.

Dictum of LORD HERSCHELL in Smith v. Baker & Sons ([1891] A.C. 362), *applied*.

[FOR THE FACTORIES ACT, 1937, s. 25, s. 26, see HALSBURY'S STATUTES, Second Edn., Vol. 9, pp. 1017, 1018.]

Case referred to:

(1) *Smith v. Baker & Sons*, [1891] A.C. 325; 60 L.J.Q.B. 683; 65 L.T. 467; 55 J.P. 660; 34 Digest 202, 1657.

ACTION for damages for negligence and breach of statutory duty.

The plaintiff was employed by the defendants in their factory, where some five thousand persons were employed. On Oct. 14, 1948, during the morning break the plaintiff was walking along a passage at the factory towards the canteen when, on turning a corner, he slipped, his foot caught between some machine tools which were standing near, and he fell and broke his ankle. The machine tools were stored at that spot for want of more suitable storage space. The passage was fifty-two inches wide. The plaintiff stated in evidence that he slipped on a patch of oil or grease, but, having regard to other evidence, SOMERVELL, L.J., found that there was not a patch of oil at the spot, although some rain water had collected, possibly in a slight depression in the concrete floor, and it was possible that mud or oil from men's boots was also present. The tools had been in the same position for three years, and had not been re-greased during that time. The plaintiff claimed damages for breach of the defendants' duty under the Factories Act, 1937, s. 25 (1) and s. 26 (1), and at common law.

R. M. Everett for the plaintiff.

John Thompson for the defendants.

SOMERVELL, L.J. [having recited the facts and considered the evidence]: The plaintiff relies first on the Factories Act, 1937, s. 26 (1), which provides:

"(1) There shall, so far as is reasonably practicable, be provided and maintained safe means of access to every place at which any person has at any time to work."

The plaintiff was going to the canteen, and, therefore, it does not seem to me that he comes within those words. Counsel for the plaintiff argued that if the plaintiff had been returning, he would have been going from the canteen to his work, and it would be absurd if the section applied in that case and not if he were going towards the canteen. Although this section has been given, as I accept, a rather wider meaning than some persons have suggested that it is intended to have, my own view is that the provisions of the Factories Act, 1937, which are intended to apply to a passage of this kind are in s. 25 (1), and, therefore, I would lean against an overlapping of the sections in a case which I do not think s. 26 (1) aptly fits. So far as the evidence goes, the passage was a means of access to the canteen and not a means of access to a place at which a person had at any time to work, and I think (although I have not got to decide it) that it would be outside s. 26 (1) whether the plaintiff was going to the canteen or coming from it.

Section 25 (1) provides:

"All floors, steps, stairs, passages and gangways shall be of sound construction and properly maintained."

"Maintained" is defined in s. 152 as

". . . maintained in an efficient state, in efficient working order, and in good repair."

That is the duty of maintaining. Assuming that there was, as I have found, water that might be slippery at the time in question, or assuming that there was an unexplained patch of oil, I do not think that that amounts to a failure by the defendants to comply with the duty imposed on them by those words. The fact that for an uncertain period and in circumstances which no one can explain there was a patch of oil does not seem to me to amount to a failure to maintain. I hold that the facts do not amount to a breach of this requirement. Equally (and the evidence on this must be very carefully considered because it was not the plaintiff's case), if there was a slight depression in the concrete in which water collected when it rained so that the floor became slippery, I do not think that, on the evidence, that amounts to a breach of s. 25 (1). It would be impracticable to maintain passages and roads and pathways so that there was never a slippery place, especially after rain, on which a man might slip. Slipping is quite a common incident of life, and usually no harm is done. The victim usually suffers no permanent injury, but, unfortunately, the plaintiff received serious damage to his ankle.

So much for the statute, and, in my view, the same general approach which leads me to the opinion that there was no breach of duty imposed by the statute leads me to hold that there was no breach of duty at common law. It was generally agreed that the duty was accurately stated in the often-quoted words of LORD HERSCHELL, in *Smith v. Baker & Sons* ([1891] A.C. 362):

"It is quite clear that the contract between employer and employed involves on the part of the former the duty of taking reasonable care to provide proper appliances, and to maintain them in a proper condition, and so to carry on his operations as not to subject those employed by him to unnecessary risk."

I find it impossible to say that the mere existence of that which I have found might have resulted in the plaintiff slipping indicates any failure to take reasonable care to protect those employed from unnecessary risk. For these reasons I think this claim fails.

Judgment for defendants with costs.

Solicitors: *Rowley, Ashworth & Co.* (for the plaintiff); *Clifford-Turner & Co.* (for the defendants).

[Reported by F. A. AMIES, Esq., Barrister-at-Law.]

WILLIAM CORY & SON, LTD. v. CITY OF LONDON CORPORATION.

Affirmed. C.A. [1951] 2 All E.R. 85.

[KING'S BENCH DIVISION (Lord Goddard, C.J.), July 4, 1950.]

Contract—Repudiation—Anticipatory breach—Contract with corporation for removal of refuse—Undertaking by contractors to observe bye-laws—Sealing of new bye-laws—Substantial additional burden on contractors.

The City of London Corporation, as the sanitary authority, made a contract for the removal of refuse by the River Thames under which the contractors undertook to use lighters and barges fitted with "temporary coamings and coverings to be secured to the permanent coamings." The contractors also undertook to comply with the bye-laws of the corporation as health authority for the port of London. In April, 1948, when the contract still had a prospective life of some twenty years, the corporation, as the port health authority, sealed new bye-laws which were due to come into force in November, 1950. One of these bye-laws required any vessel transporting refuse to be provided with "permanent coamings and close-fitting hatches to such coamings, capable of completely covering the refuse, and . . . water-proof sheeting for covering such hatches." It was not disputed that the additional burden thrown on the contractors by this bye-law was such as would entitle them when the bye-law ultimately came into force to treat the contract as having been frustrated.

HELD: the repudiation of a contract must be a conscious act with reference to the contract which is said to be repudiated; in the present case the corporation legislated in discharge of their duty as port health authority without reference to the contract into which they had entered as sanitary authority; and, therefore, the sealing of the bye-laws did not amount to a repudiation of the contract entitling the contractors to treat it as determined forthwith.

[AS TO REPUDIATION OF CONTRACT, see HALSBURY, Hailsham Edn., Vol. 7, pp. 227-230, paras. 311-315; and FOR CASES, see DIGEST, Vol. 12, pp. 338-345, Nos. 2830-2874.]

Case referred to:

- (1) *Hirji Mulji v. Cheong Yue S.S. Co., Ltd.*, [1926] A.C. 497; 95 L.J.P.C. 421; 134 L.T. 737; 41 Digest 367, 2139.

CASE STATED by the town clerk of the City of London pursuant to an arbitration clause in an agreement.

The claimants were a company of lightermen and barge-owners who had contracted with the respondents, the City of London Corporation, for the removal of refuse by the River Thames. Under the agreement they had also undertaken to comply with the bye-laws which had been made by the respondents as port health authority. The claimants contended that they were entitled to treat the contract as determined on the ground that it had been repudiated by the respondents when they sealed new bye-laws, one of which imposed so substantial a burden on them in equipping their barges as to entitle them, when it came into force, to treat the contract as frustrated.

Harvey, K.C., for the claimants.

Harold B. Williams, K.C., and *Wilfrid Hunt* for the corporation.

LORD GODDARD, C.J.: This is a Special Case stated by the town clerk of the city of London pursuant to an arbitration clause in an agreement dated Dec. 16, 1936, between the respondents, the City of London Corporation, and the claimants, William Cory & Son, Ltd., relating to the loading and discharge of refuse at Letts Wharf. The claimants, a firm of lightermen and barge-owners, undertook to load the refuse and take it down to Hornechurch to a "dump." The contract is of an indefinite character. It was to be for a certain period

and then to continue until the "dump" at Hornchurch had reached a certain height. The arbitrator finds, and there is no contest about it, that under its terms in all probability the contract would remain in force until about 1969.

The claimants' case is that by the sealing of some bye-laws in April, 1948, an action which was confirmed by the Minister of Health in July, 1948, the corporation have, in effect, repudiated the contract. The terms of the contract are conveniently stated in the Special Case. By cl. 1 it is provided:

A "The contractors shall at all times during the continuance of this agreement provide at Letts Wharf on the River Thames such a number of staunch and strong lighters and barges which shall for the purpose of this agreement be fitted and maintained with temporary coamings and coverings to be secured to the permanent coamings as will be sufficient to remove the materials aforesaid from Letts Wharf aforesaid and in particular they shall

B at all times have so many lighters and barges moored alongside Letts Wharf aforesaid as will in the opinion of the director of public cleansing be sufficient for the reception of the materials aforesaid as the same are brought or conveyed to Letts Wharf."

Then there is a clause which provides that the corporation are to give daily

C loadings to the contractors of not less than thirty thousand or more than eighty thousand tons, and by cl. 13 it is provided:

"Subject to the provisions of cl. 1 hereof the contractors shall at all times observe and comply with the bye-laws of the port health authority of the port of London."

D The corporation are the sanitary authority whose duty it is to clear the streets and dispose of refuse, and they are also, by the Public Health (London) Act, 1936, s. 5 (1), the port health authority for the port of London.

The bye-laws in force when this agreement was made were made on Apr. 8, 1897, and allowed by the Local Government Board on May 21, 1897. Under those bye-laws provision was made for the prevention of nuisance arising from the carriage of filth or other matter by any ship, boat, or vessel, but it was not

E provided that there should be temporary coamings and coverings to be secured to the permanent coamings as provided in cl. 1 of the contract. The only meaning I can give to cl. 13 is that it imposes on the contractors an obligation not only to observe and comply with the bye-laws, but also to comply with the requirements of cl. 1. It is also intended to make clear that the provisions

F of cl. 1 are to prevail notwithstanding the fact that the bye-laws which were then in force do not go as far as does cl. 1. Clause 24 of the contract deals with temporary interference with the performance of the contract, and provides that if, by certain matters such as an act of God, the acts of the King's enemies, or the regulations of any county council, parochial or local authority, or by any government interference, the contract is hindered or prevented, it is to be

G suspended so long as the performance is so hindered and prevented. That is a clause dealing only with temporary hindering of performance.

In July, 1948, a bye-law was confirmed by the Minister of Health which, when it becomes effective in November, 1950, will throw a very considerable burden on barge-owners or lighter-owners who are engaged in this trade. This bye-law provides:

H "A person who shall remove or transport or cause to be removed or transported in or upon any vessel, within the district of the port health authority, any refuse, shall: (a) Remove or transport, or cause to be removed or transported, such refuse in a sound, suitable and watertight vessel provided with permanent coamings and close-fitting hatches to such coamings, capable of completely covering the refuse, and provide waterproof sheeting for covering such hatches capable of being properly and securely attached to such coamings. (b) Except during the process of loading or un-

loading properly and securely cover and keep covered or cause to be so covered and kept covered all such refuse with close-fitting hatches, and completely cover or cause to be so covered such hatches with waterproof sheeting properly and securely attached to the said coamings of the vessel. (c) Not place or deposit or cause to be placed or deposited therein any refuse above the level of the said coamings thereof."

The claimants have found that it will cost them between £400 and £500 per barge to comply with that bye-law. It is not disputed that when that bye-law does come into force the contract will come to an end because it will have been frustrated. As a business proposition the claimants cannot be expected, with the 6s. a ton they receive under the contract for the removal of refuse, to spend £400 or £500 per barge in fitting their barges to comply with this bye-law. If they do not want to do that they can say: "Now the terms are quite different from those which prevailed when we entered into the contract. The requirements of the bye-law alter the matter to such an extent that it is commercially impossible for us to carry on the contract." They want to go further, however, and say: "As in 1948 you gave notice that this bye-law was coming into force in 1950, that amounts to a repudiation of the contract because you are going to require us in 1950 to alter our barges or lighters, if we are to carry out the business, in such a way that it will be commercially impossible. You are, therefore, not going to allow us to carry out the contract in the way it was stated it should be carried out at the time it was entered into."

The question I have to decide is whether the act of the corporation in sealing a new bye-law amounted to a repudiation so as to entitle the claimants to treat the contract as determined on Sept. 21, 1948, when the claimants first took the point that the contract had been repudiated? In my opinion, it did not. In sealing the bye-law the corporation were acting, no doubt, as a subordinate legislative authority, as all bye-law-making authorities act. They were making a bye-law of perfectly general application. It was not a bye-law which would apply to the claimants only; it would apply to all persons who engage, or might hereafter engage, in the trade or business of refuse removal or any of the other matters dealt with in the bye-laws. It seems to me that it cannot be said because the corporation, as the port health authority, are entrusted by Parliament with the duty of making bye-laws with the object of securing the health of the port, and think it right and necessary to pass a particular bye-law, they are thereby repudiating a contract. It may be, as in this case, that the effect of the bye-law will give reason to the claimants to say that a contract will be frustrated in the future, that is to say, in November, 1950, but it does not seem to me that what occurred in 1948 amounted to a repudiation by the corporation of the contract. It is not an anticipatory breach of contract, because I do not think the corporation were committing a breach of contract at all.

The doctrine of anticipatory breach, as it is generally called, depends on one party repudiating his obligation under a contract. If one party so repudiates his obligation the other party can say: "I will treat the contract as at an end." But before there can be a repudiation there must be something in the nature of a wrongful act. The wrongful act can either be a breach of contract or it may be the commission of a tort. In my opinion, it is impossible to say that the corporation, acting as the port health authority, committed a wrongful act or broke their contract because they imposed a bye-law on the port of London which incidentally will affect this particular contract.

The meaning of the words "to repudiate" are, according to the OXFORD DICTIONARY, "to refuse to discharge or acknowledge a debt or other obligation." Repudiation, it seems to me, for this purpose must be a conscious act in relation to the contract in question. That distinguishes it from the frustration of a contract as it is usually called, as was pointed out by LORD SUMNER in *Hirji Mulji v. Cheong Yue S.S. Co., Ltd.* (1). This is not a question whether the

corporation can divide themselves into two parts, and whether one is to regard them *qua* sanitary authority as one body and *qua* port health authority as another. As a corporation they are one and indivisible, but they have distinct duties, and if one of their duties is to act as the port health authority I cannot see that the making of a bye-law of general application and affecting all persons on the River Thames can in any way be said to be an act repudiating a contract entered into for another purpose altogether, although, incidentally, it may affect it. It is not disputed that, if some outside authority—Parliament or the London County Council or some other local authority—had made a bye-law which affected the contract, that might have had some effect on it, though it could not amount to repudiation. I think the repudiation with which the well-known doctrine of law is concerned must be a conscious act with reference to the particular contract which is said to be repudiated. In this case I think that all that happened is that the corporation legislated in discharge of their duty as port health authority. That legislation will, no doubt, affect the contract when the legislation comes into force. I am willing to assume that the effect of the bye-law will be to frustrate the contract and prevent its further application as commercially impossible in November, 1950, when the bye-law becomes effective, but I cannot hold that what has happened here amounted to a repudiation. I, therefore, decide that the claimants were not entitled to treat the contract as rescinded and of no effect after Sept. 21, 1948, and the corporation will have the costs of this argument.

Award upheld with costs against the claimants.

Solicitors: *E. F. Turner & Sons* (for the claimants); *Desmond Heap*, Comptroller and City Solicitor (for the corporation).

[Reported by F. A. AMIES, ESQ., Barrister-at-Law.]

R. v. HEYES.

[COURT OF CRIMINAL APPEAL (Lord Goddard, C.J., Hilbery and Byrne, JJ.), July 17, 1950.]

Criminal Law—Trial—Plea of Not Guilty—Withdrawal—Admission of guilt—Need to take verdict of jury.

On arraignment the appellant pleaded Not Guilty to charges of stealing and receiving. He was put in charge of the jury and the trial proceeded, but during the opening of the case for the prosecution his counsel said that he (the appellant) wished to change his plea to one of Guilty of receiving and asked that the jury should return a verdict accordingly, but the recorder said that that was not necessary and he passed sentence without a verdict being returned.

HELD: (i) the statement by his counsel that he wished to plead Guilty was not sufficient, for a prisoner himself must plead.

(ii) once a person had been put in charge of a jury he could only be convicted or discharged by the verdict of the jury; this trial, therefore, was a nullity, and the court could have ordered a re-trial; but in the circumstances they would not take that step, but would quash the conviction.

[AS TO PLEAS ON ARRAIGNMENT, see HALSBURY, Hailsham Edn., Vol. 9, p. 155, para. 213; and FOR CASES, see DIGEST, Vol. 14, pp. 248, 249, Nos. 2414-2433 and Digest Supp.]

Cases referred to:

(1) *R. v. Hancock*, (1931), 100 L.J.K.B. 419; 145 L.T. 168; Digest Supp.

(2) *R. v. Neal*, [1949] 2 All E.R. 438; [1949] 2 K.B. 590; 113 J.P. 468; 2nd Digest Supp.

APPEAL against sentence.

The appellant pleaded Not Guilty at Bolton Quarter Sessions to charges of stealing and receiving, but, after being put in charge of the jury, he changed his plea to one of Guilty. The recorder sentenced him to three years' imprisonment without the jury having returned a verdict. The facts appear in the judgment of the court delivered by LORD GODDARD, C.J.

C. E. Goolden for the appellant.

Corcoran for the Crown.

The following judgment of the court was delivered by

LORD GODDARD, C.J.: The appellant was charged before the recorder of Bolton on an indictment containing charges of stealing and receiving bicycles. When arraigned, he pleaded Not Guilty to all the charges. During the opening of the case by counsel for the prosecution the appellant indicated that he wanted legal aid, whereupon the recorder granted this request and counsel undertook the case. Counsel then indicated that his client desired to withdraw his plea of Not Guilty and plead Guilty to receiving. By this time, however, he was in charge of the jury. The transcript of the shorthand note of the proceedings does not indicate that the appellant himself was asked to plead. It merely contains a statement that his counsel said that he wished to plead Guilty. That is not enough. A prisoner must himself plead. After the jury had heard that the appellant wished to withdraw his plea and admit his guilt, the proper proceeding was to direct them to return a verdict. Apparently, indeed, counsel suggested to the recorder that that was the proper course, but the recorder said it did not matter. It does matter, because once a prisoner is in charge of a jury he can only be either convicted or discharged by the verdict of the jury. As there was no verdict of the jury here, the trial was a nullity, and we could set aside the proceedings and order a re-trial or *venire de novo*. We are not, however, going to do that in this case. We are simply going to quash the conviction, because the appellant is a man of good character, there is no previous conviction against him, and he has already been awaiting this appeal for two months. There is no fault of learned counsel in this case on either side.

Conviction quashed.

Solicitors: *Registrar of the Court of Criminal Appeal* (for the appellant); *Fielding & Fernihough*, Bolton (for the Crown).

[*Reported by H. McL. MORRISON, Esq., Barrister-at-Law.*]

WALTER v. ETON RURAL DISTRICT COUNCIL AND ANOTHER.

[COURT OF APPEAL (Tucker, Cohen and Asquith, L.JJ.), July 19, 1950.]

Local Government—Superannuation—Decision of claim by “authority concerned” —Scheme administered by county council—Employees of rural district council entitled to participate—Claim to annual superannuation allowance by former employee of rural district council—Claim admitted by rural district council, but rejected by county council—Local Government Superannuation Act, 1937 (c. 68), s. 8, s. 35.

The plaintiff, who was employed by a rural district council, was entitled under the Local Government Act, 1937, s. 4, to participate in the benefits of a superannuation fund which was maintained and administered by the county council. The fund was a composite one and the contributory employees of some twenty district councils were entitled to participate in its benefits. On giving notice to the rural district council of his

intention to resign on the ground of permanent ill-health, the plaintiff claimed to be entitled to an annual superannuation allowance under s. 8 (1) (a) of the Act. His claim was admitted by the rural district council, but rejected by the county council, and his appeal from the decision of the county council was dismissed by the Minister of Health. The plaintiff brought an action against the councils claiming a declaration that he was entitled to a superannuation allowance. The county council contended that he was not entitled to the declaration because, under s. 35 of the Act, the Minister's determination of the question was final. The plaintiff contended that the question was not one for the decision of the Minister under s. 35, because the rural district council, as the "employing authority," were "the authority concerned" within the meaning of the section, and, as they had accepted his claim, the county council, as the "administering authority" were merely under a duty to pay him.

HELD: as the fund was a composite one in which a number of different local authorities were interested, the county council, as the "administering authority," had to deal with it as trustees; in each case of a claim to a superannuation allowance under s. 8 of the Act they had to be satisfied that the necessary facts were established which would justify them in paying sums out of the fund; and, therefore, for the purpose of s. 8, the "administering authority" were "the authority concerned" within the meaning of s. 35, and, accordingly, the Minister's determination was final and the plaintiff was not entitled to the declaration asked for.

Decision of LORD GODDARD, C.J. ([1950] 1 All E.R. 796), affirmed.

[FOR THE LOCAL GOVERNMENT SUPERANNUATION ACT, 1937, see HALSBURY'S STATUTES, Second Edn., Vol. 14, p. 569.]

APPEAL by the plaintiff, a former employee of the Eton Rural District Council, from an order of LORD GODDARD, C.J., dated Mar. 13, 1950, and reported [1950] 1 All E.R. 796, dismissing his action against the rural district council and the Buckinghamshire County Council for a declaration that he was entitled, under the Local Government Superannuation Act, 1937, s. 8, to an annual superannuation allowance out of the superannuation fund which was maintained and administered by the county council and in the benefits of which the contributory employees of the rural district council were entitled to participate. The plaintiff's claim to an allowance was admitted by the rural district council, but rejected by the county council who contended that he was not entitled to the declaration as the Minister of Health had dismissed his appeal from the decision of the county council, and, under s. 35 of the Act, the determination of the Minister was final. LORD GODDARD, C.J., held that the county council, as the "administering authority" of the fund, were the authority who had to satisfy themselves that an employee had brought himself within the provisions of s. 8 of the Act, and, therefore, they were the "authority concerned" within the meaning of s. 35, and the Minister's determination on the appeal from their decision was final. The facts appear in the judgment of TUCKER, L.J.

Gardiner, K.C., and M. Lyell for the plaintiff.

Rowe, K.C., and W. L. Roots for the Buckinghamshire County Council.
The Eton Rural District Council did not appear.

TUCKER, L.J.: This is an appeal from a judgment of LORD GODDARD, C.J., in favour of the defendants in an action brought by the plaintiff, Mr. Edward Frank Walter, against the rural district council of Eton and the county council of Buckinghamshire. On this appeal we are only concerned with the county council as an effective party, the rural district council of Eton not having taken any part in the appeal.

The plaintiff, who was a former employee of the Eton Rural District Council, brought his action claiming

"... a declaration that he is entitled to be paid an annual superannuation allowance under the Local Government Superannuation Act, 1937, at a rate calculated in accordance with the minute of the first named defendants dated May 27, 1947, from July 31, 1947, until the happening of some further event which shall determine or modify his right to the said allowance."

The plaintiff entered the service of the rural district council as a clerk in 1930. He became a committee clerk, and, on May 13, 1947, he wrote a letter, addressed to the clerk of the Eton Rural District Council, intimating his intention to resign on the ground of permanent ill-health resulting from, or contributed to by, his long service with the council. He ends his letter by saying: A

"I shall be glad if you will submit this letter to the next meeting of the council or the staff and accommodation committee when in view of the facts mentioned above I hope the council will be able to see its way clear to take the necessary action with a view to securing for me an allowance under the Local Government Superannuation Acts on the ground of my resignation being due to ill-health." B

When the matter was considered by the rural district council, the recommendation of the staff and accommodation committee was accepted. The recommendation was: C

"That Mr. Walter be granted, as from the operative date of his resignation, namely, July 31, 1947, an allowance under the Superannuation Acts based upon the maximum possible service performed by him and allowed for under the Acts and by treating non-contributory service as contributory (converting one-hundred-and-twentieths into sixtieths) and that the clerk and treasurer be instructed to take all necessary steps in connection therewith and to approach the Bucks County Council as necessary, as the authority administering the superannuation scheme." D

The plaintiff claims that that decision of the rural district council was properly taken by the council as "the authority concerned" to deal with the matter, and that under it he is entitled to receive his pension. The matter was subsequently considered by the Buckinghamshire County Council who claimed to be "the authority concerned" in the matter and refused to grant the pension. From that decision the plaintiff appealed to the Minister of Health and his appeal was dismissed. It is not now suggested that by appealing from that decision of the Minister the plaintiff is in any way precluded from contending that the matter was properly dealt with by the resolution of the Eton Rural District Council. E F

The Local Government Superannuation Act, 1937, s. 35, provides:

"Any question concerning the rights or liabilities of an employee of a local authority, or of a person claiming to be treated as such an employee, under any of the provisions of Part I or this Part of this Act, or any regulations made under this Act, shall be decided in the first instance by the authority concerned, and if the employee is dissatisfied with any such decision or with the authority's failure to come to a decision, shall be determined by the Minister, and the Minister's determination shall be final." G

The whole question in this appeal is: Were "the authority concerned" with this particular matter the Eton Rural District Council or the Buckinghamshire County Council? H

The plaintiff's claim to a pension arises under s. 8 (1), which provides:

"Subject to the provisions of this Act, a contributory employee of an employing authority shall be entitled, on ceasing to be employed by them, to receive an annual superannuation allowance if he either (a) has completed ten years' service and is incapable of discharging efficiently the duties of his

employment by reason of permanent ill-health or infirmity of mind or body; or . . .”

Then there are certain other conditions which, if fulfilled, entitle him to a pension. Section 8 (2) provides:

A “The superannuation allowance to be made to a contributory employee under this Part of this Act shall be on the following scale, that is to say: (a) in respect of every completed year of contributory service, one sixtieth of his average remuneration; (b) in respect of every year of non-contributing service, one one-hundred-and-twentieth of his average remuneration: Provided that: (i) in the case of any particular employee, the employing authority may, on his becoming entitled to a superannuation allowance, resolve that there shall be substituted for the said fraction of one one-hundred-and-twentieth any larger fraction not exceeding one sixtieth.”

B Section 8 (4) provides:

C “Every superannuation allowance under this Part of this Act shall be paid out of the appropriate superannuation fund, but any extra charge resulting from any resolution passed by an employing authority under proviso (i) to sub-s. (2) (b) of this section shall be repaid to the fund by that authority.”

D Under the scheme of this Act it is provided, by s. 1 (1), that superannuation funds shall be maintained by “the council of every county, county borough and metropolitan borough” and “the council of every county district having on the day six months before the appointed day one hundred or more employees.” By s. 4, which provides, among other things, for the case of authorities who have less than one hundred employees:

E “(1) The appropriate superannuation fund in relation to the contributory employees of an employing authority shall, where that authority are an administering authority, or are a constituent authority under a combination scheme for the time being in force, or were immediately before the appointed day a party to an admission agreement made with an admitting authority, be the fund maintained by the employing authority, or, as the case may be, by the joint committee or by the authority who were the admitting authority. (2) In any case not falling within the preceding sub-section, the appropriate superannuation fund in relation to the contributory employees of an employing authority shall be the superannuation fund maintained by the council of the county or county borough within which the area of the employing authority, or the greater part of the area of that authority, is situate . . .”

F Then there is a provision that, in certain circumstances,

G “the Minister may order that the contributory employees of any particular employing authority shall be entitled to participate in the benefits of the superannuation fund maintained by some other administering authority.”

H Section 4 (3) provides:

“If at any time the Minister is satisfied that the number of contributory employees entitled to participate in the benefits of the fund maintained by an administering authority who are the council of a county district is, and is likely to remain, below one hundred, he may order that those contributory employees shall be entitled to participate in the benefits of the superannuation fund maintained by the council of the county, or, if that council are a local Act authority, or if the Minister for other reasons, after consultation with the authorities appearing to him to be concerned, deems it expedient, the superannuation fund maintained by some other administering authority, and the Minister shall include in his order all such directions as he deems necessary for the transfer of the superannuation fund of the first-

mentioned authority and the liabilities thereof, and with respect to other consequential and incidental matters."

Therefore, as regards the authorities with less than one hundred employees, the scheme is that a composite superannuation fund is established. We are told that in the case of Buckinghamshire there are some twenty such authorities and one fund is created for dealing with calls on this fund, and I think the decision in this case turns very largely on the nature of that fund.

To return to s. 8, the question is: Who are the appropriate authority for dealing with claims to pension arising under s. 8 (1)? Are they the "administering authority" in a case where the "administering authority" are different from the "employing authority," or are they the "employing authority"? It is argued by counsel for the plaintiff that it is only reasonable to suppose that such matters as decisions with regard to infirmity of mind or body, permanent ill-health, and incapacity to discharge duties efficiently would be better dealt with by the employing authority, who would be familiar with the case of the employee in question, rather than by some more distant authority who knew nothing about him. I think there is a good deal of force in that argument. On the other hand, it is said that the administering authority, dealing with this fund in which a number of different local authorities are interested, are in the position of trustees and that they have to be satisfied that the necessary facts are established in each case which will justify them in paying sums out of the fund, and that, if it had been intended that they should merely act as bankers and pay out on the order of the employing authority, it would have been very easy to say so.

In the present case it is not necessary to decide who are "the authority concerned" under the various sections to which we have been referred. All we have to decide is: Who are "the authority concerned" with the matters dealt with in s. 8? I think, however, that some light is thrown on these matters by some of the other sections to which we have been referred. Counsel for the plaintiff relied very strongly on s. 3 (2). Section 3 deals with persons who are to be contributory employees, and s. 3 (2) provides:

"The persons referred to in the preceding sub-section are . . . (b) every servant, or part-time officer, of such a local authority as aforesaid who belongs to a class or description which the authority have by a statutory resolution specified as a class or description the members of, or persons falling within, which are to be contributory employees."

The Local Government Superannuation (Administration) Regulations, 1938 (S.R. & O., 1938, No. 574), were made by the Minister of Health on the basis that "the authority concerned" with creating this class are the employing authority, and art. 5 of those regulations deals in terms with that matter. Counsel for the county council concedes that, having regard to the regulations which have been made, the employing authority are the persons charged with that duty. Whether he would have so conceded but for those regulations, I know not, but, for present purposes, I am prepared to assume that the regulations were properly made, allocating these duties to the employing authority.

We were then also referred to s. 6 of the Act, and, particularly, to s. 6 (5), which provides:

"If, in consequence of his incapacity to continue to discharge efficiently the duties of his post, a contributory employee is transferred to another post at a reduced remuneration, or otherwise suffers a reduction of remuneration, he shall be entitled to continue to contribute to the superannuation fund the like amount as if his remuneration had not been reduced."

Counsel for the plaintiff argues that that, again, is a matter more appropriate to be dealt with by the employing authority. Whatever may be the correct view of that matter, I pass to s. 10 (2), which provides:

"A contributory employee of an employing authority who, before becoming entitled to a superannuation allowance under this Part of this Act, ceases to be employed by them by reason of his voluntary resignation, or his resignation or dismissal in consequence of inefficiency, shall be entitled to receive out of the appropriate superannuation fund a sum equal to the aggregate amount of his contributions to the fund."

A That is to be contrasted with s. 10 (4), which provides:

"Where a contributory employee of an employing authority ceases to be employed by them in consequence of an offence of a fraudulent character, or ceases to be employed by them in consequence of misconduct and is not entitled to a superannuation allowance under this Part of this Act, the employing authority may, if they think fit, direct the return to him out of the appropriate superannuation fund of a sum equal to the whole or a part of the aggregate amount of his contributions to the fund, or, if he ceases to be employed in consequence of an offence of a fraudulent character, the payment out of that fund of an equivalent sum to his wife or family."

B It is to be observed that under s. 10 (4) the matter is discretionary, whereas under s. 10 (2) the person concerned is entitled in those circumstances to a return of his contributions. Counsel for the county council points out that, in effect, the contention of counsel for the plaintiff is that the function of the administering authority is as provided under s. 10 (4), *i.e.*, their duty is merely to pay out on the direction of the employing authority. Counsel for the county council says that, if that had been the intention of the legislature, it would have been easy to say so, and that when they did so intend, as in the case of s. 10 (4), they expressed their intention in clear language.

C I do not think that this matter is by any means free from difficulty, but, having considered the arguments and the sections to which we have been referred, and, in particular, s. 22, which deals with the periodical valuations to be made in connection with superannuation funds, I have come to the conclusion that the argument of counsel for the county council should prevail. Section 22 provides for quinquennial valuations, the manner in which actuarial calculations are to be made, and the consideration of the reports. Section 22 (6) provides:

"Where by any valuation and report under this section a deficiency or a disposable surplus is disclosed, the administering authority shall, within three months after receiving the valuation and report, make a scheme for making good the deficiency or, as the case may require, for disposing of the surplus."

F Counsel for the plaintiff has drawn our attention to the Local Government Superannuation (Actuarial Valuations) Provisional Regulations, dated Mar. 18, 1939, with regard to the actuarial valuations made under s. 22 (3) of the Act. These regulations set out the manner in which the actuarial reports are to be made. Article 6 (2) provides:

G "In the report on the first valuation made under the Act, the statement referred to in para. (1) of this article shall be supplemented by a statement . . ."

and it sets out certain matters which have to be certified. Article 6 (3) provides:

H "This part of the report shall close with a recommendation as to the aggregate annual amount which should be paid into the fund during a period not exceeding forty years from the valuation date by each authority interested in the fund to meet such estimated liabilities as are certified under paras. (1) and (2) (a) of this article to have been imposed on funds."

Then, under the heading, "Valuation Results," art. 8 (1) provides:

"The following information shall be furnished in the fourth part of the report . . . (c) if a deficiency is disclosed, a statement indicating generally

the factors which have caused the deficiency and a recommendation for the allocation of the deficiency among the authorities interested in the superannuation fund, indicating the basis adopted for the proposed allocation and the manner in which the deficiency should be liquidated."

When those reports have been received and considered, it will remain for the administering authority to make a scheme for dealing with a deficiency under s. 22 (6) of the Act, and, although I have no doubt that, in the main, the deficiency will normally be allocated to the different authorities interested in the fund proportionately to the claims which have arisen on the fund from their respective areas, the fact remains that it is one entire fund and no local authority have any right to any one particular portion of that fund. The administering authority have to deal with the fund as trustees, and, in my opinion, before they authorise the drawing of any cheques on the fund they have to be satisfied that circumstances have been established which justify their making payments.

In the result, I have come to the same conclusion as was arrived at by LORD GODDARD, C.J., *viz.*, that for purposes of s. 35 of the Act "the authority concerned in this case are the administering authority, namely, the Buckinghamshire County Council and not the Eton Rural District Council. For those reasons, I think the appeal must fail.

COHEN, L.J.: I am of the same opinion. It was common ground between the parties, first, that the question turns on the meaning of the expression "the authority concerned" in s. 35 of the Local Government Superannuation Act, 1937, and, secondly, that this phrase does not necessarily connote either of the following two authorities, both of whom are defined in the Act, (i) the employing authority, or (ii) the administering authority, but that it might be one or the other according to the nature of the question to be decided under s. 35. Counsel for the plaintiff said that LORD GODDARD, C.J., rejected the second of those points, and held that "the authority concerned" must in all cases be the administering authority. I do not so read his judgment. Dealing with s. 8 and summarising the argument of counsel for the county council in the court below, he said ([1950] 1 All E.R. 797):

"[Counsel for the county council] points out that s. 8 of the Act merely gives an employee the right to receive a superannuation allowance if certain conditions are fulfilled, and does not confer a right or duty on any authority to make a decision, and, therefore, it is the authority who have to pay, *i.e.*, the 'administering authority,' who must satisfy themselves that the employee has brought himself within the provisions of s. 8, and, if he has not done so, the 'administering authority' cannot pay, and have the right and the duty to refuse to pay . . . If they decide that he is not entitled to be paid, and the employee is dissatisfied with their decision, then, under s. 35 of the Act, the question concerning the rights of the employee is to be determined by the Minister . . ."

I think that LORD GODDARD, C.J., meant by that that the test to be applied was: Whose act gives rise to the question which falls for decision under s. 35? In the present case, and, indeed, in any case where a pension is refused under s. 8, the question arises because the administering authority refuse to pay, and, therefore, the administering authority are "the authority concerned." As I read it, that is the effect of the judgment of LORD GODDARD, C.J., and with this reasoning I respectfully agree.

Counsel for the plaintiff gave a number of illustrations which, he said, threw light in particular cases on who are the administering authority. Like TUCKER, L.J., I do not derive very much assistance from those illustrations, because what we have to decide is who are "the authority concerned" in transactions under s. 8, but let me take two sections on which, I think, counsel for the plaintiff primarily relied. The first was s. 3 and on that, he said, it was plain that "the

authority concerned " would be the employing authority. That was clear from the Local Government Superannuation (Administration) Regulations, 1938. Let me, however, consider the matter apart from the regulations and on the assumption that no regulations had been passed. How would the question arise? Section 3 deals with contributory employees, and if any person is a contributory employee he becomes subject to the contributions provided for in s. 6. If, therefore, an employing authority decide (whether or not they communicate their decision to the employee) that a person is a contributory employee, they will immediately deduct five per cent. of his remuneration from the employee's salary in accordance with s. 6. The question will then arise between the employee and the employing authority, because the employee will object to the deduction. That would clearly be a case where the employing authority are " the authority concerned " within s. 35. Let me suppose, however (an almost incredible thing to arise) that the deductions are made and that no objection is taken by the employee, that deductions go on quite happily until he retires from the service of the employing authority, and that he then demands from the administering authority payment of the pension to which he claims he is entitled under s. 8. It may well be (though it is not necessary for us to decide) that, if the administering authority were then to refuse payment, alleging that the employee had never become a contributory employee, that would be a question for the administering authority, and the contributor's only remedy for the refusal of his pension would be to appeal to the Minister. As I say, that does not arise for decision, and I only mention it because I do not think that, although counsel for the county council admitted that, having regard to the regulations passed by the Minister pursuant to his powers under s. 36 (6), it is clear that in questions arising under s. 3 the employing authority is " the authority concerned," we must necessarily conclude that his admission would have been the same if there had been no regulation.

The only other section to which I wish to refer is s. 10 (4). Counsel for the plaintiff said that it was quite clear that, in a case under s. 10 (4), " the authority concerned " must be the employing authority. I am not sure that I should draw the same conclusion from that sub-section as he would. No doubt, the employing authority are given power in that case, and in that case only, to direct the administering authority to return to an employee who has been dismissed for an offence involving fraud a sum equal to the whole or a part of the aggregate amount of his contributions to the fund. Let me suppose, however, that that direction is given, or that the employing authority thinks they have given that direction, but that, when the employee demands payment from the administering authority, the administering authority refuse payment, saying that the document relied on is not a direction which complies with the section. That would, it seems to me, be a question between the administering authority and the employee, and the Minister would have to decide whether or not the document was a direction which complied with the section. If the dispute was whether the employee had been dismissed for misconduct, and he claimed payment under s. 8, then, quite clearly, I think, for the reasons which TUCKER, L.J., has given, the position would be the same as in any other question whether the employee had been discharged in circumstances entitling him to a pension under s. 8, and the matter would be one for the decision of the administering authority who would be " the authority concerned."

Another point on which I wish to say a word is on the argument that was addressed to us that " he who pays the piper calls the tune." It was said that in the present case the whole of the fund out of which the employees of the Eton Rural District Council get their pension is provided by the rural district council, and, therefore, they must be the authority to decide whether or not the employee had fulfilled the conditions specified in s. 8 (1). I agree with TUCKER, L.J., that you cannot properly regard any part of the moneys in the pooled fund under the control of the Buckinghamshire County Council as the Eton Rural District

Council's own money. If during any quinquennial period any employee of the Eton Rural District Council became entitled to a pension, he would be entitled to be paid out of the full fund, though the payment of that pension to him might involve drawing on moneys which had not been contributed by the Eton Rural District Council. True it is that there are provisions in the Act which would enable the Buckinghamshire County Council to put forward a scheme under which the Eton Rural District Council would have to reimburse any excess drawings, but *non constat* that they are bound to do so or that necessarily that scheme would become law. In those circumstances, I do not think that the argument based on "he who pays the piper calls the tune" justifies us in departing from what, I think, is the true interpretation of the sections which we have had to consider. For these reasons, I agree that the appeal should be dismissed.

ASQUITH, L.J.: I agree with the judgments given by **TUCKER, L.J.**, **B** and **COHEN, L.J.**

Appeal dismissed with costs.

Solicitors: *Timothy Hales* (for the plaintiff); *Pyke, Franklin & Gould*, agents for *Guy R. Crouch*, Aylesbury (for the county council).

[*Reported by J. D. PENNINGTON, Esq., Barrister-at-Law.*]

WESTMINSTER AIRWAYS, LTD. v. KUWAIT OIL CO., LTD. **D**

[COURT OF APPEAL (Singleton and Jenkins, L.JJ.), July 10, 11, 1950.]

Discovery—Privilege—Production of documents—Communications between insurers and assured—Communications before plaintiffs' formal claim—Right of court to inspect documents—R.S.C., Ord. 31, r. 19A (2).

An aircraft owned by the plaintiffs was damaged by a motor truck owned by the defendants and driven by a person alleged to be their servant or agent. The plaintiffs sued the defendants for damages for negligence and in their defence the defendants denied that the driver of the truck was negligent or that he was their servant or agent. Before a claim was made by the plaintiffs correspondence passed between the defendants and their insurance brokers and insurers, for which privilege was claimed. The plaintiffs disputed the claim to privilege on the ground that the documents did not belong to the class of documents which were privileged, and that in any case the court ought to look at them before deciding the question of privilege. **E**

HELD: (i) where, as in the present case, the circumstances were such that there could have been no doubt, even before a formal claim for damages was lodged, that a claim would ensue, *prima facie* communications between the assured and the insurance company, whether direct or through the brokers of the assured, were of a character in respect of which a claim to privilege was justified. **G**

Jones v. Great Central Ry. Co. ([1910] A.C. 4) and *Anderson v. Bank of British Columbia* (1876) (2 Ch.D. 644), distinguished. **H**

Birmingham and Midland Motor Omnibus Co., Ltd. v. London and North Western Ry. Co. ([1913] 3 K.B. 850), and *Adam S.S. Co., Ltd. v. London Assurance Corpn.* ([1914] 3 K.B. 1256), applied.

(ii) if, looking at the affidavit of documents, the court found that the claim to privilege was formally correct, and that the documents in respect of which it was made were sufficiently identified and were such that, *prima facie*, the claim to privilege would appear to be properly made in respect of

them, the court should, generally speaking, accept the affidavit as sufficiently justifying the claim without going further and inspecting the documents.

[AS TO WHEN THE PRODUCTION OF DOCUMENTS CAN BE RESISTED, see HALSBURY, Hailsham Edn., Vol. 10, pp. 378-402, paras. 458-483; and FOR CASES, see DIGEST, Vol. 18, pp. 120-139, Nos. 705-891.]

Cases referred to:

- A (1) *Jones v. Great Central Ry. Co.*, [1910] A.C. 4; 79 L.J.K.B. 191; 100 L.T. 710; 18 Digest 137, 875.
- (2) *Anderson v. Bank of British Columbia*, (1876), 2 Ch.D. 644; 45 L.J.Ch. 449; 35 L.T. 76; 18 Digest 131, 823.
- (3) *Greenough v. Gaskell*, (1833), 1 My. & K. 98; 39 E.R. 618; 18 Digest 125, 743.
- B (4) *Reid v. Langlois*, (1849), 1 Mac. & G. 627; 19 L.J.Ch. 337; 41 E.R. 1408; 18 Digest 132, 828.
- (5) *Birmingham and Midland Motor Omnibus Co., Ltd. v. London and North Western Ry. Co.*, [1913] 3 K.B. 850; 83 L.J.K.B. 474; 109 L.T. 64; 18 Digest 87, 394.
- C (6) *Southwark Water Co. v. Quick*, (1878), 3 Q.B.D. 315; 47 L.J.Q.B. 258; 18 Digest 121, 714.
- (7) *Jones v. Monte Video Gas Co.*, (1880), 5 Q.B.D. 556; 49 L.J.Q.B. 627; 42 L.T. 639; 18 Digest 85, 380.
- (8) *Collins v. London General Omnibus Co.*, (1893), 63 L.J.Q.B. 428; 68 L.T. 831; 57 J.P. 678; 18 Digest 141, 905.
- (9) *Adam S.S. Co., Ltd. v. London Assurance Corpn.*, [1914] 3 K.B. 1256; 83 L.J.K.B. 1861; 111 L.T. 1031; 18 Digest 138, 890.
- D (10) *Coss v. National Maternity Hospital* (unreported).

APPEAL by the plaintiffs from an order of PARKER, J., dated June 9, 1950, partly allowing the defendants' appeal from an order of a master ordering the defendants to disclose further documents, being communications between them and their insurers regarding the accident which gave rise to the action. The facts appear in the judgment of SINGLETON, L.J.

C. N. Shawcross, K.C., and Bickford Smith for the plaintiffs.

R. M. Everett for the defendants.

SINGLETON, L.J.: This is an appeal from an order of PARKER, J., who allowed in part an appeal from a master on a question of discovery of documents. The action was commenced on May 12, 1949, the statement of claim was delivered on May 14, and the defence on June 10. An amended statement of claim was delivered on Nov. 8. This alleges that the defendants were the owners of a motor truck and that the plaintiffs at all material times were the owners of a De Havilland "Dove" aircraft which was forced to land on a road in the district of Kuwait in the principality of Kuwait on the night of Nov. 25, 1947. Whilst the aeroplane was stationary, it is alleged, the motor truck was driven into it and caused severe damage to it. It is alleged, further, that at the time the truck was in the charge of the defendants' servant or agent, one Jackson, and driven by their servant or agent, one Hough. By their defence the defendants admit that they were the owners of the truck. They plead that neither of the individuals mentioned as being in charge of, or as driving, the truck was their servant or agent, and they deny negligence.

On Sept. 29, 1949, the defendants delivered a list of documents. It is not surprising that this was regarded by the plaintiffs' advisers as insufficient. The letter sets out a few documents in the first part, and below "documents for which privilege is claimed." There are four groups of them, and the only one which I need read is as follows: "Correspondence passing between the defendants and their insurers which by its nature is privileged." The plaintiffs contested the question of privilege and applied for an affidavit of documents and on May 18,

1950, the master made an order. In para. 2 he dealt in this way with the question of the documents for which privilege was claimed as I have stated:

"That the defendants do on four days' notice being given produce at the office of Messrs. Hair & Co., solicitors for the said defendants . . . the following documents, namely, correspondence between the defendants and their insurers listed in the second part of the defendants' list of documents dated Sept. 29, 1949, and that the plaintiffs be at liberty to inspect."

A

The defendants appealed to the judge in chambers, who adjourned the matter. On June 6, 1950, two affidavits were sworn by Mr. Angeloni, secretary of the defendant company. On June 9 the matter came before PARKER, J., again, and he allowed the appeal so far as it related to para. 2 of the order. It is against that part of his order that the plaintiffs appeal.

B

The first affidavit of Mr. Angeloni deals with the subject-matter of para. 2 of the order of the master, and says:

"The defendant company have in their possession or power documents passing between the defendants and their insurers set forth in the schedule hereto."

The schedule embraces some fifty documents, beginning with a letter of Dec. 19, 1947. The affidavit also says:

C

"The defendant company object to produce any of the documents set forth in the schedule hereto upon the ground that they came into existence and were made after litigation was in contemplation and in view of such litigation for the purpose of obtaining and furnishing to the solicitors of the defendant company evidence and information as to the evidence which could be obtained and otherwise for the use of the solicitors to enable them to conduct the defence in this action and to advise the defendants."

D

That claim is in a form which has been frequently before the courts. The appeal of the plaintiffs is purely in relation to the documents which are set forth in the schedule to this first affidavit, and in respect of which the defendants claim privilege.

E

The defendants have disclosed the first document mentioned in the schedule. That is a letter from the Tanker Insurance Company, Ltd., insurance brokers of the defendants, to the Royal Insurance Company, Ltd., dated Dec. 19, 1947. That letter says:

"Dear Sirs, Motor Vehicle Insurance, Kuwait Oil Company, Ltd. We enclose herewith a copy of a memorandum received to-day from Kuwait in connection with an accident occurring on Nov. 25 last. Pending any advices you may have, we are deferring acknowledgement of their communication."

F

The memorandum enclosed was a letter from the defendants' resident accountant at Kuwait to their London office, dated Dec. 3, 1947, and it is important to notice that that memorandum, as well as another memorandum, was disclosed by the defendants in a list of documents in the other affidavit, a list in respect of which privilege is not claimed.

G

In the second affidavit the secretary, having set out certain facts with regard to the ownership and use of the lorry, enclosed in the schedule of documents which are disclosed a memorandum from Mr. Campbell, the defendants' resident accountant in Kuwait, to the defendants in London, dated Nov. 27, 1947, and also a memorandum from Mr. Campbell to the defendants in London, dated Dec. 3, 1947, which is the document enclosed with the letter of Dec. 19. The second affidavit contains a number of other documents, but the plaintiffs have applied for, and have had access to, the two memoranda which I have mentioned, and, in particular, the one sent with the letter of Dec. 19, 1947, the letter being the first document, among others, for which privilege is claimed. The schedule

H

to the first affidavit includes the item "Letter Claims Superintendent of Royal Insurance Company to Tanker Insurance Company, Dec. 22, 1947." Then the next item is: "Letter Claims Superintendent of Royal Insurance Company to Tanker Insurance Company, Dec. 23, 1947." The next document is a letter from the defendants to Mr. A. C. Wright, of the Tanker Insurance Company, dated Dec. 31, 1947, and to that document counsel for the plaintiffs, in his reply, said he attached considerable importance. It is of interest to notice that formal notice of claim in respect of this accident was given on Dec. 29, 1947, that is, before the date of the letter from the defendants to Mr. Wright of the Tanker Insurance Company, who were acting as their insurance brokers.

It is quite clear from the document enclosed with the letter of Dec. 19, 1947 (the memorandum from the Kuwait Oil Company, Kuwait, to the defendants in London), that there was more than a probability of litigation at the time of the writing of the memorandum which was prepared in December, 1947. That memorandum is in these terms:

"At about 7.30 p.m. on November 25 a Dove aircraft belonging to the Westminster Airways made a forced landing on the Burgan Magwa road about two miles from Magwa. Through electric storms and inability to make contact with Basrah airport the pilot had lost his bearings and landed where he did to inquire of his whereabouts from someone at Magwa. A few minutes later a Pickup [the truck] coming from the direction of Burgan crashed into the aircraft which was still on the road and caused extensive damage. The accident was peculiar, to say the least of it, and we were advised by a member of the staff of airworks who are here that the Ministry of Civil Aviation would probably require a court of inquiry. The political agent was asked to do this and agreed, but subsequently stated that to take evidence on oath a case would have to be raised against the driver of the vehicle who was Mr. H. H. Hough, a driller, who, incidentally, had tendered his resignation some few days previously. We were not prepared to state a case against Hough but the pilot of the aircraft did so and Hough was tried in the political agent's court for driving without due care and in such a way as might cause hurt. The result of the case was that Hough was found guilty and a fine of Rs.500 was imposed. The political agent has left Kuwait for a few days, but on his return we will obtain from him a certified copy of the particulars, evidence etc., in the case and forward it to you so that if any legal action follows the facts will be available to you."

That document has been disclosed, as has the earlier memorandum to which I referred.

The formal claim is from Lloyd's sub-agent on Dec. 29, 1947:

"Dear Sirs, Dove Aircraft G/AKET. Under instructions from Lloyd's, London, we hereby give you formal notice of their intention to lodge a claim against you for the loss of, and damage to, the above aircraft on Nov. 25, 1947."

It is obvious from the nature of the accident and from the document of Dec. 31, 1947, that litigation was anticipated before the actual claim was received.

Counsel for the plaintiffs claims that the further documents set out in the schedule to the first affidavit are not privileged, and, furthermore, he submits that the court ought to look at them before deciding that they are privileged. PARKER, J., did not think it necessary to do so, nor do I. The court ought to regard the defendants' affidavit as covering the question unless there is some reason to cast doubt on it. The defendants have now disclosed documents up to a time when it was clear beyond doubt, if not it was not clear before, that litigation was imminent, and the documents thereafter came into existence for the purpose of providing information on which the defendants' solicitors

could meet any claim which was made, and which they anticipated would be made.

In support of the appeal counsel for the plaintiffs relied chiefly on two authorities. The first is *Jones v. Great Central Ry. Co.* (1), the headnote of which is as follows ([1910] A.C. 4):

"A member of a trade union who had been dismissed by his employers furnished the union authorities, as required by the rules, with information in writing to enable the authorities to decide whether he was entitled to bring an action for wrongful dismissal at the expense of the union and with the assistance of their solicitor. The information comprised the evidence available in support of the action and the names of the witnesses. The union authorities sanctioned an action brought by the member, with their solicitor acting as solicitor for the plaintiff. Upon a summons for discovery taken out by the defendants:—*Held*, that the letters containing the information did not fall within the established rule as to the privilege between solicitor and client and must be produced."

LORD LOREBURN, L.C., said (*ibid.*, 5):

"The question arises as follows: Godfrey Jones, a servant of the defendant railway company, had a dispute with his official superiors which ended in his dismissal. He thought himself aggrieved and brought this action. He was a member of a trade union on terms which entitled him to a variety of benefits, and among others to the right of receiving legal assistance in case of unjust dismissal. In such case he was bound by the rules to give full particulars to the authorities of the trade union, and the sanction of the executive committee or of the general secretary was needed before a solicitor was engaged. In the present instance certain letters passed between Godfrey Jones and the officials of the union, containing information about the dispute. They were written before any action was brought in order to satisfy the union authorities that they ought to sanction the employment of a solicitor and to furnish information by which the solicitor should be enabled to conduct the action which the workman contemplated and desired."

The learned Lord Chancellor held, and the other Law Lords agreed, that those documents were not privileged. That case seems to be quite different from the case before this court.

The other authority was *Anderson v. Bank of British Columbia* (2), the headnote of which is:

"A bill was filed against a banking company to compel them to replace a sum of money alleged to have been improperly transferred by them from one account to another at their branch bank in Oregon. Before the bill was filed, but after litigation had become highly probable, the manager in London telegraphed to the manager in Oregon to send full particulars of the whole transaction. On an application by the plaintiffs in the suit for production of documents, the bank resisted production of the letter sent in answer, as being privileged:—*Held* (affirming the decision of the Master of the Rolls), that the letter was not privileged, and must be produced."

Counsel for the plaintiffs relied chiefly on the judgment of JAMES, L.J., in the Court of Appeal, but it is useful to look at the judgment of SIR GEORGE JESSEL, M.R. The Master of the Rolls, having referred to the words of LORD BROUGHAM, L.C., in *Greenough v. Gaskell* (3) and to LORD COTTENHAM, L.C.'s summary of that decision in *Reid v. Langlois* (4), went on to say ((1876) 2 Ch.D. 649):

"The object and meaning of the rule is this: that as, by reason of the complexity and difficulty of our law, litigation can only be properly

conducted by professional men, it is absolutely necessary that a man, in order to prosecute his rights or to defend himself from an improper claim, should have recourse to the assistance of professional lawyers, and it being so absolutely necessary, it is equally necessary, to use a vulgar phrase, that he should be able to make a clean breast of it to the gentleman whom he consults with a view to the prosecution of his claim, or the substantiating his defence against the claim of others; that he should be able to place unrestricted and unbounded confidence in the professional agent, and that the communications he so makes to him should be kept secret, unless with his consent (for it is his privilege, and not the privilege of the confidential agent), that he should be enabled properly to conduct his litigation. That is the meaning of the rule. Now, as to the extent of the rule. It goes not merely to a communication made to the professional agent himself by the client directly, it goes to all communications made by the client to the solicitor through intermediate agents, and he is not bound to write letters through the post, or to go himself personally to see the solicitor; he may employ a third person to write the letter, or he may send the letters through a messenger, or he may give a verbal message to a messenger, and ask him to deliver it to the solicitor, with a view to his prosecuting his claim, or of substantiating his defence."

The judgment of JAMES, L.J., appears to me to limit the privilege rather more strictly than has been done in some of the other cases. I do not propose to read it all, but there is one short passage which I think I ought to read (*ibid.*, 656):

"Looking at the *dicta* and the judgments cited, they might require to be fully considered, but I think they may possibly all be based upon this, which is an intelligible principle, that as you have no right to see your adversary's brief, you have no right to see that which comes into existence merely as the materials for the brief."

It was held on the facts of that case both by the Court of Appeal and by the Master of the Rolls in the court of first instance that the document—the report from the manager in Oregon to the general manager—was not privileged. Again, I think, that case can be distinguished from the present case. In matters of this kind which, as counsel for the defendants put it, involve a certain amount of discretion, it really is a question on which side of the line a case falls.

I need only refer to two authorities cited in support of the order of PARKER, J. The first, *Birmingham and Midland Motor Omnibus Co., Ltd. v. London and North Western Ry. Co.* (5). The headnote states:

"In an affidavit of documents on behalf of the defendants in an action of negligence privilege was claimed for certain documents in a schedule to the affidavit on the ground that 'they came into existence and were made after this litigation was in contemplation and in view of such litigation for the purpose of obtaining for and furnishing to the solicitor of the defendant company evidence and information as to the evidence which could be obtained and otherwise for the use of the said solicitor to enable him to conduct the defence in this action and to advise the defendants.' A judge at chambers, after inspecting the documents under the provisions of R.S.C., Ord. 31, r. 19A (2), made an order by which some of the documents were protected and others were ordered to be disclosed, the dividing line being drawn at the date on which the plaintiffs first preferred their claim against the defendants:—*Held*, first, that the judge at chambers and the Court of Appeal were entitled under R.S.C., Ord. 31, r. 19A (2), to inspect the documents for the purpose of deciding on the validity of the claim of privilege, as no particular formula of words in the affidavit could be conclusive against evidence furnished by the documents themselves; and, secondly, after inspecting the documents, that protection had been

appropriately claimed for them by the affidavit and that the dividing line drawn by the judge in chambers was inappropriate in the particular case. It is not necessary that the affidavit should state that the information was obtained 'solely' or 'merely' or 'primarily' for the solicitor, if it was obtained for the solicitor in the sense of being procured as materials upon which professional advice should be taken in proceedings pending, or threatened, or anticipated."

There are three matters which come to mind in regard to that decision. The first is that the claim of the defendants to privilege was upheld on the wording of the affidavit and that the wording of the present affidavit in the present case is similar in all respects; the second is—as it makes quite clear, and, indeed, the rule itself makes it clear—that it is open to the court to look at the documents themselves in order to ascertain whether they are privileged or not, if the court thinks it necessary so to do. The third is that the argument of counsel for the plaintiffs that one cannot determine whether a document is privileged or not without looking at it must be considered in regard to the affidavit, and it is not necessary that the affidavit should state that the information is obtained solely for the use of the solicitor. There may be other purposes allied to that purpose of a kind which would not of themselves be privileged.

In the course of his judgment BUCKLEY, L.J., said ([1913] 3 K.B. 856):

"The question for determination here is I think whether the documents in question fall within the principle of"

Anderson v. Bank of British Columbia (2) or within that of *Southwark Water Co. v. Quick* (6). BUCKLEY, L.J., continued, referring to *Anderson v. Bank of British Columbia* (2) (*ibid.*, 856):

"The resulting document was not privileged, and this upon the ground that it was not a confidential communication obtained by or for the solicitor or as materials forming, as it is called, part of the brief of the party making the affidavit."

HAMILTON, L.J., said (*ibid.*, 858):

"Although an affidavit of discovery cannot be controversially challenged, as by cross-examination, counter-affidavit, or administration of interrogatories, *Jones v. Monto Video Gas Co.* (7) lays down authoritatively how and how far it can be challenged otherwise: 'If from the affidavit itself, or from the documents therein referred to, or from an admission in the pleadings of the party from whom discovery is sought, the master or judge is of opinion that the affidavit is insufficient, he ought to make an order for a further affidavit, but except in cases of this description no right to a further affidavit exists.' Now that r. 19A (2) has given the judge power to inspect documents as to which there is a disputed claim of privilege, the documents which are not disclosed are available, either at the instance of the opposite party or in the discretion of the judge himself, as material on which to shew the insufficiency of the affidavit, because both are equally 'documents therein referred to'."

Dealing with the facts of the case, HAMILTON, L.J., said (*ibid.*, 861):

"Hence I should not have been disposed to interfere with the order which BUCKNILL, J., in his discretion made as to particular documents, but on examining them I think he has proceeded on a wrong principle. He has drawn his distinguishing line by the date at which the defendants first received a letter of claim from the plaintiffs, a test which, though often unexceptionable, and particularly so in mercantile disputes, is inappropriate in such a case as the present, where, as in *Collins v. London General Omnibus Co.* (8), at the very moment when the accident occurs an ordinary employee can anticipate that litigation in respect of it will probably ensue."

The formal notice of claim in the case under appeal was not made until Dec. 29, but if ever a claim could be anticipated after an accident, I should think this is the case. It was, indeed, an unusual case. Heavy damage was done, it is claimed by the statement of claim, and I should think myself that everyone must have anticipated at once that a claim would follow. The privilege claimed is in respect of documents at a date considerably after the date of the accident.

A The other case on which counsel for the defendants relied is *Adam S.S. Co., Ltd. v. London Assurance Corpn.* (9). It is not necessary to go into the facts of that case, but I draw attention to the judgment of BUCKLEY, L.J., where, on an affidavit in much the same form as the present one, he said ([1914] 3 K.B. 1259):

B "To my mind that is a complete and satisfactory claim of privilege based upon the grounds recognised in *Birmingham and Midland Motor Omnibus Co., Ltd. v. London and North Western Ry. Co.* (5). The question to be answered is this: Is the judge satisfied that the documents, which are sought to be protected, were *bona fide* obtained for the solicitor, though not actually by him? Were they documents obtained for the purpose of being used, not necessarily in an existing litigation, but in an anticipated litigation?"

KENNEDY, L.J., said (*ibid.*, 1260):

C "Assuming that to be so, these letters were written after the first step had been taken which put the parties, as has been said, at arm's length. The defendants in their list of documents, which is to be treated as if it were an affidavit of documents, claim privilege for them. To my mind they clearly appear privileged. They were letters which passed between the salvage association and their agents in Perim for the purpose of being used by the underwriters in a litigation which was obviously threatened and impending, and they were letters written for the purpose of obtaining or giving advice on the subject; and counsel has assured us that the only letters for which privilege is claimed are of that character. Upon principle as well as upon authority the documents are privileged."

E In my view, the documents set out in the schedule to the first affidavit fall within the line of authorities relied on by the defendants rather than upon those relied upon by the plaintiffs, and I am of opinion that the order of PARKER, J., was right, and that the claim to privilege is established. I do not find it necessary, for the reasons I have given, to look at the documents themselves. I am satisfied on the whole that this appeal ought to be dismissed.

F JENKINS, L.J.: I agree. The claim for further discovery, as developed in argument before us, was not to the effect that the claim to privilege was wholly bad on the face of it, with the result that the whole of the documents to which that claim related should be disclosed, but was argued on the lines that here was a dubious claim to privilege which might, or might not, be justified, and that the proper course in the circumstances was for the court itself to inspect the documents and decide how far, if at all, they were privileged documents. It is not open to doubt that under R.S.C., Ord. 31, r. 19A (2), the court has power in a proper case to inspect documents where a claim of privilege is set up against a claim for inspection of documents by the opposite party. *Birmingham and Midland Omnibus Co., Ltd. v. London and North Western Ry. Co.* (5), to which my Lord has already referred, affords an illustration of a case in which the court

G did take that course, and, as it happened, having done so, held that the claim to privilege was well founded, but there is nothing in the rule or in the authorities to constrain the court to hold that in every case where a claim to privilege is made and disputed the party seeking production is entitled to come to the court and (as it were) demand as of right that the court should go behind the oath of the opposite party and itself inspect the documents. The question whether the court should inspect the documents is one which is a matter for the discretion of the court, and primarily for the judge of first instance. Each case must depend

on its own circumstances, but if, looking at the affidavit, the court finds that the claim to privilege is formally correct, and that the documents in respect of which it is made are sufficiently identified and are such that, *prima facie*, the claim to privilege would appear to be properly made in respect of them, then, in my judgment, the court should, generally speaking, accept the affidavit as sufficiently justifying the claim without going further and inspecting the documents.

Considering this matter from that point of view, I find that the documents in respect of which privilege is claimed are communications passing between the defendants and their insurance brokers and insurers with respect to the accident which gave rise to the claim in the action, and that the claim to privilege in respect of those communications is made in the usual and regular form. In my judgment, *prima facie*, those documents are of a character in respect of which the claim to privilege is justified. The insurers, after all, are concerned in the matter only because they have agreed by the contract of insurance to indemnify their assured against claims of the character in question. That is how they come into it. That being so, the very fact that the insurance company is communicated with at all indicates that a claim is anticipated. Moreover, in the present case, the circumstances were such that there could be no doubt, even before a formal claim was lodged, that a claim would ensue. *Prima facie*, in such circumstances a communication between the assured and the insurance company, whether direct or through the assured's brokers, would be directed to the question whether the claim should be disputed or admitted, and if it was to be disputed, how best to conduct the defence. If the communications were of that character, then, in my judgment, they would be well within the privileged area, and the deponent to the affidavit claims that they were in fact within the privileged area by making in respect of them the claim to privilege in the usual general form. In those circumstances, it seems to me that on the face of the affidavit here a *prima facie* case of privilege is made out.

Counsel for the plaintiffs said that the court ought to go behind that claim, because the insurance company is not concerned, or not primarily concerned, with the defence of the expected action, or with the collecting of information and advice to that end, unless and until it has admitted liability. He, therefore, in effect, invites the court to read through the correspondence and find out when it was that the insurance company, having admitted liability, identified itself, so to speak, with the defendants' side of the matter. He was, as I understood him, prepared to agree that after that point was reached, what ensued would be privileged from discovery. In my judgment, this suggestion of a possibility of a dispute as to liability on the part of the insurance company is not enough to make it proper for the court to go behind the affidavit in the present case. There is, in fact, no reason to suppose that the insurance company ever did dispute liability, and, on the other hand, it is on the whole unlikely that they would ever categorically, and in so many words, have said to the defendants: "We acknowledge that we are liable to indemnify you." In the circumstances of this case, therefore, there seems no reason to suppose that the search we are invited to embark on by counsel for the plaintiffs would result in arriving at the dividing line which he suggests. The whole of this correspondence took place after it had become obvious from the accident itself that a claim was likely to ensue, and for the reasons I have endeavoured to state, I think that in the circumstances of this case, PARKER, J., having exercised his discretion in the matter, the order he has made should stand.

I should, perhaps, mention an unreported case from Southern Ireland to which we were referred, the case of *Coss v. National Maternity Hospital* (10), a decision of NIXON, J. The case is of interest because the learned judge had to deal with the question of privilege in regard to correspondence between an insurance company and the defendants and their solicitors and so had before him the very matter with which we are concerned. In that case the judge held, with regard

to the correspondence, that the proper course for him to take was to look at the documents under the general power given by the corresponding rule in Southern Ireland, and he said this:

A “So far as a line of demarcation may apply, I conceive it should not have reference to the date of the making of a claim by the plaintiffs, but to the point of time, if ascertainable, at which the insurance company ceased to be interested or concerned in the matter from the point of view of their own liability to their insured, and acquired instead the character of agents, even prospectively, for the legal advisers of the defendants. Having inspected the documents, I think the line of demarcation should be drawn at the letter of Aug. 23, 1946, from the insurance company to the assistant secretary of the defendants. The plaintiffs are entitled, in my view, to inspection of documents within the description in item 21 up to and including that date.”

B The judge in that case thus took the view which we were invited by counsel for the plaintiffs to adopt. With respect to the judge, I think that is too narrow a view to form the foundation of any general rule. After all, it must be remembered that the documents are documents with respect to which privilege has been claimed on oath, and, for the reasons I have endeavoured to state, they are documents in respect of which, *prima facie*, the claim to privilege would appear to be proper. I, therefore, cannot see that it would be right to lay down any general rule to the effect that in all such cases it is necessary to peruse the document for the purpose of arriving at a line of demarcation such as the judge in Southern Ireland described. Of the authorities cited to us, it seems to me that D the one nearest in point is the *Adam S.S. Co., Ltd. v. London Assurance Corpn.* (9), in which the Court of Appeal, looking at the affidavit and the nature of the documents, held—so far as appears from the report, without inspecting them—that the claim to privilege made in the affidavit was properly made, and disposed of the matter on that footing. For these reasons I agree that the appeal fails and should be dismissed.

E *Appeal dismissed with defendants' costs in the cause.*

Solicitors: *William Charles Crocker* (for the plaintiffs); *Hair & Co* (for the defendants).

[*Reported by F. GUTTMAN, Esq., Barrister-at-Law.*]

DOLLFUS MIEG ET COMPAGNIE S.A. v. BANK OF ENGLAND.

G [CHANCERY DIVISION (Wynn-Parry, J.), July 19, 20, 1950.]

H *Practice—Parties—Adding defendants—Applicants not asserting title to property, but claiming possession or control through bank as bailee—Invocation of doctrine of immunity of foreign sovereign States—Applicants not necessary parties at commencement of action—Action against Bank of England for delivery up of gold bars deposited with bank by governments of United Kingdom, United States of America, and France—Application by governments of United States and France to be added as defendants—R.S.C., Ord. 16, r. 11.*

A French company was the owner of sixty-four identifiable gold bars which were looted by the Germans during their occupation of France and were later found and seized by the Allied armies. Custody of the bars was acquired by a Tripartite Commission, consisting of representatives of the governments of the United Kingdom, the United States of America, and

France, which was set up under treaty arrangements between the United Nations for the purpose of acquiring and eventually distributing, in accordance with the provisions of the treaty, the gold and treasure looted by the Germans. The sixty-four gold bars were conveyed to England and deposited by the commission with the Bank of England, and, on learning this, the French company asserted its claim to them. On Oct. 18, 1948, the company issued the writ in an action against the bank claiming delivery up of the bars or damages for their detention. The bank applied for an order to set aside the writ and all subsequent proceedings on the ground that the bars were in the possession or under the control of the governments of the United States of America, France, and the United Kingdom and the action impleaded two foreign sovereign States, *viz.*, the governments of the United States and France, who declined to submit to the jurisdiction. The case proceeded on the basis that the bars were returnable *in specie* to the three governments on demand and the judge made the order which was asked for. The company appealed and, at the conclusion of the argument before the Court of Appeal, the bank put fresh evidence before the court, *viz.*, that, although it had segregated all the sixty-four bars at the request of the Tripartite Commission, it had inadvertently sold thirteen of them while the action was pending. As a result of this fresh evidence, the Court of Appeal allowed the company's appeal, but gave leave to the bank to appeal to the House of Lords. The governments of the United States of America and France now applied under R.S.C., Ord. 16, r. 11, to be added as defendants to the action. For the purpose of the application they did not assert a title to the bars, but they contended that, if they could establish that they had possession or control of them through the bank, the company would fail to obtain from the court an order in its favour by reason of the doctrine of immunity which applied to foreign sovereign States, and, therefore, the applicants would retain possession and control over the bars and be able to dispose of them.

HELD : (i) in determining whether or not the applicants had a proprietary right in the subject-matter of the action sufficient to entitle them to be joined as defendants, the true test lay, not so much in an analysis of what were the constituents of their rights, but rather in what would be the result on the subject-matter of the action if their rights could be established. Although the applicants did not assert title to the gold bars, the result of a successful intervention by them would be that, as between the company and themselves, they would, for all practical purposes, be the true owners, and, therefore, although their right arose indirectly, *viz.*, by the invocation of the doctrine of immunity and through the bank as bailee, they had a direct interest in the subject-matter of the action which was similar to a proprietary right and was of such a nature as would entitle them to an order that they be joined as defendants, if it could be shown that in their absence their claim would not effectually be put forward.

Moser v. Marsden ([1892] 1 Ch. 487), *distinguished*.

(ii) to invoke the jurisdiction of the court under R.S.C., Ord. 16, r. 11, it was not necessary to show that the intervener ought to have been joined in the action, for the rule conferred a wide jurisdiction on the court to entertain an application at any stage of the proceedings and gave to the court a general discretion to bring in an intervener so that the questions involved in the action might be completely adjudicated on and settled, and, therefore, although the applicants were not necessary parties at the commencement of the action, they could now be added as defendants if the result of the disclosure in the fresh evidence before the Court of Appeal made their presence necessary to enable the court effectually and completely to adjudicate on the matter.

(iii) in view of the applicants' submission that the bank might, on one view of the matter, find itself liable to the applicants for the value (approximately £300,000) of the gold bars, the court had grounds for being satisfied that the bank would now find itself seriously embarrassed in prosecuting the case on behalf of the applicants, and, therefore, the court was entitled to exercise its jurisdiction under R.S.C., Ord. 16, r. 11, by adding the applicants as defendants to the action.

A

[AS TO JOINDER OF PARTIES, see HALSBURY, Hailsham Edn., Vol. 26, pp. 19-21, paras. 16, 17; and FOR CASES, see DIGEST, PRACTICE, pp. 429-431, Nos. 1243-1266.

See also THE ANNUAL PRACTICE, 1949, pp. 275-280.]

B Cases referred to :

(1) *Norris v. Beazley*, (1877), 2 C.P.D. 80; 46 L.J.Q.B. 169; 35 L.T. 846; Digest Practice 429, 1243.

(2) *McCheane v. Gyles* (No. 2), [1902] 1 Ch. 911; 71 L.J.Ch. 446; 86 L.T. 217; Digest Practice 429, 1246.

(3) *Vavasour v. Krupp*, (1878), 9 Ch.D. 351; 39 L.T. 437; Digest Practice 912, 4543.

C

(4) *Moser v. Marsden*, [1892] 1 Ch. 487; 61 L.J.Ch. 319; 66 L.T. 570; Digest Practice 423, 1194.

(5) *Apollinaris Co. v. Wilson*, (1886), 31 Ch.D. 632; 55 L.J.Ch. 665; 54 L.T. 478; Digest Practice 911, 4538.

(6) *Wilson v. Anderton*, (1830) 1 B. & Ad. 450; 9 L.J.O.S.K.B. 48; 109 E.R. 855; 3 Digest 115, 385.

D

(7) *Duff Development Co. v. Kelantan Government*, [1923] 1 Ch. 385; 92 L.J.Ch. 273; 129 L.T. 290; *on appeal, sub nom. Kelantan Government v. Duff Development Co.*, [1923] A.C. 395; 129 L.T. 356; Digest Practice 646, 2734.

PROCEDURE SUMMONS by which the governments of the United States of

E America and the Republic of France applied under R.S.C., Ord. 16, r. 11, to be added as defendants in an action by a French company, Dollfus Mieg et Compagnie S.A., against the Bank of England, claiming the delivery up of sixty-four gold bars which had been looted from the plaintiffs by the Germans during their occupation of France, recovered from Germany by the Allied armies, and deposited with the Bank of England by the governments of the United States

F of America, the United Kingdom, and France, as members of the Tripartite Commission for the Restitution of Monetary Gold. The bank applied for an order to set aside the writ and all subsequent proceedings in the action on the ground that the court had no jurisdiction to entertain the action as the bars were in the possession and under the control of the three governments concerned and the action impleaded two foreign sovereign States, *viz.*, the United States of

G America and France, who declined to submit to the jurisdiction of the court. The case proceeded on the basis that the bars were returnable *in specie* to the three governments on demand, and on Apr. 6, 1949, JENKINS, J., made the order asked for : see [1949] 1 All E.R. 946. The company appealed, and, at the end of the argument before the Court of Appeal, fresh evidence was submitted by the bank that, while the action was pending, one of its subordinate officers

H had inadvertently disposed of some of the bars in the course of the bank's business. After considering this evidence, the Court of Appeal allowed the company's appeal: see [1950] 1 All E.R. 747, but gave the bank leave to appeal to the House of Lords. The applicants, the governments of the United States of America and the Republic of France, now moved the court for an order that they be joined as defendants, on the ground that, in view of the fresh evidence, their presence as defendants was necessary to enable the court to adjudicate effectually and completely in the matter.

The Attorney-General (Sir Hartley Shawcross, K.C.) and Denys B. Buckley for the applicants.

Cross, K.C., and J. R. C. Lee for the defendants, the Bank of England.

Sir Andrew Clark, K.C., and R. O. Wilberforce for the plaintiffs.

WYNN-PARRY, J.: This is a summons by the governments of the United States of America and the Republic of France for an order that they may be added as defendants to an action brought by a French company, Dollfus Mieg et Compagnie, S.A., against the Bank of England, and for certain consequential relief. [His LORDSHIP stated the facts and continued:] The application is made under R.S.C., Ord. 16, r. 11, which reads:

"No cause or matter shall be defeated by reason of the misjoinder or non-joinder of parties, and the court may in every cause or matter deal with the matter in controversy so far as regards the rights and interests of the parties actually before it. The court or a judge may, at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court or a judge to be just, order that the names of any parties improperly joined, whether as plaintiffs or as defendants, be struck out, and that the names of any parties, whether plaintiffs or defendants, who ought to have been joined, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all the questions involved in the cause or matter, be added."

The general rule is, I think, accurately stated in *THE ANNUAL PRACTICE*, 1949, p. 253, in these words:

"Generally in common law and chancery matters a plaintiff who conceives that he has a cause of action against a defendant is entitled to pursue his remedy against that defendant alone. He cannot be compelled to proceed against other persons whom he has no desire to sue."

In *Norris v. Beazley* (1), the defendant, in an action on a bill of exchange against the acceptor, sought to add the name of a company as defendants under R.S.C., 1875, Ord. 16, r. 13 (the rule to which the present r. 11 corresponds), on the grounds that:

"It was alleged by the defendant that the acceptance was given for the purchase-money of a ship which he had agreed to purchase of the plaintiffs; that in entering into the agreement for such purchase he had acted as a trustee for the company, to whom the ship was afterwards conveyed in pursuance of the agreement, and that the plaintiffs made fraudulent representations with regard to the ship, by reason of which the company had been put to useless expense, which they claimed to recover from the plaintiffs."

The court, consisting of LORD COLERIDGE, C.J., DENMAN and GROVE, JJ., refused the application. LORD COLERIDGE, having considered the wording of the rule, and, in particular, the last words of it, said (2 C.P.D. 83):

"It seems to me to be correctly argued that those words plainly imply that the defendant to be added must be a defendant against whom the plaintiff has some cause of complaint, which ought to be determined in the action, and that it was never intended to apply where the person to be added as defendant is a person against whom the plaintiff has no claim, and does not desire to prosecute any. It seems to me that this application is answered, and that it was not intended that persons in the position of this company should be added as defendants, merely for the convenience of another defendant between whom and the company there may be questions which will afterwards have to be settled. It seems to me that it is the more important to construe this rule strictly, because it is obvious that, in many cases, if the defendant's contention is right, its provisions might be made

use of in a manner exceedingly harassing to plaintiffs, by forcing them to include in their actions persons against whom they do not seek to proceed, and to mix up their rights, as against one person, with questions of a highly complicated nature arising between themselves and others."

In the middle of his judgment, DENMAN, J., said (*ibid.*, 85):

A "I am quite clear, however, that the court ought not to bring in any person as defendant against whom the plaintiff does not desire to proceed, unless a very strong case is made out, showing that in the particular case justice cannot be done without his being brought in."

B In *McCheane v. Gyles* (No. 2) (2), a single defendant, who was a trustee being sued for breach of trust, desired to bring in a person, resident in Ireland, who was the legal personal representative of his co-trustee. A third-party notice, by which the defendant claimed a contribution from the co-trustee's estate, and an order giving leave to serve it on the legal personal representative in Ireland, were set aside by the Court of Appeal, but without prejudice to an application by the defendant under R.S.C., Ord. 16, r. 11, to add the legal personal representative as a defendant to the action. BUCKLEY, J., held that the legal personal representative ought not to be added as a defendant against the plaintiff's wish. C In his judgment the learned judge said ([1902] 1 Ch. 914):

"The *cestui que trust*, who is the plaintiff in these proceedings, says, 'There were two trustees, John Cronyn and the defendant Gyles. They committed a breach of trust, and were under a joint and several liability in respect of it. Gyles is liable; I elect to sue him alone.' The plaintiff is not bound to sue both the trustees." D

HIS LORDSHIP then considered the wording of the rule, and a number of authorities, and said (*ibid.*, 917):

E "Looking at the rule you must, in order to say that a person who is not a party ought to be added, find either that he 'ought to have been joined,' or that his 'presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all the questions involved in the cause or matter.' I cannot hold that the plaintiff ought to have joined Mrs. Cronyn as a defendant, and her presence is not necessary to enable the court to decide whether Gyles is liable for a breach of trust. Moreover, if Mrs. Cronyn were joined as a defendant and the plaintiff F did not make any allegation against her, she might ask to be dismissed from the action."

Those two cases are examples of the general rule, and it will be observed that both cases rested on the ground that, in the circumstances of each of them, the court had no jurisdiction to make the order asked for. There are, however, certain exceptions to the general rule, conveniently divided in THE ANNUAL G PRACTICE, 1949, p. 254, into three classes, and prefaced—in my view, accurately—with the words: "Generally speaking, intervention can only be insisted upon in three classes of case." The first of these three classes is a representative action where the person seeking to intervene is one of a class whom the plaintiff H claims to represent and the intervener is unwilling that the plaintiff should represent him. In such a case the intervener can insist on being added as a defendant. The second class of case is where the proprietary rights of the intervener are directly affected by the proceedings. The third class of case concerns actions for specific performance of contracts where third parties have an interest in the question of the manner in which the contract should be performed. The applicants, strictly speaking, do not come within any of the three classes. The first and third classes, clearly, are not applicable. As regards the second class of case, the applicants—at any rate, so far as regards the purposes for which they desire to be joined as defendants—do not seek to set up

any proprietary rights in the sense in which that phrase was used in *Vavasasseur v. Krupp* (3). In that case, a foreign sovereign, the Mikado of Japan, bought in Germany shells made there, but said to be infringements of an English patent. The shells were brought to this country to be put on board a ship of war, which had been built for the Mikado in this country, with a view to being used as ammunition for the guns of that ship. The patentee obtained an injunction against the agents of the foreign sovereign, as the persons in whose custody the shells were, restraining him from removing the shells. The Mikado then applied to be made a defendant in the suit. Both JESSEL, M.R., and the Court of Appeal held that, notwithstanding the injunction, he ought to be free to remove the shells. In his judgment, JAMES, L.J., said (9 C.D. 354):

"It is an undoubted and admitted fact that the Mikado of Japan, who is a sovereign prince, bought in Germany a certain quantity of shells, which shells were lawfully made in Germany, although they were, as alleged, made upon the same principle as something which is the subject of a patent in this country. Those shells were bought by the Mikado for the purpose of his government. He brought them into this country on the way to Japan, and he asks to be allowed to remove them from this country, that is to say, he asks that he shall not, by reason of something which was done between the plaintiff and some other persons, be interfered with in his removal of them to his own country. It seems to me that to refuse him that leave would be a very dangerous proceeding."

JAMES, L.J., then dealt with the plaintiff's objections (*ibid.*, 355):

"The plaintiff says, 'True it is that these shells were your property; you had brought them to this country *in transitu* to Japan, and you had no doubt a right so to bring them. But some persons in this country, either with or without your authority—with your authority it may be, but at all events having possession of these things as your agents—were minded to make, and did make, a use of these shells which was inconsistent with our patent, that is to say they were making a profitable use of them.' If they were doing so, then they are liable in an action for damages, and the plaintiff may recover any damages that he may be entitled to. But that does not interfere with the rights of the sovereign of Japan, who now asks to be allowed to take his property. It was his property. It is now in the shape in which it was when he lawfully bought it in Germany, where it was lawfully made, and he asks to be allowed to take it out of this country in that shape."

Indeed, through the rest of his judgment, JAMES, L.J., emphasised the point, and again, at the end of his judgment, he made it quite clear that he was resting his decision on what he described as the undoubted and admitted fact that the property in question was the property of the Mikado, the intervener.

On the other hand, it is to be observed, as I have already mentioned, that in *THE ANNUAL PRACTICE*, 1949, p. 254, the description of the classes of case in which intervention can be insisted on is prefaced by the words "Generally speaking." The authorities furnish instances of when intervention will be allowed and when it will not, and from those authorities the general rule embracing the three classes in question has been evolved, but in no case has the court attempted to lay down in an exhaustive statement all the cases in which the court will allow or refuse applications for the joinder of new defendants. On one side of the line is *Moser v. Marsden* (4), which establishes that an indirect interest on the part of an intervener is not sufficient. In that case the plaintiff, the patentee of a machine, brought an action against the defendant for using a machine which he alleged was an infringement of his patent. The maker and patentee of the defendant's machine applied to be added as a defendant, alleging that a judgment in the action would injure him, and that the existing defendant would not efficiently defend the action. The application was refused by the

Court of Appeal, reversing the decision of the Vice-Chancellor of the County Palatine of Lancaster. In his judgment, LINDLEY, L.J., having referred to R.S.C., Ord. 16, r. 11, said ([1892] 1 Ch. 490):

“ In order to properly understand the rule we must look at the whole of it.

A It begins by saying, ‘ No cause or matter shall be defeated by reason of the misjoinder or nonjoinder of parties ’—that is the key to the whole section: if the court cannot decide the question without the presence of other parties, the cause is not to be defeated, but the parties are to be added so as to put the proper parties before the court . . . Can it be said that the rule prevents the plaintiff from proceeding against a defendant without having to litigate with everybody who may be in any way affected, however indirectly, by the action? It appears to me that it does not. The counsel for the applicant B grounded his argument on the allegation that Montfort’s interest would be affected by the decision in this action. It is true that his interest may be affected commercially by a judgment against the defendant, but can it be said that it would be legally affected? Can we stretch the rule so far as to say that whenever a person would be incidentally affected by a judgment he may be added as a defendant? No case has been cited that goes so far as that: C *Vavas seur v. Krupp* (3), and *Apollinaris Co. v. Wilson* (5), are the nearest to the present case. But in both those cases the proceedings affected the property of persons not before the court. I can understand the application of the rule where the property of a third party is affected. He may well say, ‘ I am not to be deprived of my property in my absence.’ But this case does not come up to that.”

D On the other side of the line is *Vavas seur v. Krupp* (3), to which I have already referred, which established that a proprietary right of the proposed defendant in the subject-matter of the action is sufficient. The question here is: On which side of the line does this case fall? For the purposes of this application, the applicants do not assert a title to the property in question, and, therefore, it cannot be asserted E that they have a proprietary right, as that phrase is used in *Vavas seur v. Krupp* (3). What they assert is that, if they can establish that they have possession or control of the property in question through the defendant bank, then, by virtue of the doctrine of immunity which applies to foreign sovereign States, two results might well follow: (i) the plaintiffs must fail to obtain any order from this court in their favour, and (ii) the applicants will retain the possession and F control over the remaining bars of gold, and will be able to dispose of them. In other words, although the applicants do not assert title to the bars of gold, the result of a successful intervention by them would be that, as between the plaintiffs and themselves, they would, for all practical purposes, be the owners. It seems to me that the true test lies not so much in an analysis of what are the constituents of the applicants’ rights, but rather in what would be the result on G the subject-matter of the action if those rights could be established. That is the approach which I have made. Viewing the matter in this way, it is impossible, in my judgment, to say that the applicants have only an indirect interest of the nature which fell to be considered in *Moser v. Marsden* (4). They appear to me to have something more, namely, a right, which, although it may arise indirectly, *viz.*, by the invocation of the doctrine of immunity and through H the defendant bank as bailee, nevertheless results in a direct interest in the subject-matter of this action, and is a right nearly akin to the proprietary right which was under consideration in *Vavas seur v. Krupp* (3). There is no authority directly bearing on the point, but, on the analysis which I have made of the nature of the applicants’ interest in the matter, I have come to the conclusion that I ought not to say that I have no jurisdiction to entertain the application on the short ground which counsel for the plaintiffs put forward, *viz.*, that the applicants could not show a proprietary right, and, therefore, did not come

within the second of the three classes of case to which I have referred, but that I am dealing with a right of such a nature as, on an application by applicants in the position of the present applicants, should result in an order that they be joined as defendants, provided it can be shown that in their absence the claim to the right will not effectually be put forward.

To accede to the application I have to be satisfied either that the applicants are persons who ought to have been joined as defendants or that they are persons

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“... whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all the questions involved in the cause or matter...”

As regards the first limb, it cannot be said that at the commencement of the action they were necessary parties. The action, as it stands, was properly constituted by suing the Bank of England as bailee, and, if any authority be wanted for that proposition, it is provided by *Wilson v. Anderton* (6). Does the case then fall within the language of the alternative provision which I have read? I do not consider it necessary in the circumstances to pause with a view to inquiring whether, if this application had been made at an early stage in the action, it would have been successful. As has emerged from what I have said, no difficulty was experienced in the early stages of the action in dealing, in the absence of the applicants with the point which they desire to argue, and, had it not been for the matters disclosed in the fresh evidence which was brought before the Court of Appeal, it is quite clear that this application would never have been considered necessary to be made. The rule is wide enough to allow the court to entertain an application at any stage of the proceedings, and I can see no reason, on the facts before me, for saying that there can be any objection to the application from the point of view of the stage of the proceedings at which it is made.

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The crux of the matter appears to me to be this. Is the result of the disclosure in the further evidence such that I can now justifiably say that the presence of the applicants before the court is necessary to enable the court effectually and completely to adjudicate on this question, which up to now has been argued on behalf of the applicants by the defendant bank? Counsel for the plaintiffs has urged on me that the absence of the applicants will not prejudice them, and that there is little substance in the submission, both by the bank and the applicants, that the bank will be so embarrassed in the further conduct of this part of the case as to make it necessary that the applicants should be joined. He has stressed, quite legitimately, his submission that to allow the applicants to be joined at this stage will only cause the plaintiffs further delay, and may increase the costs which they themselves may have to bear. On the other hand, counsel for the applicants, in his reply, has pointed out that on one view of the matter, into the details of which I do not propose to go, the bank might find itself liable to the applicants for the value, approximately £300,000, of the sixty-four bars of gold. I need merely say upon that point that I am not prepared to disregard that submission as having no foundation. I think it is a risk which, without inquiring further into the matter, I ought to take into consideration in deciding whether or not to exercise my discretion in the applicants' favour. If I take that submission into account, the result is that I have grounds for being satisfied that the bank now finds itself, so far as prosecuting the appeal from the order of the Court of Appeal in the House of Lords on behalf of the applicants is concerned, very seriously embarrassed. Is that enough to entitle me to exercise my jurisdiction under the rule?

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It is to be observed that the passage in R.S.C., Ord. 16, r. 11, on which I am asked to rely:

“... or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all the questions involved in the cause or matter...”

are alternative to the earlier words, "the names of any parties, whether plaintiffs or defendants, who ought to have been joined," and that, therefore, they must be intended to extend the jurisdiction of the court, and it is not necessary, to invoke the jurisdiction of the court under the latter words, to show that the intervener ought to have been joined. I think those words confer on the court a wide jurisdiction, and, having regard to the review of the cases which I have made, it is a jurisdiction which I ought not to treat as cut down more than I must do by the guidance which I find from those cases. I find nothing in those authorities which would prevent me from taking the view that there is a general discretion in the court, if it thinks right, having regard to all the circumstances, to bring in an intervener so that the questions involved in the action may be completely adjudicated on and settled.

On terms which I shall mention, I propose to allow this application, finding nothing in the authorities which would prevent me doing so, and taking the view, with all the circumstances in mind, that it is the proper, and, indeed, the only satisfactory, course to take in the circumstances. I shall order the applicants to pay the plaintiffs' costs of this application in any event. If the plaintiffs desire to appeal, I shall give leave. If they do appeal, I shall say nothing more as to costs or other terms. If, however, the plaintiffs decide not to appeal, then I shall put the applicants on the further terms that they shall take and join with the plaintiffs in taking all steps which they can to assure that a motion is brought before this court by the applicants asking for the same relief as was asked for before JENKINS, J., and that, this court having pronounced on that matter, it shall be taken to the Court of Appeal with a view to the matter being disposed of by this court and the Court of Appeal before the end of this sittings. As regards the costs before the Court of Appeal, I do not quite see how I can deal with those. I think it would be better that I should say nothing about those. It may be that the Court of Appeal, when dealing with this matter, may be disposed to take into account the order which I have made as to costs here, and may themselves put the applicants on terms as regards the costs in the House of Lords, particularly having regard to the admission made by the Attorney-General yesterday that he could not see how he could oppose an order on the applicants to the same effect as the order on the defendant bank made by the Court of Appeal as a condition of granting leave to appeal to the House of Lords.

Wilberforce : The next point I want to mention to your Lordship is the question of security for costs. YOUR LORDSHIP remembers that in *Vavasour v. Krupp* (3) it was made one of the terms of joining the Mikado as a defendant that he should provide security for costs. I do not know whether your Lordship would think fit to add that as one of the terms, or to leave it to us to make another application. In my submission, there clearly would have to be security provided before the appeal could be prosecuted before the House of Lords. It might save time and expense to the parties if your Lordship were to think fit to include that as one of the terms of this order, as was done in *Vavasour v. Krupp* (3).

WYNN-PARRY, J. : Are you really asking for security for costs against the United States of America and the Republic of France ?

Wilberforce : I must, because they are only submitting to the jurisdiction for the purpose of arguing this point. You remember what happened in *Duff Development Co. v. Kelantan Government* (7), in which the company prevailed, but could not get its costs because the Kelantan Government could still rely on its immunity if it was a question of enforcing costs. It is always a condition, when sovereign governments are given leave to come in, that they give security.

WYNN-PARRY, J. : What are you asking for ?

Wilberforce : We were ordered to give security before the Court of Appeal in the sum of £300, when we appealed from the order of JENKINS, J. This would be in the House of Lords, and the costs would be higher. I ask for £500.

WYNN-PARRY, J. : Do you think that is unreasonable, Mr. Buckley ?

Buckley : I leave it in your Lordship's hands.

WYNN-PARRY, J. : I do not think it high. Very well, I will make that order for security for costs.

Wilberforce : That will be part of the terms on which your Lordship gives leave ?

WYNN-PARRY, J. : Yes.

Order accordingly.

Solicitors : *The Treasury Solicitor* (for the applicants); *Freshfields* (for the bank); *Slaughter & May* (for the plaintiffs).

[Reported by H. McL. MORRISON, Esq., Barrister-at-Law.]

YATES (INSPECTOR OF TAXES) v. STARKEY.

[CHANCERY DIVISION (Vaisey, J.), July 17, 18, 1950.]

Income Tax—Reliefs—Children's allowance—Secured maintenance order—Order providing for payment of annual sum to be held in trust for children—Treatment as husband's income of sums paid—“Settlement”—“Settlor”—Finance Act, 1936 (c. 34), s. 21 (1), (9).

Divorce—Maintenance—Children—Order for payment of annual sum to be held in trust for children—Power of court to create trust in favour of children—Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 193 (3) (added by the Matrimonial Causes Act, 1937 (c. 57), s. 10 (4)).

The taxpayer had been divorced by his wife who was given the custody of the infant children of the marriage, and by an order of the Divorce Court he was ordered to pay to the wife an annual sum of £100 less tax in trust for each of the children of the marriage, the taxpayer to claim the income tax allowances obtainable in respect of children. The taxpayer made the payments ordered, and the wife, as guardian of the children, claimed relief from tax on their behalf, on the basis that the sums were income of the children. These claims were allowed by the Revenue. The taxpayer claimed to be entitled to allowances in respect of the children on the ground that the court had no power under the Supreme Court of Judicature (Consolidation) Act, 1925, s. 193 (3) (as added by s. 10 (4) of the Matrimonial Causes Act, 1937), to create a trust in favour of the children, and, consequently, the children had no income in their own right. Alternatively, the taxpayer claimed that, if the order of the Divorce Court created a trust in favour of the children, the annual payments made under the order must be treated as his income under s. 21 (1) of the Finance Act, 1936.

Held: (i) the court had power, under s. 193 (3) of the Supreme Court of Judicature (Consolidation) Act, 1925, to create a trust in favour of the children.

Stevens v. Tirard ([1939] 4 All E.R. 186), distinguished.

(ii) the annual sums payable in trust for each of the children were paid to or for the benefit of the children by virtue of or in consequence of a settlement within the Finance Act, 1936, s. 21 (1) and (9) in relation to which the taxpayer was the settlor within the meaning of the sub-sections as being a person who had provided or undertaken to provide funds directly or indirectly for the purpose of the settlement, and, therefore, these sums

were to be treated, under s. 21 (1) as the income of the taxpayer, and he was entitled to the allowances made in respect of the children.

(FOR THE FINANCE ACT, 1936, s. 21 (1), (9), see HALSBURY'S STATUTES, Second Edn., Vol. 12, pp. 361, 362.

FOR THE SUPREME COURT OF JUDICATURE (CONSOLIDATION) ACT, 1925, s. 193 (3) (as added by the Matrimonial Causes Act, 1937, s. 10 (4)), see *ibid.*, Vol. 11, p. 834.]

Cases referred to:

(1) *Stevens v. Tirard*, [1939] 4 All E.R. 186; [1940] 1 K.B. 204; 109 L.J.K.B. 202; 161 L.T. 400; 23 Tax Cas. 321; 2nd Digest Supp.

(2) *Hood-Barrs v. Inland Revenue Comrs.*, [1946] 2 All E.R. 768; 176 L.T. 283; 27 Tax Cas. 385; 2nd Digest Supp.

CASE STATED by general commissioners of income tax.

In 1945 the taxpayer was divorced by his wife who was given the custody of the three children of the marriage. By an order of the Divorce Court, dated July 16, 1946, the taxpayer was ordered, *inter alia*, to pay to his wife as an interim provision until further order the annual sum of £100 less tax in trust for each of the three children of the marriage, the taxpayer to claim the relief allowed in respect of children. The taxpayer paid to his wife the sums ordered, less tax, and she, as guardian of the children, then claimed, on their behalf, repayment of tax on the basis that the said annual sums were income of the children. These claims were allowed by the Revenue. The general commissioners found that the order of the court dated July 16, 1946, created a trust in favour of the three children, but that, under the Finance Act, 1936, s. 21, the income of each child under the trust must for income tax purposes be treated as the taxpayer's income who was in consequence entitled to the allowances. The Crown appealed.

Upjohn, K.C., and *R. P. Hills* for the Crown.
J. W. P. Clements for the taxpayer.

VAISEY, J.: This is a short point, but, in my judgment, it is one of considerable difficulty. The Case, which has been stated by the income tax commissioners for the Dartford division of Kent, refers to the appeal which was before them as being an appeal against the taxpayer's coding for income tax purposes, but, in point of fact, as is made clear at the end of the first paragraph of the Case, the ground of the appeal was that the taxpayer was not allowed the relief which he claimed under s. 27 (1) of the Income Tax Act, 1918.

The first matter which has to be decided arises under s. 193 (3) of the Supreme Court of Judicature (Consolidation) Act, 1925, that sub-section being added by the Matrimonial Causes Act, 1937, s. 10 (4), and the second point lies within the ambit of the Finance Act, 1936, s. 21. The taxpayer, Mr. Starkey, was the respondent in divorce proceedings brought against him by his wife, and an order of the Probate, Divorce and Admiralty Division was made on July 16, 1946, by which he was ordered to pay, or cause to be paid, to his former wife as an interim provision until further order, as from the date of the decree absolute, an annual sum of £100 less tax, in trust for each of the three children, the issue of the marriage. Their names are given, and then the order provides:

"All the said sums to be payable monthly; credit to be given for any sums paid since the [date of the decree]."

The first question which was raised before the commissioners was whether it was within the powers of the court to make the provision for the children in the form of a trust, but when I look at s. 193 (3) of the Act of 1925, I feel no doubt that such an order was within the competence of the court, and that no

exception can be taken to it either in point of substance or in form. The sub-section provides:

"The court may, if it thinks fit, on any decree of divorce . . . order the husband . . . to secure for the benefit of the children such gross sum of money or annual sum of money as the court may deem reasonable, and the court may for that purpose order that it shall be referred to one of the conveyancing counsel of the court to settle . . . a proper deed . . ."

I was referred to a decision of the Court of Appeal in *Stevens v. Tirard* (1). That case, however, in my judgment, was very different, and affords very little assistance to me on this occasion. There the order was not that the sums should be held in trust for the children, but that they should be paid to the mother of the children for their maintenance and education, and, although there are some expressions of opinion in the case which might seem to throw doubt on the competence of the court to declare a trust, I am of opinion that those observations in no way preclude me from reaching the conclusion at which I have arrived, viz., that the order did create, and operated as having created, a trust in favour of each of the three children.

The next question arises under s. 21 of the Finance Act, 1936, the marginal note of which is: "Provisions as to income settled on children." Sub-section (1) of that section provides:

"Where, by virtue or in consequence of any settlement to which this section applies and during the life of the settlor, any income is paid to or for the benefit of a child of the settlor in any year of assessment, the income shall . . . be treated for all the purposes of the Income Tax Acts as the income of the settlor for that year and not as the income of any other person."

Sub-section (9) of the section provides:

"(a) the expression 'child' includes a stepchild, an adopted child and an illegitimate child; (b) the expression 'settlement' includes any disposition, trust, covenant, agreement . . . or transfer of assets; (c) the expression 'settlor,' in relation to a settlement, includes any person by whom the settlement was made or entered into directly or indirectly, and in particular (but without prejudice to the generality of the foregoing words of this definition) includes any person who has provided or undertaken to provide funds directly or indirectly for the purpose of the settlement, or has made with any other person a reciprocal arrangement for that other person to make or enter into the settlement . . ."

In the first place, I think that the £100 per annum payable under this order is income which is paid to or for the benefit of a child of the taxpayer and that, apart from the provisions of the section, that it be income of that child. The question, however, arises: Does it become that child's income by virtue or in consequence of a settlement?, bearing in mind (and regard being had to the definition clause) that the expression "settlement" includes "any trust." This order, as I have already held, creates a trust, and it seems to me that it creates a trust by virtue or in consequence of which the income is paid to or for the benefit of the child. I think there can be no doubt that the trust is a "settlement" within the meaning of the section.

The next question which has to be decided is one as to which I feel a good deal of hesitation, namely, whether the taxpayer is a "settlor." It is suggested, first of all, that the expression "settlement" limits and controls, and throws light on, the word "trust," so that the definition of "settlement" must be read as though the word "trust" which appears in it is to be regarded as something of the character of a trust in the nature of a settlement. Against that method of construing the definition I have the authority of LORD GREENE, M.R., in *Hood-*

Barrs v. Inland Revenue Comrs. (2). The matter in issue in that case was whether there was a "transfer of assets," and LORD GREENE, commenting on the argument that that expression must in some way be limited because it had to be brought within the general idea of a settlement, said ([1946] 2 All E.R. 773):

A "I can find no justification for suggesting that such a covenant [*i.e.*, a covenant for the transfer of assets] is excluded from the operation of the section [s. 21 (1) of the Act of 1936] although it bears no resemblance to anything which, in the ordinary sense of the word, could be described as a settlement."

B He held that the expression could not be limited on any such principle. In what sense was the taxpayer, who was a party to the order in question, a settlor, and, in particular, was he a settlor within the meaning of the definition? I was much impressed by the argument that the settlement was the creation of a trust, and that the settlor, or the originator of the trust, must necessarily be a person who acts voluntarily and of his own volition. Certain possible consequences of the contrary view were pointed out to me with great force by counsel for the Crown, but, in my judgment, in this case the settlor was the person by whom the settlement (or trust) was made (or created) directly or indirectly, and not the less so because he was doing it under the compulsion of an order of the court. There may be many cases in which a man may be said to act voluntarily in one sense, and involuntarily in another. The taxpayer submitted to this order. It was not a consent order, but one which was made on him and which he was obliged to carry out, but, it seems to me, on the whole, he was a person by whom a settlement was indirectly made, or by whom a trust was indirectly created, and that he clearly comes within the subsequent words which define a "settlor" as a person who has provided or undertaken to provide funds directly or indirectly for the purposes of the settlement.

D I think the point is doubtful, but on the whole it seems to me that the conclusion at which the commissioners arrived was right. They said:

E "We have come to the conclusion that the order of the court dated July 16, 1946, created a trust in favour of the three children, but under s. 21 of the Finance Act, 1936, the income of each child under the trust must for income tax purposes be treated as the income of the [taxpayer] who is in consequence entitled to the child allowances."

F This last point was merely a sequel to the conclusion which the commissioners reached, and I cannot see my way to depart from that conclusion. An arrangement has been made about the costs of this appeal, and, therefore, I need say nothing about those, and I will merely, by my present order, dismiss the appeal.

Appeal dismissed.

Solicitors: *Solicitor of Inland Revenue* (for the Crown); *James Turner & Son* (for the taxpayer).

[*Reported by C. N. BEATTIE, ESQ., Barrister-at-Law.*]

CHANDRIS v. ISBRANDTSEN MOLLER CO. INC.

[COURT OF APPEAL (Tucker, Cohen and Asquith, L.J.J.), July 19, 20, 1950.]

Arbitration—Award—Damages—Power of arbitrator to award interest—Law Reform (Miscellaneous Provisions) Act, 1934 (c. 41), s. 3 (1).

An arbitrator awarded to a shipowner against the charterers of a vessel £2,137 10s. under the demurrage clause in the charterparty. On the question of his jurisdiction to award interest on that sum, A

HELD: it was an implied term of the submission that the arbitrator should decide the dispute according to the existing law of contract; that law included the provisions of the Law Reform (Miscellaneous Provisions) Act, 1934, s. 3 (1), giving a court power to award interest on debt or damages; and, therefore, the arbitrator had power to award interest.

Dictum of LORD MAUGHAM, L.C., in Naamlooze Vennootschap Handels-en-Transport Maatschappij "Vulcaan" v. A/S J. Ludwig Mowinckels Rederi ([1938] 2 All E.R. 155), and Edwards v. Great Western Ry. Co. (1851) (11 C.B. 588), applied. B

Podar Trading Co., Ltd., Bombay v. Francois Tagher, Barcelona ([1949] 2 All E.R. 62), overruled.

Decision of DEVLIN, J. ([1950] 1 All E.R. 768), reversed on the question of interest. C

[AS TO POWERS OF AN ARBITRATOR, see HALSBURY, Hailsham Edn., Vol. 1, pp. 648, 649, paras. 1097-1099; and FOR CASES, see DIGEST, Vol. 2, pp. 472, 473, Nos. 1171-1177.]

Cases referred to:

(1) *Podar Trading Co., Ltd., Bombay v. Francois Tagher, Barcelona*, [1949] 2 All E.R. 62; [1949] 2 K.B. 277; [1949] L.J.R. 1470; 2nd Digest Supp. D

(2) *Edwards v. Great Western Ry. Co.*, (1851), 11 C.B. 588; 21 L.J.C.P. 72; 138 E.R. 603; 2 Digest 473, 1176.

(3) *Naamlooze Vennootschap Handels-en-Transport Maatschappij "Vulcaan" v. A/S J. Ludwig Mowinckels Rederi*, [1938] 2 All E.R. 152; Digest Supp. E

(4) *Board of Trade v. Cayzer, Irvine & Co.*, [1927] A.C. 610; 96 L.J.K.B. 872; 137 L.T. 419; *affg.*, S.C. *sub nom.*, *Cayzer, Irvine & Co. v. Board of Trade*, [1927] 1 K.B. 269; 95 L.J.K.B. 1054; 136 L.T. 7; Digest Supp.

(5) *Ramdutt Ramkissendass v. E. D. Sassoon & Co.*, (1929), I.L.R. 56 Calc. 1048; 98 L.J.P.C. 58; 140 L.T. 542; Digest Supp. F

APPEAL by the claimant from an order of DEVLIN, J., dated Mar. 6, 1950, on a Special Case stated by an arbitrator.

The claimant, the administratrix of the owner of a ship, claimed from the respondents, the charterers of the vessel under a voyage charter, damages and interest under the provisions of the charterparty in respect of extra expenses incurred and the detention of the ship for sixteen additional days by reason of the cargo being unloaded into river craft instead of at the dockside. The arbitrator found against the charterers on all points and awarded the claimant £7,529 15s. In the alternative, on the assumption that demurrage only was recoverable, he assessed the figure at £2,216 15s. DEVLIN, J., held that the amount of damages recoverable by the claimant was limited by the demurrage clause, and that the question whether the arbitrator could award interest had been concluded in the negative by the decision of the Divisional Court of the King's Bench Division in *Podar Trading Co., Ltd., Bombay v. Francois Tagher, Barcelona* ([1949] 2 All E.R. 62). The claimant appealed only on the question of interest. G

Mocatta and Michael Holman for the claimant.

A. W. Roskill, K.C., and *Boyes* for the respondents. H

TUCKER, L.J.: This is an appeal from a judgment of **DEVLIN, J.**, on a Special Case stated in arbitration proceedings between the claimant, Evgenia John Chandris, and the respondent corporation. The Case Stated dealt with a number of issues arising out of a charterparty which the deceased man, of whose estate the claimant was administratrix, had entered into with the respondents for the charter of a steamship called the *Evgenia Chandris*. **DEVLIN, J.**, held that the claimant was entitled to £2,137 10s. by way of demurrage, and to one other small sum in respect of certain other items. We are only concerned with one aspect of the case—the question whether or not interest can be awarded by the arbitrator on the amount awarded for demurrage. In the Case the arbitrator dealt with this matter as follows:

“The claimant also claimed interest. A further question for the decision of the court is whether I have jurisdiction to award interest. If the court answers the stated question in the affirmative, then I award that the charterers do pay to the claimant the sum of £170 as interest on £2,137 10s.”

The matter does not appear to have been fully argued before the arbitrator as to what his powers were, nor was the matter argued before **DEVLIN, J.**, because of a decision which had been given by the Divisional Court in *Podar Trading Co., Ltd., Bombay v. Francois Tagher, Barcelona* (1), the judgment in which was delivered on May 12, 1949, a few months before this Case was signed on Aug. 13, 1949. On this aspect of the matter **DEVLIN, J.**, said ([1950] 1 All E.R. 770):

“I can get rid of this last question [of interest] at once. In *Podar Trading Co., Ltd. v. Tagher* (1) the Divisional Court answered the same question in the negative. Whether or not I am technically bound by a decision of the Divisional Court, I propose to follow this one as a recent and authoritative pronouncement on the law, and I have not, therefore, invited argument on it.”

He, accordingly, answered one of the questions submitted by the arbitrator to the effect that interest could not be awarded. Therefore, in effect, this is really an appeal against the judgment of the Divisional Court in *Podar Trading Co., Ltd. v. Francois Tagher, Barcelona* (1).

It is common ground that in the circumstances of this case interest would not have been recoverable at common law, but, it is said by counsel for the claimant, interest would have been recoverable in these proceedings by reason of the Civil Procedure Act, 1833, or rather, interest would have been recoverable by reason of the submission to arbitration of a matter with regard to which interest would have been recoverable if it had been dealt with in a court of law. The Civil Procedure Act, 1833, s. 28, provides:

“Upon all debts or sums certain, payable at a certain time or otherwise, the jury on the trial of any issue, or on any inquisition of damages, may, if they shall think fit, allow interest to the creditor at a rate not exceeding the current rate of interest from the time when such debts or sums certain were payable, if such debts or sums be payable by virtue of some written instrument at a certain time, or if payable otherwise, then from the time when demand of payment shall have been made in writing, so as such demand shall give notice to the debtor that interest will be claimed from the date of such demand until the term of payment; provided that interest shall be payable in all cases in which it is now payable by law.”

It is to be observed in that section that the right is given only to a jury, and the provision is that the jury may “if they shall think fit,” i.e., it is a discretionary remedy given to a jury. It must, however, be remembered that at that date all issues of fact had of necessity to be dealt with by juries in a court of law, and, therefore, in effect, the introduction of the jury means very little more than

that interest could be awarded by any court which had jurisdiction to deal with questions of fact.

In 1851 *Edwards v. Great Western Ry. Co.* (2) was decided, and the question whether an arbitrator could or could not award interest in a case which was within s. 28 was therein considered. That matter is dealt with in the headnote as follows (11 C.B. 588):

"The plaintiff having, after notice of action, served the company with a written demand of interest under the [Civil Procedure Act, 1833] s. 28:—*Held*, that the arbitrator, under a submission of 'all matters in difference,' might award the plaintiff interest, notwithstanding the notice of action did not contain a demand of interest; and, further, that, assuming a notice of action to have been necessary, the want or insufficiency of such notice could not be taken advantage of, since the [Limitations of Actions and Costs Act, 1842] s. 3, unless pleaded specially."

That aspect of the case is set out in more detail later in the report (11 C.B. 638):

"On Feb. 10, 1848, and before the commencement of the action, but after the notice thereof, the plaintiffs served on the company a demand in writing, bearing date Feb. 8, 1848, whereby they demanded payment of the money alleged in the notice of action to be due to them, and claimed interest thereon from the date of that demand until payment. The plaintiffs now contend that they are entitled to recover such interest, not exceeding five per cent. per annum, from Feb. 10, 1848, as the arbitrator may think proper to allow, on all such sums as are recoverable by them under the foregoing heads of claim, or any of them. The company contend that the plaintiffs' claims under the foregoing heads, if recoverable at all, are not such debts or sums certain as to warrant a jury, or the arbitrator, in giving interest on them; and also that interest is not recoverable, because not included in the notice of action. The last question for the opinion of the court is,—whether, in addition to any other sum or sums recoverable in this action, the plaintiffs are entitled to recover interest thereon, if the arbitrator shall think the case a proper one for giving interest."

SIR JOHN JERVIS, C.J., in giving judgment, said (*ibid.*, 649):

"The only remaining question is this,—whether the arbitrator is at liberty, if he shall think fit, to allow interest on the sums recoverable in this action. The plaintiffs contend that Parker has from the commencement been paying a sum certain to the company in excess of the lawful charge upon every transaction. There is a demand in writing of the debt, and a demand of interest under the [Civil Procedure Act, 1833], s. 28. This, therefore, is a sum certain with respect to which a demand has been made for principal and interest; and the arbitrator may, if he thinks fit, give interest. But it is said, on the other hand, that the arbitrator cannot do this, because the company's Act of Parliament entitles the company to a notice of action, and the notice of action here does not demand interest."

SIR JOHN JERVIS, C.J., then proceeds to say there are two answers to that point (with which we are not concerned) and he then continues (*ibid.*, 650):

"A further answer would be, that this is a submission, not only of the action, but of all matters in difference; and the interest would be a matter in difference, whether demanded by the notice of action or not. If the arbitrator could give it, he might give it in that way, notwithstanding the want of claim of interest in the notice."

That case clearly decides that, although the Civil Procedure Act, 1833, s. 28, speaks in terms of a jury, and only confers on a jury a discretionary right to give interest, none the less, if a matter with regard to which a jury could have given interest is referred to an arbitrator, the arbitrator may equally give interest, and that despite the language used in that Act.

That decision stood from 1851 until 1934, when the Law Reform (Miscellaneous

Provisions) Act of that year was passed, and it has been referred to in repeated editions of RUSSELL ON ARBITRATION as authority for the proposition that, in such cases, an arbitrator can award interest. The Law Reform (Miscellaneous Provisions) Act, 1934, s. 3, provides:

“(1) In any proceedings tried in any court of record for the recovery of any debt or damages, the court may, if it thinks fit, order that there shall be included in the sum for which judgment is given interest at such rate as it thinks fit on the whole or any part of the debt or damages for the whole or any part of the period between the date when the cause of action arose and the date of the judgment . . . (2) Sections 28 and 29 of the Civil Procedure Act, 1833, shall cease to have effect.”

The result is that, if and in so far as the arbitrator derived his power to give costs directly from the Act of 1833, that power terminated with the repeal of those sections, for which there is substituted s. 3 (1) of the Act of 1934.

The argument for the claimant is that just as in 1851 the arbitrator derived his power to give interest directly, not from the Act of 1833, but from a submission to him of all matters in dispute, so, now, in 1950, the arbitrator does not derive his jurisdiction to give interest from the Act of 1934, but from the submission to him of the disputes, which involves that he has to deal with those disputes according to the law of the land and that he is clothed with authority to give to the claimant such rights and remedies as would have been available to him in a court of law having jurisdiction to deal with the same subject-matter. Counsel submits that, applying the reasoning of SIR JOHN JERVIS, C.J., in *Edwards v. Great Western Ry. Co.* (2) to the statute of 1934, in which we find a court of record substituted for a jury, the same result should follow, *viz.*, that, by reason of the submission, the arbitrator has been clothed with authority to deal with this matter in the same way as that in which it could have been dealt with by a court of record. The argument for the charterers is that one must now look only at s. 3 (1) of the Act of 1934 to determine what the powers of the arbitrator are, and that that sub-section in terms merely gives a discretionary power to courts of record with regard to any proceedings tried in such a court. The Act of 1934, it is urged, is silent regarding arbitrations, and, therefore, it must be taken to have been intended that its provisions should not apply to arbitrations. Counsel drew our attention to the fact that in the Arbitration Act, 1934, which had been passed two months earlier, there was a special provision under s. 11 providing for interest to be allowed on awards. That section provides:

“A sum directed to be paid by an award shall, unless the award otherwise directs, carry interest as from the date of the award and at the same rate as a judgment debt.”

Counsel further points out that the Arbitration Act, 1934, makes no provision for the awarding of interest by the arbitrator as distinct from the interest given under s. 11, which only runs from the date of the award. Furthermore, says counsel, the policy of the legislature in this matter can be ascertained by seeing what has been done in subsequent Acts, and he quotes the Evidence Act, 1938, the Limitation Act, 1939, the Law Reform (Frustrated Contracts) Act, 1943, and the Law Reform (Contributory Negligence) Act, 1945, in all of which special provision has been made in terms, including the case of arbitrations, and, says counsel, that shows that the legislature, when it intends to give powers to an arbitrator, does so in terms.

With regard to that argument, I do not think it is strictly permissible to interpret a statute by reference to what has been done in subsequent statutes, but, however that may be, I think the history of this matter shows that up till 1938, or thereabouts, there had been a considerable difference of judicial opinion as to the power of an arbitrator in the absence of express provision to deal with certain defences which are expressly available as answers to actions, and the position with regard to those matters was dealt with by the House of

Lords in *Naamlooze Vennootschap Handels-en-Transport Maatschappij "Vulkaan" v. A/S J. Ludwig Mowinckels Rederi* (3). There, LORD MAUGHAM, L.C., said ([1938] 2 All E.R. 155):

"The matter does not rest there, because we have to consider how far the suggested elimination of defences available at law or in equity must logically be held to extend in other arbitrations. If the party defending may not rely on the Statute of Limitations, can he rely on the Statute of Frauds, or the Act partially replacing it? Could he rely in a commercial arbitration on the Gaming Act? A number of like questions might be asked. It is true, and this is the main point on which the appellants rely, that the Limitation Act, 1623, s. 3, was in terms limited to actions. It may be noted that no such statute passed before the Real Property Limitation Act, 1833, expressly bound courts of equity. There is, however, no doubt that long before the Judicature Act, 1873, where a court of equity had to adjudicate on the validity of a debt in a suit to administer an estate, or in any like suit, it held itself bound to apply the statutes of limitations in precisely the same way as if there were an action at law to recover the debt . . . It is indisputable that, in modern arbitration, the principles of equity must be applied just as they would now be applied in a court of law, since upon a Special Case for the opinion of the court under s. 7 of the Arbitration Act or the Judicature Act, 1925, s. 94 (replacing s. 19 of the Arbitration Act), the court is, and has long been, bound to apply equitable rules and relief. It is difficult to see how the equitable view of the applicability of the Limitation Act, 1623, to a case of debt can be excluded in a legal arbitration . . . The authorities on the question as to whether the statutes of limitation are available in an arbitration have been carefully considered by my noble and learned friend LORD WRIGHT, presiding in the Court of Appeal, and it is not necessary to repeat them. The hesitation or the doubts expressed by SCRUTTON, L.J., in *Board of Trade v. Cayzer, Irvine & Co.* (4) appear to be mainly directed against the laying down of an absolute and general rule applicable in all kinds of arbitration. At least, that is how I understand them, and, if I may say so with all respect, to that extent I agree with them. The remarks of VISCOUNT CAVE, L.C., in the same case, when the matter came before this House, certainly tend to show that, in his view, in commercial arbitrations an arbitrator is bound to give effect to all legal defences, including a defence under any statute of limitation. On a careful consideration of all the cases, I am content to say that I agree with what was said by LORD SALVESEN, delivering the judgment of the Board in *Ramdutt Ramkissendass v. E. D. Sassoon & Co.* (5). In that case the Indian Limitation Act, 1908 (the relevant period being three years), was taken for practical purposes to be the same as the Limitation Act, 1623, and LORD SALVESEN observed: 'Although the Limitation Act does not in terms apply to arbitrations, they [their Lordships of the Judicial Committee] think that in mercantile references of the kind in question it is an implied term of the contract that the arbitrator must decide the dispute according to the existing law of contract, and that every defence which would have been open in a court of law can be equally proposed for the arbitrator's decision unless the parties have agreed—which is not suggested here—to exclude that defence. Were it otherwise, a claim for breach of a contract containing a reference clause could be brought at any time, it might be twenty or thirty years after the cause of action had arisen . . .'"

Counsel for the charterers says that a distinction is to be drawn between statutes which bar a remedy, such as the statutes of limitation, the Statute of Frauds, 1677, the Sale of Goods Act, 1893, and so forth, to all of which statutes an arbitrator is bound to give effect notwithstanding they afford defences to actions, and statutes which confer rights, and that in the latter cases the right so conferred is not to be extended beyond the plain words of the enacting statute.

I cannot see why any distinction should be drawn between the duty of an arbitrator to give effect to such statutes as the Statute of Limitations and his jurisdiction in his discretion to award interest. An award of interest is only a part of the damages recoverable, and, adapting to the facts of this case the language of LORD SALVESEN in the case to which I have just referred—language which was approved by LORD MAUGHAM—it would read as follows: “Although the Law Reform (Miscellaneous Provisions) Act, 1934, does not in terms apply to arbitrations, I think that in mercantile references of the kind in question it is an implied term of the contract that the arbitrator must decide the dispute according to the existing law of contract, and that every right and discretionary remedy given to a court of law can be exercised by him.” To that there are certain well-known exceptions, such as the right to grant an injunction, which stand on a different footing. One of the reasons why an arbitrator cannot give an injunction is that he has no power to enforce it, but such an objection does not apply to an award of interest.

This matter was dealt with fully by LORD GODDARD, C.J., in delivering judgment of the court in the *Podar* case (1). He dealt with the power to give interest at common law and under the Civil Procedure Act, 1833, and he then proceeded to say ([1949] 2 All E.R. 67):

“The case which would seem to be directly in point is *Edwards v. Great Western Ry. Co.* (2). In that case the court approved of the allowance of interest by an arbitrator because it was allowable in the circumstances of that case by the provisions of the Civil Procedure Act, 1833. Accordingly, we think we must take it to be the law that before the Law Reform (Miscellaneous Provisions) Act, 1934, an arbitrator had the same powers as the court with regard to the award of interest, but no greater power.”

The Lord Chief Justice then goes on to deal with the Law Reform (Miscellaneous Provisions) Act, 1934, and he says (*ibid.*):

“Moreover, as s. 28 and s. 29 of the Civil Procedure Act are repealed, we feel driven to hold that not only have arbitrators no power to give interest on damages, but they have been deprived of the powers which they had so long as the sections of the Civil Procedure Act were in force and can now only give it in circumstances in which it was recoverable at common law.”

Counsel for the charterers argued that that judgment was based on the assumption that it was the Civil Procedure Act, 1833, which gave the arbitrator his power to award interest, and that, once that Act was repealed, all such powers had gone, and, unless the arbitrator had been given fresh powers, he had none. I think, however, that the real basis of *Edwards v. Great Western Ry. Co.* (2) was that the arbitrator derived his powers, not from the Act of 1833, but from the submission to him which necessarily gave him the “implied powers” referred to in the language of LORD SALVESEN which I have just quoted, and I see no reason why, since the Act of 1934, an arbitrator should not be deemed impliedly to have the same powers. Therefore, with diffidence, having regard to the view expressed by the Divisional Court on this matter, I have come to the conclusion that in such a case as the present the arbitrator has power to award interest, and, accordingly, to that extent, I think this appeal should succeed and the *Podar* case (1) be overruled.

COHEN, L.J.: I am of the same opinion. I agree with counsel for the claimant that this case is really decided for us by the decision of the Court of Common Pleas in 1851 in *Edwards v. Great Western Ry. Co.* (2). That case is not binding on us, but it had stood unchallenged for over eighty years when the Law Reform (Miscellaneous Provisions) Act, 1934, was passed, and I agree with the words of LORD GODDARD, C.J., when he stated in the *Podar* case (1) ([1949] 2 All E.R. 67) that before the Act of 1934 an arbitrator had the same powers as a jury to give interest. I think the Court of Common Bench reached its conclusion not because it thought that as a matter of construction of the Civil

Procedure Act, 1833, s. 28 and s. 29, the arbitrator fell within the description of a "jury on the trial of any issue, or on any inquisition of damages," but because it considered that an arbitrator had all the powers in regard to awarding damages which a jury had. In this connection it is to be remembered that in 1833 all relevant cases would have been heard by a judge with a jury. In my view, the decision of the court was not based on any statute, but the court considered that, apart from any statute, an arbitrator had all the powers of the appropriate court including the power to award interest in the cases indicated.

By the Law Reform (Miscellaneous Provisions) Act, 1934, s. 28 and s. 29 of the Civil Procedure Act, 1833, were repealed, and, in lieu, there has been substituted s. 3 of the Act of 1934 which provides:

"(1) In any proceedings tried in any court of record for the recovery of any debt or damages, the court may, if it thinks fit, order that there shall be included in the sum for which judgment is given interest at such rate as it thinks fit on the whole or any part of the debt or damages for the whole or any part of the period between the date when the cause of action arose and the date of the judgment."

The Divisional Court had decided in the passage which my Lord has read that the effect of that sub-section is to deprive the arbitrator of the power to award damages in accordance with the Civil Procedure Act, 1833, s. 28 and s. 29, without conferring on him the increased powers conferred by the sections on a court of record. The Divisional Court arrived at that conclusion with reluctance, and I am glad not to feel myself compelled to agree with it. The section does not purport to deal in any way with the powers of arbitrators. It may, of course, have curtailed their powers, but I do not think that in the present case it has done so.

In my opinion, the right of arbitrators to award interest was not derived from the Civil Procedure Act, 1833, s. 28 and s. 29, but from the rule that arbitrators had the powers of the appropriate court in the matter of awarding interest. In my opinion, therefore, the effect of the Act of 1934 is that, after it came into force, an arbitrator had no longer the powers of awarding interest damages conferred on juries by the Civil Procedure Act, 1833, s. 28 and s. 29, but he had the power conferred on the appropriate court, in the Act of 1934 described as a court of record. The change of description may be due to the fact that damages are now usually awarded by a judge sitting alone. I agree with my Lord that, for the reasons he has given, the conclusion we have reached is supported by the decision in the *Naamlooze* case (3), and I cannot help thinking that if the attention of the Divisional Court had been directed to that case, they might have reached a different conclusion. For those reasons, and for the reasons given by my Lord, I think this appeal should succeed.

ASQUITH, L.J.: I agree. I should have found it very difficult to resist the argument presented by counsel for the respondents if *Edwards v. Great Western Ry. Co.* (2) had not been decided as it was and had not stood unchallenged for over three-quarters of a century before the Act of 1934. But for those circumstances, it would have been difficult, it seems to me, to resist a construction of s. 3 (1) of the Act of 1934 which would limit the discretion conferred by that section. But, by parity of reason, the right given by the Act of 1833 should have been limited to proceedings before a jury, yet, in the *Edwards* case (2), that contention was impliedly or expressly rejected, and it was held that an arbitrator could award interest in cases in which, by statute, a jury was given power to do so.

For those reasons, and for the reasons given by my Lords, I think this appeal should succeed.

Appeal allowed with costs.

Solicitors: *Holman, Fenwick & Willan* (for the claimant); *Lightbounds, Jones & Co.* (for the respondents).

[Reported by J. D. PENNINGTON, Esq., Barrister-at-Law.]

NEATH RURAL DISTRICT COUNCIL v. WILLIAMS AND ANOTHER.

[KING'S BENCH DIVISION (Lord Goddard, C.J., Hilbery and Byrne, JJ.), July 19, 20, 1950.]

Nuisance—Statutory nuisance—Watercourse—Natural watercourse—Obstruction impeding flow of water and causing flooding—Liability of owner for failing to abate—Nuisance not due to owner's act or default—Land Drainage Act, 1930 (c. 44), s. 35 (1), s. 57 (1), (2)—Public Health Act, 1936 (c. 49), s. 93, s. 259 (1) (b), proviso.

Under the Public Health Act, 1936, s. 93, a local authority is empowered to serve a notice requiring the abatement of a statutory nuisance "... on the person by whose act, default or sufferance the nuisance arises or continues, or, if that person cannot be found, on the owner or occupier of the premises on which the nuisance arises ...". By the proviso to s. 259, "... nothing in this sub-section shall be deemed to impose any liability on any person other than the person by whose act or default the nuisance arises or continues" in the case of "any part of a watercourse ... which is so choked or silted up as to obstruct or impede the proper flow of water and thereby to cause a nuisance ..." which sub-s. (1) (b) declares to be a statutory nuisance. Under the Land Drainage Act, 1930, s. 35, a duty is imposed on any person having control of part of a watercourse in which an impediment occurs, or if he is unknown, on the occupier of the land through which it passes, to put the watercourse in proper condition if agricultural land of another person is injured or in danger of being injured by water. Under s. 57 of the same Act the owner or occupier of land, injured by the failure of an occupier of other land to cleanse and scour a watercourse passing through it, may serve notice requiring him to cleanse or scour the watercourse and in the event of default may do the works himself and recover the expense.

Owing to an obstruction in a natural watercourse caused by debris washed down by the stream, flooding occurred which constituted a nuisance. The local authority served a notice on the respondents, owners of the land where the obstruction existed, requiring them to remove debris, silt and boulders causing the obstruction as a statutory nuisance under s. 93 and s. 259 of the Public Health Act, 1936. The justices being of opinion that the respondents had not done anything or neglected to do anything to cause the flooding dismissed the informations.

HELD: (i) as owners of land the respondents were under no duty at common law to remove obstructions arising by natural causes in a natural watercourse.

Hodgson v. York Corpn. (1873) (28 L.T. 836), *followed*.

Sedleigh-Denfield v. O'Callaghan ([1940] 3 All E.R. 349), *distinguished*.

(ii) to constitute a statutory nuisance under the Public Health Act, 1936, s. 93, it was necessary to show that the statutory nuisance alleged occurred through the act or default of the respondents, and there was nothing in the evidence to show that they had done any act which could properly be called a "default" in the sense of failing to do something imposed by the Act. There might have been a "sufferance" of the obstruction, but that word did not appear in the proviso to s. 259 (1).

(iii) the respondents were not under any duty under the Land Drainage Act, 1930, s. 35 (1), because the notice served upon them to abate the statutory nuisance was not concerned with agricultural land or with default under that Act and s. 35 (1) would seem to apply only where the watercourse was within the area of a drainage board, of which there was here no evidence; nor under s. 57 (1), which imposed a duty, not at large, but only on service of a notice on the owner or occupier under that section.

(iv) accordingly, the justices were right in dismissing the summonses.

[AS TO SUMMARY PROCEEDINGS FOR ABATING STATUTORY NUISANCES, see HALSBURY, Hailsham Edn., Vol. 24, pp. 98-102, paras. 172-179; and FOR CASES, see DIGEST, Vol. 36, pp. 229-236, Nos. 698-750 and Digest Supp.]

Cases referred to :

- (1) *Sedleigh-Denfield v. O'Callaghan*, [1940] 3 All E.R. 349; [1940] A.C. 880; 164 L.T. 72; *sub nom. Sedleigh-Denfield v. St. Joseph's Society for Foreign Missions*, 109 L.J.K.B. 893; 2nd Digest Supp. A
- (2) *Hodgson v. York Corpn.*, (1873), 28 L.T. 836; 37 J.P. 725; 44 Digest 59, 429.
- (3) *Rylands v. Fletcher*, (1868), L.R. 3 H.L. 330; 37 L.J.Ex. 161; 19 L.T. 220; 33 J.P. 70; 36 Digest 187, 311.
- (4) *Pontardawe Rural Council v. Moore-Gwyn*, [1929] 1 Ch. 656; 98 L.J.Ch. 242; 141 L.T. 23; 93 J.P. 141; Digest Supp. B
- (5) *Giles v. Walker*, (1890), 24 Q.B.D. 656; 59 L.J.Q.B. 416; 62 L.T. 933; 54 J.P. 599; 36 Digest 195, 359.
- (6) *Finch v. Bannister*, [1908] 1 K.B. 485; 77 L.J.K.B. 313; 97 L.T. 913; 72 J.P. 73; *affd.*, [1908] 2 K.B. 441; 77 L.J.K.B. 718; 99 L.T. 228; 72 J.P. 203; 41 Digest 55, 399.
- (7) *Margate Pier and Harbour (Co. of Proprietors) v. Margate Town Council*, (1869), 20 L.T. 564; 33 J.P. 437; 36 Digest 179, 240. C
- (8) *A.-G. v. Tod Heatley*, [1897] 1 Ch. 560; 66 L.J.Ch. 275; 76 L.T. 174; 36 Digest 177, 221.
- (9) *Clayton v. Sale Urban District Council*, [1926] 1 K.B. 415; 95 L.J.K.B. 178; 134 L.T. 147; 90 J.P. 5; 36 Digest 229, 702.
- (10) *Thames Conservators v. Port of London Sanitary Authority*, [1894] 1 Q.B. 647; 63 L.J.M.C. 121; 69 L.T. 803; 58 J.P. 335; 36 Digest 229, 700. D

CASE STATED by Glamorgan justices.

At a court of summary jurisdiction sitting at Neath a complaint was preferred by the clerk of the appellants, Neath Rural District Council, alleging that a nuisance arising in part of a watercourse in the council's district existed and that notices to abate it under s. 93 and s. 259 of the Public Health Act, 1936, had been served on the respondents, by whose act or neglect the nuisance arose or continued, and that the respondents had made default in complying with the requirements of the notices. For the appellants it was contended that, though the respondents, through whose land the watercourse flowed, had not been guilty of any common law breach of duty, s. 259 (1) (b) of the Public Health Act, 1936, created a statutory nuisance and imposed a duty on the owner and occupier of the bed of a watercourse which was choked or silted up to scour and cleanse it, and that failure to do so constituted a default within the meaning of the sub-section. The appellants also contended that by failing to cleanse and scour the watercourse the respondents had committed a breach of the statutory duty imposed upon them by the Land Drainage Act, 1930, s. 57 (1) and (2), and that the Public Health Act, 1936, provided a summary remedy in the hands of the appellants as local authority by enacting that such a breach of obligation should be a statutory nuisance. For the respondents it was contended that the Public Health Act, 1936, s. 259 (1) (b), merely provided a summary remedy for what was in law a nuisance, that at common law no damage caused by the natural user of land was actionable, and that such natural user was not a nuisance and could not be the subject of the proceedings under the Act of 1936. The complaint was heard on Dec. 30, 1949, and Mar. 3, 1950, when the justices dismissed the complaint. E
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R. Harding for the appellants.

H. V. Brandon for the respondents.

LORD GODDARD, C.J.: This is a Case stated by Glamorgan justices sitting at Neath. It arises out of certain nuisance notices served under s. 93

and s. 259 of the Public Health Act, 1936, requiring the respondents to scour out and remove certain debris, silt, boulders, and so forth which were obstructing a watercourse running through their land.

I have come to the conclusion that the justices were right in dismissing these complaints. The respondents are the owners of land near Neath. On that land there is a mountain stream which comes from the hills and has a very steep fall until it gets on the respondents' land, somewhere in the vale of Neath.

- A When it gets lower, the stream passes through a culvert. The culvert was constructed by a canal company, and it may, therefore, be assumed that it was erected under statutory powers. The water passes through that culvert and then flows on to other land of the respondents, making two sharp turns in its course. At one of these turns obstruction has arisen which holds back the water so that it does not flow freely through the culvert. The consequence is
- B that in time of heavy rain there is flooding from the upper side of the culvert which causes discomfort to persons living nearby in a row of cottages. I have no doubt that that flooding does amount to a nuisance in the sense that where water is allowed to flow from a stream on to people's land a nuisance arises because it is detrimental to the health and comfort of residents.

- The question is: Are the respondents liable for that state of affairs? The
- C Case Stated finds that the obstruction existing in this watercourse—which is a natural watercourse and remains a natural watercourse throughout except in so far as it passes through a culvert with which the respondents have nothing to do—has caused it to become silted up and blocked up by debris washed down by the stream in the course of its fall. The sections of the Public Health Act, 1936, which we have to consider, replace sections of the Public Health Act, 1875,
- D and earlier Acts, and the considerations which apply to the earlier cases apply, no doubt, to the present sections. The first sections to which I think it is necessary to call attention are those which begin with s. 92 and form part of Part III of the Act of 1936. Part III deals with nuisances and offensive trades, and creates what are called in the Act "statutory nuisances," that is to say:

- E ". . . (a) any premises in such a state as to be prejudicial to health or a nuisance; (b) any animal kept in such a place or manner as to be prejudicial to health or a nuisance; (c) any accumulation or deposit which is prejudicial to health or a nuisance . . ."

These are all matters which are capable of being ordinary common law nuisances, and the object of this Part of the Act is to give a quick and summary remedy

F to secure the stopping and discontinuance of the nuisances. The scheme of the Act is that the local authority should serve notices requiring the abatement of the nuisances, the discontinuance of the nuisances and the prevention of their recurrence, and, if the notices are disobeyed, the justices can make an order requiring the person to abate the nuisance and to take steps against its recurrence. The justices may, not must, in a proper case impose a fine of £5, and there is

G also a provision that not only may there be a fine of £5 but a daily fine, if the order of the justices is not obeyed.

We then turn to another section which is in another Part of the Act, Part XI, said to be the Miscellaneous Part. Section 259 provides:

- "(1) The following matters shall be statutory nuisances for the purposes of Part III of this Act, that is to say—(a) any pond, pool, ditch, gutter
- H or watercourse which is so foul or in such a state as to be prejudicial to health or a nuisance; (b) any part of a watercourse, not being a part ordinarily navigated by vessels employed in the carriage of goods by water, which is so choked or silted up as to obstruct or impede the proper flow of water and thereby to cause a nuisance, or give rise to conditions prejudicial to health . . ."

Stopping there for a moment, the effect of that is that if a watercourse gets into that state—and be it observed that it applies both, in my opinion, to a

natural watercourse as well as to an artificial watercourse—it becomes a statutory nuisance, and the provisions of Part III of the Act apply to its abatement, to the notice that can be given, to the proceedings taken, and so forth.

It is not without importance to observe that, whereas s. 93 in Part III, provides:

“Where a local authority are satisfied of the existence of a statutory nuisance, they shall serve a notice (hereafter in this Act referred to as ‘an abatement notice’) on the person by whose act, default or sufferance the nuisance arises or continues, or, if that person cannot be found, on the owner or occupier of the premises on which the nuisance arises, requiring him to abate the nuisance . . .”

in s. 259, the section which brings the watercourse within Part III, there is this proviso:

“Provided that in the case of an alleged nuisance under paragraph (b) nothing in this sub-section shall be deemed to impose any liability on any person other than the person by whose act or default the nuisance arises or continues.”

The absence of the word “sufferance” may be very important, because it is quite clear, taking those two sections together, that whereas in the case of the statutory nuisances referred to in s. 92 the local authority can proceed against a person who has suffered a nuisance to continue, if the nuisance is a choked watercourse there is no liability on the person unless the nuisance arises or continues from his act or default. In my opinion, the decision in this case depends on the answer to the question whether a landowner on whose land there is a watercourse which becomes choked by natural causes—action of the water on land or on rocks or whatever it may be, or by weeds or by any other cause—can be said to be a person by whose act or default the nuisance arises or continues. Does that of itself impose a liability on the landowner to clear the watercourse?

Apart from authority, I think the position is that a landowner is not at common law under any liability to do anything with regard to a watercourse if it is a natural watercourse flowing through his land. If he creates a watercourse or does anything to make artificial that which was previously natural, very different considerations arise, and that is why, when I first saw this case, I thought that *Sedleigh-Denfield v. O’Callaghan* (1) in the House of Lords might have a great bearing on our decision. In my opinion, that case does not apply because it seems to me implicit in the speech of VISCOUNT MAUGHAM that he is dealing with a case where there was a ditch into which had been placed a pipe for the purpose of carrying off water, and the people on whose land it was had allowed that pipe to get choked. I think it is clear that VISCOUNT MAUGHAM was referring throughout and intended to refer throughout to an artificial watercourse or to something where works had been done to the watercourse, and not to the ordinary bed of a natural stream. Therefore, I do not think it necessary to discuss the principles which were laid down in that case, the decision in which was that, if a person allows a nuisance to continue on his land, even though it had been originated by a trespasser, he nevertheless becomes liable.

It seems to me clear that the proviso to s. 259 is designed to prevent an additional duty being cast upon a landowner, and, as I have already said, it seems clear at common law that a landowner is under no duty so far as a natural stream is concerned to do any works for keeping the bed clear or removing obstructions arising in the natural course of events. Authority on the point is to be found first, I think, and quite clearly, in *Hodgson v. York Corpn.* (2). It is unnecessary to go through the somewhat complicated facts of the case, but it was alleged there that flooding had been caused through allowing a stream to get choked by weeds. BLACKBURN, J., who delivered the leading judgment, said, referring to the judgment of the county court judge (28 L.T. 839):

"But he goes on to say that the liabilities of the corporation, after due provision for the escape of the water, were such only as attach at common law to the owners of the natural bed of a river; and that the respondents were not, under the said Act or at common law, under any obligation to remedy any natural and gradual silting up and growing up of weeds in the said bed for the benefit of adjacent landowners. In this I am of opinion he was right . . ."

A There is a clear expression of opinion by a judge of the highest eminence that the owner of the bed of a stream is not under any obligation at common law to remedy the natural and gradual silting up of the stream, and there is no difference, in my opinion, whether the silting up is caused in one way or in another. The obstruction may be caused by a heavy growth of weeds in the bed of the stream, or by sand and earth being washed down, or by boulders or rocks being washed down a mountain stream, but the common law of England has never imposed liabilities on landowners for anything which happens to their land in the natural course of affairs if the land is used naturally.

I might just refer to a passage to which we were referred in the speech of LORD CAIRNS, L.C., in *Rylands v. Fletcher* (3), in which he said (L.R. 3 H.L. 338):

C ". . . and if, in what I may term the natural user of that land, there had been any accumulation of water, either on the surface or underground, and if, by the operation of the laws of nature, that accumulation of water had passed off into the close occupied by the plaintiff, the plaintiff could not have complained that that result had taken place."

D That clearly shows that if, for instance, the course of the stream had been diverted—and there are many instances to be found in this country where the course of a river has been diverted owing to a storm—nobody is liable, because it happens in the course of nature. There is the very striking instance of the river Ouse which now goes out to sea at Newhaven and used to go out to sea at Seaford Head, where the old bed of the river can be seen, and history relates that the course of the river was diverted sometime in the sixteenth century as the result of a severe storm. In that connection it is by no means, I think, foreign to this case to refer to the judgment of EVE, J., in *Pontardawe Rural Council v. Moore-Gwyn* (4), because it seems to me the principle which applies to that case applies to this case. The headnote is ([1929] 1 Ch. 656):

F "The owner of land on which there is an outcrop of rock overhanging a steep slope is not liable for damage caused by reason of portions of that rock breaking away and falling down the slope if the break is due to natural causes, such as weathering, and the owner has used his land in an ordinary way, without any mining or quarrying operations."

G In that case a man had on his land rocks parts of which broke off and rolled down on to other people's land and did damage. If that happens in the ordinary course of events, he is under no liability. So, too, in *Giles v. Walker* (5), where LORD COLERIDGE, C.J., delivered a well-known judgment. That was an action in which a man sought to obtain damages by reason of his neighbour allowing thistledown to blow from his field on to the plaintiff's land and damage it. This court very summarily dismissed that contention, saying that such a thing was unheard of and that a man could not be liable for that which happened in the ordinary course of nature. It is because of that sort of case that various statutes or regulations of the Ministry of Agriculture are made to compel people to clean their land of weeds. Enough has been said, therefore, to show that it is well established that there is no common law duty on the owner or occupier of this land to do anything to the stream or to the bed of the stream, provided that the obstruction is caused by natural and not artificial causes, and provided that the stream is a natural and not an artificial stream.

Before I go to the authorities under the section, I should deal with an argument advanced by counsel for the appellants, which must be considered, although this is the first case, apparently, in which the point has ever been raised as regards statutory nuisances due to watercourses. He submits that a duty has now been put upon landowners upon whose property watercourses exist by reason of the Land Drainage Acts. The Land Drainage Act which is now in operation, and which we must consider because it was in operation at the time of the Public Health Act, 1936, is the Land Drainage Act, 1930, which consolidated, re-enacted, and to some extent amended the previous Acts, including an Act of 1847. Two sections are material. The first is s. 35, contained in Part V of the Act which is headed: "Members and proceedings and powers of drainage boards." Without giving a concluded opinion on the matter, it seems to me it is probably only applicable if the watercourse in question is within the district of a drainage board because of the fasciculus of sections which constitute Part V. Section 35 provides:

"(1) Where any watercourse is in such a condition that the proper flow of water is impeded, it shall, except where the condition of the watercourse is attributable to subsidence of surface due to mining operations (including brine pumping), be the duty of the person having control of the watercourse or of the part thereof where the impediment occurs, or, if that person is not known, the person occupying the land through which the watercourse or that part of the watercourse passes, to put the watercourse or that part of the watercourse in proper order if by reason of such impediment agricultural land belonging to or in the occupation of some other person is injured by water or in danger of being so injured."

That section obviously does impose a statutory duty on a person on whose land the watercourse is situate, and, that being so, it adds to the common law duties or it imposes a duty other than the common law duty on the landowner, but we are not here in any way concerned with agricultural land nor in any proceedings taken in respect of any default under that Act. As I have said, in my opinion, it probably only applies to a watercourse which is within the area of a drainage board, and there is no evidence or suggestion that this one was. Further reliance was placed on s. 57 of the Act of 1930, which provides:

"(1) Where by reason of the neglect of the occupier of any land to maintain or join in maintaining the banks, or to cleanse and scour or join in cleansing and scouring the channels, of watercourses passing through over or adjoining his land, injury is caused to any other land, the owner or occupier of that land may serve notice on the said occupier requiring him, as the case may be, to maintain the banks or cleanse or scour the channels, or to join in maintaining the banks or in cleansing or scouring the channels of the watercourses."

It is provided by sub-s. (2) of that section that if any person is in default after notice has been duly served upon him and fails within two months from the date of the service to comply with the requirements,

"... the person by whom the notice is served may, if he thinks fit, execute all such works as are reasonably necessary ..."

and recover the expense of so doing. Again, I do not think we are concerned with that in this proceeding because it seems to me only to impose a duty on the owner or occupier of the land if he has been served with a notice. It is in effect giving a new remedy, a statutory remedy, and a statutory cause of action, to an adjoining landowner, first enabling him to serve a notice calling on a person to do something which he otherwise was not under a liability at common law to do, and, if he neglects to do it, the person serving the notice can do it himself and recover the expense. I cannot read that section as imposing a duty at large. The obligation seems to me to arise only where the notice has

been served, and there has been a failure to comply with it. So I do not further consider the Land Drainage cases, and I do not think *Finch v. Bannister* (6) gives any real help on this matter, because the *ratio decidendi* of that case, both in the Divisional Court and the Court of Appeal, was that a mill—the owner of the mill being the person complaining—was not land within a particular section.

A I now have to consider certain authorities to which our attention has been directed. The first is *Margate Pier and Harbour (Co. of Proprietors) v. Margate Town Council* (7), on which counsel for the appellants strongly relied because it was a case in which an accumulation of seaweed had taken place. The facts were that the harbour of Margate was vested in the Margate Pier and Harbour Company, and by the action of the sea a quantity of seaweed had drifted into the harbour, and, being left there, became a nuisance. It was held that the company were bound to remove it, and that, they not having effectually done so, an order was rightly made upon them under a section of the Nuisances Removal Act, 1855. In the course of the argument, LUSH, J., said (20 L.T. 568):

B “It is not so stated in the Case, and I cannot assume that there would not be the same accumulation if the piers were not there.”

C Piers had been built which, apparently, caused the accumulation of the seaweed. In giving judgment, LUSH, J., said (*ibid.*):

“I have no doubt, whatever, that it is the duty of the appellants to prevent the accumulation of seaweed so that it shall not become a nuisance, and that, whether produced by natural or artificial causes, they are bound to remove all matter in the harbour which is a nuisance, or injurious to health.”

D We need not consider that case at great length, because obviously one thing shown to have happened was that the accumulation had occurred owing to the building of the piers which were vested in the appellants, and, therefore, there had been something done by them which caused an accumulation to take place. There is an obvious difference between allowing seaweed or any other form of what may become filth to accumulate on your land and not remove it when it becomes a nuisance and what is alleged to be a nuisance which has arisen through the ordinary natural circumstances which occur in the bed of a stream. I do not think that case is really helpful in considering the present case.

E *A.-G. v. Tod Heatley* (8) was a very different case. A landowner in London allowed a piece of his land to get into a filthy condition. The court there approved of *Margate Pier and Harbour (Co. of Proprietors) v. Margate Town Council* (7), and I will read the headnote ([1897] 1 Ch. 560):

F “The defendant was the owner and occupier of a vacant piece of land in the metropolis. He had surrounded it by a hoarding, but people threw filth and refuse over, and broke up the hoarding, so that the condition of the land and the use to which it was put constituted a continuing public nuisance. In an action by the Attorney-General at the relation of the vestry of the parish :—*Held*, that it was a common law duty of the owner of the piece of land to prevent it from being so used as to be a public nuisance; and that the Attorney-General was entitled to an injunction to enforce the performance of that duty.”

G There the nuisance arose not from natural causes but because the owner of the land did not prevent people from throwing filth on the land, and therefore permitted the accumulation of filth on the land. That, again, I do not think helps us in this case.

H The case which, perhaps, needs more careful consideration is *Clayton v. Sale Urban District Council* (9), the headnote of which is as follows ([1926] 1 K.B. 415):

“Where a nuisance has arisen on land adjoining a river by flooding through a breach in the flood bank thereon, the owner of the land may,

under the Public Health Act, 1875, s. 94, be required to abate the nuisance, if it be found that the nuisance arose or continues by his 'act, default, or sufferance,' notwithstanding that, apart from that section, he is under no obligation by contract or otherwise to maintain or repair the flood bank."

We have had an interesting argument from counsel for the respondents on this case, because the court distinguished it from *Thames Conservators v. Port of London Sanitary Authority* (10). Counsel for the respondents contended that in *Clayton v. Sale Urban District Council* (9) the court had misunderstood or taken a wrong view of what was held in the *Thames Conservators v. Port of London Sanitary Authority* (10), and he said he derived assistance from that case. Whether it would be open to this court to say that the court was wrong in the view they took in the *Thames Conservators v. Port of London Sanitary Authority* (10) would raise a nice question. Where there are two conflicting authorities, it is always open to the court to follow the authority which it prefers; but this was a case in which the court did, rightly or wrongly—and we must assume rightly—distinguish the *Thames Conservators v. Port of London Sanitary Authority* (10), saying that part of the judgment of LORD COLERIDGE, C.J., on which I think counsel for the respondents wished to rely was *obiter*. I do not find it necessary to decide that question, or say whether I prefer *Clayton v. Sale Urban District Council* (9) to the *Thames Conservators v. Port of London Sanitary Authority* (10), because, in my opinion, it does not affect the present case. At first sight I dare say it does, but when one comes to examine the case one finds that it did not come under s. 259 of the Public Health Act, 1936, at all, and that makes a very considerable difference because, if under s. 259 an obligation was imposed on a landowner who by his act, default, or sufferance allowed this state of affairs to continue, it might be we should have to come to a different decision from that which we are giving to-day. It is observable that there is a great distinction between s. 94 of the Public Health Act, 1875, with which section alone the court was concerned in *Clayton v. Sale Urban District Council* (9), and s. 259, that is to say, that in the section with which we are dealing, the word "sufferance" does not occur. Therefore, we have to consider whether or not this obstruction was caused and was continued by the act or default, but not whether it was caused and continued through the act, default, or sufferance, of the respondents. I cannot construe the word "default" here in the way in which we have been asked to do so by the appellants. I do not think "default" means in this case merely doing nothing, unless the obligation to do something is imposed by the Act. There was no act here which caused the obstruction either to arise or to continue. I can well understand that there may be circumstances whereby a person failing to do something which he ought to do, as, for instance, preventing material going into a river from his own premises may be said to cause the obstruction by his default. In this case, on the facts found by the justices, there is nothing to show that the respondents did anything which caused this obstruction to arise or to continue, nor do I think that there is anything which can properly be called a default. There might have been facts which amounted to a sufferance, but sufferance is not mentioned in this section. For these reasons, in my opinion, the justices were fully justified in coming to the conclusion they did, and this appeal fails.

HILBERY, J.: I agree.

BYRNE, J.: I agree.

Appeal dismissed with costs.

Solicitors: *Sharpe, Pritchard & Co.*, agents for *T. D. W. Williams*, Neath (for the appellants); *Seeley & Son*, agents for *Lewis C. Thomas, Son & Blazey*, Neath (for the respondents).

[Reported by F. A. AMIES, Esq., Barrister-at-Law.]

HUTCHINSON & CO. (PUBLISHERS), LTD. v. TURNER (INSPECTOR OF TAXES).

[CHANCERY DIVISION (Vaisey, J.), July 11, 12, 20, 1950.]

Income Tax—Deductions against profits of trade—Publication of journals for charity—Profits paid to charity—Liability of publishers in respect of profits.

A *Income Tax—Deductions against profits—Subscriptions to charity on behalf of employees—Income Tax Act, 1918 (c. 40), sched. D, Cases I and II, r. 3 (a).*

The taxpayers published certain journals for the benefit of a charity and earned substantial profits, which, together with other moneys, they paid over to the charity. There had been no written agreement between the taxpayers and the charity, but publication was undertaken on the "distinct understanding" that the profits were to be paid to the charity. On a claim by the Crown for income tax in respect of the profits,

B HELD: (i) as there was no enforceable agreement between the taxpayers and the charity and no trust had been created, the profits formed part of the trading profits of the taxpayers and were assessable as such.

C (ii) although it might well be that the taxpayers would have suffered in reputation so as to affect their financial position had they not honoured their promise to pay the profits (or a sum equal thereto) to the charity, the moneys paid over could not on that ground be regarded as constituting a proper deduction in computing the taxpayers' profits for the purposes of income tax.

D The taxpayers paid subscriptions to the pension fund of the charity for such of their employees as accepted their offer to do so. An employee for whom such payment was made obtained a right to vote at the annual elections of pensioners or beneficiaries, and himself became eligible for a pension or other benefit. The taxpayers claimed to deduct the amount of the subscriptions in computing its profits for tax purposes.

E HELD: the payments were not moneys expended wholly and exclusively for the purpose of the company's trade, and, therefore, deduction thereof was prohibited by the Income Tax Act, 1918, sched. D, Cases I and II, r. 3 (a).

[AS TO DEDUCTION OF TRADE EXPENSES, see HALSBURY, Hailsham Edn., Vol. 17, pp. 149-156, paras. 309-320; and FOR CASES, see DIGEST, Vol. 28, pp. 42-45, Nos. 215-226.]

F Cases referred to:

(1) *Tennant v. Smith*, [1892] A.C. 150; 61 L.J.P.C. 11; 66 L.T. 327; 56 J.P. 596; 3 Tax Cas. 158; 28 Digest 17, 87.

(2) *British Insulated and Helsby Cables, Ltd. v. Atherton*, [1926] A.C. 205; 95 L.J.K.B. 336; 134 L.T. 289; *affg.*, S.C. *sub nom.*, *Atherton v. British Insulated and Helsby Cables, Ltd.*, [1925] 1 K.B. 421; 94 L.J.K.B. 319; 132 L.T. 288; 10 Tax Cas. 155; 28 Digest 52, 264.

G

CASE STATED by general commissioners for the city of London pursuant to the Income Tax Act, 1918, s. 149.

H The taxpayers, Hutchinson & Co. (Publishers), Ltd., appealed against an assessment to income tax of their trading profits for 1944-45, claiming that £31,469, which represented the profits from the publication of certain journals and which, pursuant to a prior understanding, were paid to a printing trade charitable organisation, did not fall to be included in the company's profits, or, alternatively, that an equivalent sum was deductible as a revenue expense of their trade. The company also claimed that a sum of £6,972 paid by them as employees' subscriptions to the pension fund of the charitable organisation was deductible in computing their profits. The general commissioners found against the company on all points.

Sir Andrew Clark, K.C., and Graham-Dixon for the company.
Pennycuik, K.C., and R. P. Hills for the Crown.

Cur. adv. vult.

July 20. VAISEY, J., read the following judgment. This is a Case stated by the income tax commissioners for the city of London. The taxpayers are Hutchinson & Company (Publishers), Ltd. The case raises two entirely separate points. The first concerns a sum of £31,469 which the Crown has claimed, and the commissioners have held, to be part of the taxpayers' profits based on the accounts for the trading year ending Dec. 31, 1943, and assessable to tax for the year 1944-45.

The taxpayers carry on a well-known publishing business, and the sum which I have mentioned represents the profits which were admittedly made by them in the printing, producing, and selling of certain publications entitled "Printers' Pie," "Christmas Pie," "Junior Pie," and "Printers' Devil," but what the taxpayers say is, in brief, that the sum was no part of the profits of their own trading but belonged in truth and in fact to a charity known as the Printers' Pension Almshouse and Orphan Asylum Corporation, which I will call "the corporation." Alternatively, they say that if (contrary to their first contention) the said sum did form part of their own trading profits, they are, nevertheless, entitled to set against it an equivalent sum as a permissible deduction from those profits. There is no doubt that they have paid that sum, with other moneys (as, indeed, is admitted), to the corporation. This alternative submission was by implication, though not expressly, rejected by the commissioners. I can refer to the various publications collectively as "Printers' Pie."

The facts are not really in dispute. At all material times the late Mr. Walter Hutchinson owned all the ordinary shares in Hutchinsons. He was its chairman and managing director and very largely controlled its operations and directed its policy. "Printers' Pie" had originated in 1902 and was, I think, then something of a novelty in charitable appeals. For a number of years thereafter it was brought out annually by various printing and publishing firms for the benefit of the corporation, which may be described as their special trade charity. Whether in those former years the proceeds were for tax purposes treated as belonging to the corporation *ab initio*, or as belonging to the firms and handed over by them *ex gratia* to the corporation, I do not know, but, on any view of the matter, it was common knowledge that a purchaser of "Printers' Pie" was, by his purchase, contributing to the support of the corporation which, as I have stated and as its name indicates, is a charity established for the benefit of persons and the dependants of persons engaged or employed in the trades or businesses of publishers and printers. "Printers' Pie" had not appeared since 1933 and when, in 1943, Mr. Hutchinson became chairman of the corporation he determined to revive it in order to augment the corporation's funds, and he, or, rather, the taxpayers, did so. The venture was very successful. The gross receipts from the sale of the issue of the resuscitated "Printers' Pie" amounted to no less than £42,677. The cost of the paper and printing came to £11,208. The balance is the sum of £31,469 which is now in dispute. I have already said that considerably more than that sum was paid over by the taxpayers to the corporation. The circumstances in which that was done are really not material, but there can be no question but that the corporation has, in fact, received from the taxpayers that sum, and more also, in augmentation of its charitable funds.

Now, in the admitted absence of any written agreement between the taxpayers and the corporation, but in view of the "distinct understanding" (whatever that may mean) to which they had come that the profits should go to the corporation, it seems to me that there are two possible views which may be taken in this case about what the essence of the matter really is. First, it may be said that the venture of bringing out "Printers' Pie" was undertaken by the taxpayers on the terms that they were acting as agents for the corporation

under a special bargain that, if the venture resulted in a profit, the corporation should receive it, while, if there was a loss, the taxpayers would bear it. On that view, the profit belonged, as soon as realised, to the corporation and nothing belonged to the taxpayers, with the result, as they claim, that they ought not to be assessed to tax in respect of it. Or, secondly, it may be said that the taxpayers produced "Printers' Pie" with the object and intention of handing over to the corporation the profit, or an amount equal to the profit, resulting from the venture, or (to put the matter in another way) the amount by which the trading profits of the taxpayers were increased or augmented thereby. That means, I think, that the taxpayers were to hand over to the corporation some of the moneys which they themselves had earned and on which they were, accordingly, liable to be taxed. I incline to think that the taxpayers would have been justified in the forum of their own conscience if they had paid over to the corporation £31,469 less the amount of the tax, that is to say, 11/20ths of that sum, assuming that it had been subjected to tax in their hands, but it may well be that such a payment would have appeared to be lacking in generosity or might have been represented as an evasion of the taxpayers' obligations (were they legal or moral) to the corporation.

I am wholly unable to find any agreement here, whether of agency or otherwise, and I am equally unable to spell out of what was done or said any trust. At no time, so far as I can see, could the corporation have taken any proceedings either against the taxpayers or against Mr. Hutchinson to enforce any claim to the money. They were, of course, morally quite certain of getting it. The benevolent intentions of the taxpayers, and of Mr. Hutchinson in particular, and the wide publicity which had been given to those intentions served to create the very maximum of confidence and to afford ample security to the corporation that effect would be given to them, but a promise, however solemnly given and however certain it may be that it will not (because it cannot in decency) be broken, remains a promise and nothing else. That is the view which the commissioners have taken, and I can see no reason to differ from it.

The alternative claim on this part of the case may be thus stated. The payment of the £31,469 to the corporation is alleged to have been a necessary outgoing of the taxpayers' business because, had it not been made, the taxpayers would, or at least might, have been so ruined in reputation as to affect to a serious degree their financial position and standing. This is, to my mind, a plausible plea, but I have come to the conclusion that it is open to the same kind of objection as the other. Take the case of a successful tradesman in a country town who has a relative living in poverty near him whom, as his customers and neighbours all know, he has promised to maintain with an annual payment. If such a man were to withhold that payment, it is all too likely that he would lose his custom as well as his reputation, but could the payment for that reason be held to be a proper outgoing of and deduction from the profits of his business? I think not. The analogy of that imaginary case to the present case seems to me to be close. On this ground also, the appeal as to the £31,469 must fail.

Much stress was laid by the taxpayers' counsel on that passage in the Case which states that Mr. Hutchinson had invited advertisers who were willing to help the corporation to subscribe £100 for the corporation in return for a page advertisement in the publication, and that he secured the help of contributors and others free of charge, such persons being, of course, well aware that the publications were being brought out for the corporation's benefit. Indeed, that knowledge was widespread and there is no doubt that any attempt by the taxpayers to retain the profits for their own use (including the advertisers' payments) would have been damaging in the extreme to the taxpayers' reputation and goodwill. There is, however, nothing in those facts which, in my judgment, prevented the commissioners from reaching the conclusion at which they arrived, or is inconsistent with the view which I myself have expressed. On any view of the matter, the appeal as regards the £31,469 must, in my judgment, fail.

The other point raises entirely different considerations and presents, in my judgment, rather more difficulty. It concerns a sum of £6,972 which represents life subscriptions to the corporation paid by the taxpayers on behalf of certain of their employees—that is to say, 1,468 employees were made life members of the corporation's pension fund at a single-payment subscription of four guineas each and 384 employees were made life members of the orphan fund at a like subscription of two guineas each. Of all the employees to whom the offer was made, two only refused to accept it, and no equivalent cash payment was made to them. It appears that an employee for whom the payment, whether of four guineas or two guineas, was made obtained thereby two separate advantages—first, a right to vote at the annual elections of pensioners or beneficiaries, and, secondly, the right for himself or herself to be eligible for a pension or other benefit. With regard to the former of these privileges, it may be suggested that the conferring of voting rights on its employees would be remotely to the advantage of the taxpayers because the probability of the election of their employees rather than those of any rival publishing firm would be increased. It may also be said, with truth, that this payment was, in the case of each employee, something in the nature of a bonus, not of a large amount, giving to him or her an immediate advantage in consideration of past services and calculated to encourage efficiency and good feeling in the future, but can it be said that these were moneys wholly and exclusively expended for the purposes of the trade, properly referable to income and not to capital? So far as the taxpayers themselves were concerned, no benefit, and certainly no “enduring benefit,” except as previously mentioned, was conferred on them by these payments, and the fact that the benefits conferred on the employees were “enduring” seems to me to be immaterial, but because no employee seems to have had the option of taking his or her four guineas or two guineas in cash, I cannot for myself see how the sum was really a gratuity, or how it differed in substance from a free pass to a theatre or a free railway ticket to the seaside presented as a reward for good service. The sums of four guineas or two guineas were never cash in the hands of the employees, and cannot, I think, be treated as part of their wages or taxable income: see *Tennant v. Smith* (1). To allow them as deductions from the taxpayers' profits is, in my judgment, prohibited by r. 3 (a) of the Rules Applicable to Cases I and II of sched. D of the Income Tax Act, 1918, and possibly also by r. 3 (f). *British Insulated and Helsby Cables, Ltd. v. Atherton* (2), and particularly the classic speech of LORD CAVE, L.C., seems to me to support the view which I have stated, though the formation of a pension fund with which that case deals seems to me to be rather a different matter from anything with which I am concerned here.

I feel bound to hold that there was ample evidence on which the commissioners could have reached their conclusions on this second point, and, although the matter is, to my mind, not free from difficulty, I think that the commissioners came to a right decision and drew a proper inference from the admitted facts. I hold, therefore, that the appeal fails as to the said sum of £6,972 also. The appeal must accordingly be dismissed, with costs.

Order accordingly.
Solicitors: *Rubinstein, Nash & Co.* (for the appellants); *Solicitor of Inland Revenue.*

[Reported by C. N. BEATTIE, ESQ., Barrister-at-Law.]

RAILWAY EXECUTIVE v. CULKIN.

[HOUSE OF LORDS (Lord Simonds, Lord Normand, Lord Morton of Henryton, Lord MacDermott and Lord Reid), May 17, 18, 22, July 21, 1950.]

Workmen's Compensation—Compensation—Calculation of weekly payments—Change in rates of remuneration—Alteration in working hours—Same wage paid for forty-four hour week as previously paid for forty-eight hour week—Workmen's Compensation Act, 1943 (c. 6), s. 6 (1).

By the Workmen's Compensation Act, 1943, s. 6 (1): "For the purpose of calculating—(a) any weekly payment payable under the Workmen's Compensation Acts, 1925 to 1943 . . . the average weekly earnings of the workman before the accident shall, if and whenever a change occurs after the date of the accident in the rates of remuneration obtaining in the class of employment in which the workman was employed during the relevant period before the accident, be deemed, so long as the changed rates obtain without further change, to be the average weekly earnings which he would have earned during that period if the changed rates had obtained throughout that period."

On Mar. 7, 1944, a workman employed in railway work as a loader was injured in an accident arising out of and in the course of his employment. His pre-accident basic wage was 76s. a week for a standard week of forty-eight hours, but with overtime and tonnage bonus his average weekly wages amounted to 95s. 6d. From Apr. 17, 1944, the basic rate of 76s. a week was increased to 81s. a week, and from July 30, 1945, to 89s. a week, and as from the latter date the rate of overtime pay was also increased. On June 30, 1947, the forty-four hour week without loss of pay was introduced throughout the railway service, and the basic rate of loaders was increased from 89s. to 96s. 6d. a week. The workman claimed that in addition to the admitted change in his remuneration due to the increases in the basic and overtime rates a change in the rate of his remuneration within the meaning of s. 6 (1) of the Act of 1943 had also occurred in consequence of the reduction of the hours of the standard week, for, whereas the rate per hour before the accident was 76s. divided by forty-eight, it now was 96s. 6d. divided by forty-four, and, whereas before the accident forty-eight hours of actual work a week was remunerated at the basic weekly wage, now no more than forty-four hours of work was so remunerated, and, consequently, the workman must be regarded as having worked overtime, in the relevant pre-accident period, from the forty-fifth hour to the end of the forty-eighth hour.

HELD (LORD MACDERMOTT *dissenting*): there was a clear distinction between rates of remuneration and conditions of work; the appellant's basic rate of remuneration was, not an hourly, but a weekly, one, and it did not change merely because his conditions of service were altered by a variation in his working hours; and, therefore, the reduction in the hours of the working week did not result in a change occurring in the rates of remuneration obtaining in his class of employment within s. 6 (1).

Shaw v. Rootes Securities, Ltd. ([1948] 2 All E.R. 168), *overruled*.

[FOR THE WORKMEN'S COMPENSATION ACT, 1943, s. 6 (1), see HALSBURY'S STATUTES, Vol. 36, p. 189.]

Cases referred to:

- (1) *Shaw v. Rootes Securities, Ltd.*, [1948] 2 All E.R. 168; 41 B.W.C.C. 128; 2nd Digest Supp.
- (2) *Hill v. Wolverhampton Corrugated Iron Co., Ltd.*, [1939] 3 All E.R. 72; [1939] 2 K.B. 469; 108 L.J.K.B. 536; 161 L.T. 6; 32 B.W.C.C. 129; Digest Supp.

(3) *Trawlers (Grimsby), Ltd. v. Crouchen*, [1943] 1 All E.R. 253; 36 B.W.C.C. 22; 2nd Digest Supp.

(4) *Paterson v. Beardmore (William) & Co., Ltd.*, [1948] L.J.R. 1146; 41 B.W.C.C. 64; 2nd Digest Supp.

APPEAL by the employers, the Railway Executive, from a decision of the Court of Appeal (BUCKNILL, COHEN and DENNING, L.J.J.), dated Mar. 3, 1949, allowing the appeal of the workman from an award of His Honour JUDGE STEWART, acting as an arbitrator under the Workmen's Compensation Acts, made at York County Court on May 11, 1948.

The workman was employed as a loader in a railway goods warehouse. On Mar. 7, 1944, he met with an accident in his employment in consequence of which he was unable to perform the work of a loader, and subsequently he was employed as a messroom attendant. The workman was paid compensation under the Workmen's Compensation Acts, 1925 to 1943, at the rate of 30s. per week plus supplementary allowances from the date of his accident to May 1, 1944, and thereafter weekly compensation at appropriate rates for partial incapacity. In consequence of increases in the basic rate of pay and the rate for Sunday duty, new calculations were made under s. 6 (1) of the Act of 1943 with the result that as from July 30, 1945, the workman's pre-accident average weekly earnings were calculated at 110s. 4d. On June 24, 1947, a court of inquiry appointed under the Industrial Courts Act, 1919, recommended further increases in the basic rates of wages of all grades of employees and the introduction, in place of the forty-eight hour week, of a forty-four hour week, without loss of pay. In acceptance of these recommendations, the employers introduced, as from June 30, 1947, the forty-four hour week throughout the railway service and increased by 7s. 6d. the basic weekly rate of remuneration of the "conciliation" staff which included both the pre-accident and post-accident grades of the workman. The workman claimed that, by reason of a reduction of the hours of the standard week, there had been a change of remuneration within the meaning of s. 6 (1) (a) of the Act of 1943 necessitating a further calculation of his pre-accident average weekly wages by dividing those wages by the number of hours comprising the new standard week. The employers contended that the change in the standard week was merely an alteration in the conditions of work, leaving the basic weekly rate unaffected. The learned county court judge upheld the employers' contentions, but the Court of Appeal, following its previous decision in *Shaw v. Rootes Securities, Ltd.* (1) allowed the workman's appeal and remitted the case for a new trial. The facts are fully set out in the opinion of LORD SIMONDS.

Beney, K.C., and *R. W. Payne* for the appellants.

Paull, K.C., and *R. M. Everett* for the respondent.

The House took time for consideration.

July 21. The following opinions were read.

LORD SIMONDS: My Lords, in this case it was conceded by the appellants in the Court of Appeal that they could not succeed in that court if the earlier case of *Shaw v. Rootes Securities, Ltd.* (1) was rightly decided, and, in effect, their appeal to this House is brought to test the correctness of that decision, in which the Court of Appeal (TUCKER, L.J., and ROMER, J., SOMERVELL, L.J., dissenting) dismissed the employers' appeal from an award of a learned county court judge and gave to s. 6 of the Workmen's Compensation Act, 1943, a meaning and effect which the present appellants ask your Lordships to reject. That section, which is headed "Calculation of weekly payments in case of changes in rates of remuneration," provides by sub-s. (1) as follows:

"For the purpose of calculating—(a) any weekly payment payable under the Workmen's Compensation Acts, 1925 to 1943, or under any scheme made under those Acts, for total or partial incapacity, or (b) any

A supplementary allowances payable in respect of any such weekly payment or the total amount of the supplementary allowances payable in respect of any such weekly payment, the average weekly earnings of the workman before the accident shall, if and whenever a change occurs after the date of the accident in the rates of remuneration obtaining in the class of employment in which the workman was employed during the relevant period before the accident, be deemed, so long as the changed rates obtain without further change, to be the average weekly earnings which he would have earned during that period if the changed rates had obtained throughout that period."

B In the present case these are the material facts. Culkin, the respondent, was before his accident employed by the predecessors of the appellants, who undertook their liabilities, as a loader at the York goods warehouse. On Mar. 7, 1944, he met with an accident in his employment in consequence of which he was unable to perform the work of a loader. He has for some time past been employed by the appellants at York as a messroom attendant. For the fifty-two weeks preceding the accident he worked as a loader on a guaranteed or standard week of forty-eight hours at a basic rate of 76s. per week. During C the same period he was entitled to be paid special rates as follows: Day overtime at the rate of time and a quarter, night duty at the rate of time and a quarter, night overtime at the rate of time and a half, and Sunday duty at the rate of time and a half. His weekly earnings during the period in question averaged at these rates 95s. 6d. which included a tonnage bonus of 8s. 7d. The respondent was paid compensation under the Workmen's Compensation Acts at the rate D of 30s. per week plus supplementary allowances from the date of his accident to May 1, 1944, and thereafter weekly compensation at appropriate rates for partial incapacity. By virtue of agreements between the appellants or their predecessors and the railway trade unions the basic rate of 76s. per week was from Apr. 17, 1944, increased to 81s. per week and from July 30, 1945, to 89s. per week. From July 30, 1945, the rate of Sunday duty was also increased E from time and a half to time and three quarters. In consequence of these increases new calculations were made under s. 6 of the Act of 1943 with the result that as from July 30, 1945, the respondent's pre-accident average weekly earnings were calculated at 110s. 4d.

Then came the event which gave rise to the present dispute. On June 24, 1947, a court of inquiry appointed under the Industrial Courts Act, 1919, to F inquire into applications by trade unions representing the employees of the railway companies for improvements in wages and reductions in weekly hours of work made a report containing certain recommendations, which, since they were adopted by the parties and must be regarded as defining their contractual rights and obligations, I will state, so far as they are relevant, verbatim. By para. 111, they recommended as follows:

G "Having regard to all the considerations outlined above and as an interim measure we recommend that the basic rates or salaries of all adult workers covered by the various claims before us be advanced by the sum of 7s. 6d. per week (or £19 10s. per annum in the case of salaried employees), with appropriate adjustments for juveniles in accordance with the practice of the industry, as from the beginning of the first full pay period following H June 30, 1947."

By para. 115 they recommended as follows:

"We recommend that a forty-four hour week be introduced . . . without loss of pay. To this general recommendation we make one exception. We think that the hours of clerical staffs should be standardised at forty-two per week without loss of pay and without prejudice to more favourable arrangements at present operating. The new arrangements

with regard to hours should come into force simultaneously with the increase in wages."

In pursuance of this report and its acceptance, the appellants, as from June 30, 1947, introduced the forty-four hour week throughout the railway service and increased by 7s. 6d. the basic weekly rate of remuneration of the "conciliation" staff which included both the pre-accident and post-accident grades of the respondent. Thus the rate of his pre-accident grade of loader was increased from 89s. to 96s. 6d. per week and the rate of his present grade from 85s. to 92s. 6d. per week. A

The question, however, arose what effect, if any, on the re-calculation, which in any case had to be made, should be given to the reduction of the standard week from forty-eight hours to forty-four hours. On this the parties could not agree and on Feb. 3, 1948, the respondent filed in the York county court a request for arbitration under the Workmen's Compensation Acts claiming as follows: B

"(A) That in the relevant pre-accident period the respondent worked on a guaranteed week of forty-eight hours plus overtime rates calculated on a daily basis and tonnage bonus, and his average weekly earnings were 95s. 6d. As from June 30, 1947, men in the respondent's pre-accident grade had worked on a guaranteed week of forty-four hours plus overtime rates calculated on a daily basis as aforesaid; Sunday work had been paid at the rate of time and three quarters as compared with time and a half at the date of the accident and payment for the forty-fifth to the forty-eighth hours both inclusive had been at overtime rates. C

"(B) That as from June 30, 1947, the rate per hour on which remuneration for ordinary time, overtime and Sunday work had been calculated had been 2s. 2½d. (i.e., 96s. 6d. divided by forty-four) as compared with a rate per hour before the accident of 1s. 7d. (i.e., 76s. 0d. divided by forty-eight). D

"(c) That the result of substituting the current rate of 2s. 2½d. per hour for the pre-accident rate of 1s. 7d. per hour and taking into account the above-mentioned adjustments as to payment for Sunday work and for the forty-fifth to forty-eighth hours inclusive was to increase the respondent's average weekly earnings from 95s. 6d. a week to a notional figure of 133s." E

To this claim the appellants made an answer which (as amended at the hearing), while admitting that the respondent was by reason of the increase in the relevant basic rate from 89s. to 96s. 6d. and the increase in Sunday rate entitled to have his notional pre-accident average weekly earnings increased to the sum of 121s., otherwise denied the validity of the claim. The learned county court judge (who made his award before the decision of the Court of Appeal in *Shaw's* case (1) to which I have referred) held that the application was not well founded and made an award in favour of the appellants. From his decision the respondent appealed to the Court of Appeal, who, as I have said, then had the authority of *Shaw's* case (1) before them, and, as was conceded by the present appellants, were bound by it. I must now refer in more detail to that case. F

In *Shaw's* case (1) the material fact was that by an industrial arbitration award the basic pay for women workers in the engineering industry was, after the workman's accident, fixed at 62s. 6d. for a forty-four hour week instead of 62s. 6d. for a forty-seven hour week. The question was whether there had been a change in the "rate of remuneration" of a workman, who had in the pre-accident period worked an average of fifty-seven hours per week (including overtime), so as to entitle her to a re-calculation of her notional pre-accident earnings and an adjustment of her compensation. This question, as I have already indicated, was answered in the affirmative by TUCKER, L.J., and ROMER, J., in the negative by SOMERVELL, L.J. I do not very easily follow G H

the reasoning of TUCKER, L.J. The crucial passage in his judgment appears to be that in which he says ([1948] 2 All E.R. 170):

"I would agree that a mere change in the hours of a working week where no question of overtime is involved would not constitute a change in the rate of remuneration. It is, however, essential in the present case to remember that we are bound to apply the change to the average fifty-seven hours per week in fact worked by the workman before her accident, and this necessarily involves applying overtime rates to hours which did not previously carry overtime rates."

If I understand this passage, it appears to involve that, whereas there was no change in the rate of remuneration for the forty-fifth, forty-sixth and forty-seventh hours, yet by reason of the reduction of hours from forty-seven to forty-four there was *ipso facto* a change in the rate of remuneration for each hour above forty-seven. With great respect to the learned lord justice I do not think that this can possibly be right. ROMER, J., took, I think, a somewhat different view. He asks the question (*ibid.*, 171):

"Is, then, 62s. 6d. for forty-seven hours' work a week, and overtime for subsequent hours, the same 'rate of remuneration' as 62s. 6d. for forty-four hours' work, and overtime for subsequent hours?"

To this he gives the answer No, and accordingly would regard a change in the rate of remuneration as having occurred in respect not only of the hours in excess of forty-seven but also of the forty-fifth, forty-sixth and forty-seventh hours. SOMERVELL, L.J., on the other hand, after stating the change of hours in the normal working week, poses the question thus (*ibid.*, 170):

"Is this a change in the rates of remuneration? The answer seems to me to depend on whether the rate of remuneration is properly expressed as a rate for a week or for so many hours in a week. If the former, then I think a reduction of working hours, though it gives the workman more spare time, leaves unaffected his rate of remuneration which is a weekly rate. In a case such as this, where the wage was clearly a weekly wage, this seems to me to be the natural and ordinary meaning of the words."

The learned lord justice, after enforcing his view by examples from every-day usage, concluded that there had been no change in the rates of remuneration within the meaning of the section.

My Lords, I think that SOMERVELL, L.J., was right and that his reasoning is clearly applicable to the present case. In the first place, I cannot doubt that the basic rate of remuneration is a weekly rate. In every relevant contractual document it is referred to either expressly as a weekly rate or in terms which make it clear that it is a weekly rate. It may be called a standard week's rate and the week may be a varying number of hours' work, but it remains a weekly rate. No doubt, it was necessary for many purposes in order to calculate the amount of wages due to a workman at the end of the week to break down the weekly rate to an hourly sum, whether because the workman had not worked (in which I include availability for work) the requisite number of hours or because he had worked overtime or night duty or Sunday duty and the *quantum* due to him at the appropriate rate of time and a quarter or time and a half had to be ascertained. The wages department of the appellants and of their predecessors made their calculations accordingly and specimens of such calculations were put in evidence, but this proper, and, indeed, necessary, method of calculation does not appear to me to affect the elementary fact that the basic rate was a weekly not an hourly rate and that the sums due for what I will call special duty, *i.e.*, overtime, night duty and Sunday duty, were ascertainable by reference to that weekly rate.

What, then, must the arbitrator do when it falls to him to determine whether there has been, since the accident, a change in the rates of remuneration

obtaining in the class of employment in which the workman was during the relevant period employed? This determination is the necessary prelude to the application of the changed rates to his actual average pre-accident weekly earnings. It appears to me that this question is not difficult to answer. In the case now under appeal the respondent's wages were made up of his basic weekly wage and payments for overtime, night duty, and Sunday duty, each of these constituents of his total weekly earnings being paid for at the appropriate rate. The arbitrator will ask whether any and which of these rates have been changed since the accident or (for the purposes of this case) since the last re-calculation. He will be told that the basic rate has been increased by 7s. 6d. a week, but that no other rates have been increased. He must base his calculation on this increase. He turns then to the pre-accident weekly earnings. They are made up of wages for ordinary duty and wages for special duty. As I have already indicated, it is necessary to do a simple mathematical sum in order to ascertain the amount due for special duty. This is simply and conveniently done by aggregating all the hours worked in a week. To the hours of ordinary duty are added the hours of special duty equated at the appropriate rate (four hours' overtime equal five hours' ordinary time and so on) and the sum which is ascertained by dividing the weekly rate by the number of hours in the standard week is multiplied by this aggregate number of hours. If the only increase has been an increase in the weekly rate the arbitrator has nothing else to do than to apply the new increased rate instead of the old rate to the same number of hours. The method of calculation ensures that the new increased rate is reflected in an increased payment for the special duty hours as for the ordinary duty hours. If, on the other hand, there has been an increase in some other rate also, as, for instance in the rate for Sunday duty, then the arbitrator must make a further adjustment, counting the hours of Sunday duty included in the aggregate of hours at time and three quarters instead of time and a half. Nothing, as it seems to me, could be simpler than this and it is what the appellants say should be done and what the arbitrator in fact did.

The respondent, however, seeks to introduce an entirely different method of computation. His starting point is that the basic rate is really an hourly rate, this contention, if I understand it, being based on the fact that the working week is a week of so many hours and that for numerous purposes, as I have already pointed out, the weekly rate must be broken down to an hourly rate. He then says that, if the workman is paid at an hourly rate and if he works less hours for the same sum, then his rate of remuneration is changed. This is, I think, the view taken by ROMER, J., in *Shaw's* case (1). The short answer is that the argument proceeds on a false premise. The basic rate of remuneration is, not an hourly, but a weekly, one, and that rate does not change merely because the conditions of service are altered whether by an alteration of the working hours or otherwise. To put it slightly differently, an alteration of working hours will, no doubt, result in hours, which before the accident were ordinary hours, becoming after it overtime hours, but that is no justification for treating the hours which were actually worked before the accident as being other than what they, in fact, were. This appears to have been the view of TUCKER, L.J., when he said ([1948] 2 All E.R. 170):

"I would agree that a mere change in the hours of a working week where no question of overtime is involved would not constitute a change in the rate of remuneration."

This seems to me a very clear point and not susceptible of elaboration. Then, however, it is said—and this seems to have been the view of TUCKER, L.J.—that it makes a difference if overtime has been worked. I see no reason for this. Let me assume a very simple case. Let a workman's pre-accident weekly rate be 96s. for a week of forty-eight hours and let the overtime rate

be time and a quarter. Assume that his weekly earnings are 126s. made up of forty-eight hours ordinary time ($48 \times 2s. = 96s.$) and twelve overtime hours ($5/4 \times 12 \times 2s. = 30s.$). This can be and habitually is stated simply by saying that his earnings are calculated at sixty-three hours at 2s. an hour. Now let the basic rate be increased to 120s. This figure must now be applied to the same hours. The same process is gone through. A weekly rate of 120s. equals 2s. 6d. per hour for a week of forty-eight hours, but the workman has *ex hypothesi* worked also twelve overtime hours which are counted as fifteen ordinary hours: he is therefore entitled to sixty-three hours at 2s. 6d. per hour or to 157s. 6d. in all. To me, my Lords, this seems simply and inevitably to flow from acceptance of the view that you must not for the purpose of making your new calculation change the character of the pre-accident hours from ordinary to overtime. If indeed you do that, I do not know to what confusion it may lead. Let me, however, pursue the example I have given a little further. Let me suppose that not only is the basic rate increased but the overtime rate also is increased from time and a quarter to time and a half. Then, taking the same figures, the twelve overtime hours become eighteen ordinary hours and there is an aggregate of sixty-six hours to be paid for at the new rate of 2s. 6d.

I have taken a simple example but hardly, I think, so simple as the case now under appeal. Here the basic rate is increased. This increase takes effect in the way that I have described. That is, in fact, the way in which the appellants have, with the approval of the arbitrator, calculated the sum due to the respondent. In my opinion, this appeal should be allowed with costs here and below and the decision and award of the arbitrator restored.

LORD NORMAND: My Lords, the respondent is an employee in the railway service in "the conciliation grade," and for the fifty-two weeks preceding Mar. 7, 1944, the date of the accident, he worked as a loader on a guaranteed or standard week of forty-eight hours at a basic rate of 76s. per week. In the same period he was entitled to be paid for day overtime at the rate of time and a quarter, for night duty at the rate of time and a quarter, for night overtime at the rate of time and a half and for Sunday duty at the rate of time and a half. The wages payable each week to a workman were calculated by converting the number of hours actually worked into the number of hours for which payment had to be made—for example, by treating four hours actually worked overtime as five hours ordinary time, and applying to the total the weekly base rate. The average of the weekly wages earned by the respondent in the year before the accident was 95s. 6d., but this included a tonnage bonus of 8s. 7d. per week. The figure of 95s. 6d. was re-calculated in consequence of increases in the base rate to 81s. per week from Apr. 17, 1944, and to 89s. per week from July 30, 1945, and of an increase of the Sunday duty rate to time and three quarters from July 30, 1945. On June 24, 1947, a court of inquiry appointed under the Industrial Courts Act, 1919, to inquire into applications by the trade unions representing the employees of the railway companies for improvements in wages and reductions in weekly hours of work submitted a report recommending that the base rate should be advanced by the sum of 7s. 6d. per week and that a forty-four hour week should replace the forty-eight hour week without loss of pay. In pursuance of this report the appellants as from June 30, 1947, introduced a forty-four hour week and increased the base weekly wage of the conciliation grade by 7s. 6d. a week. The base rate for the respondent's pre-accident grade of loader was thus increased to 96s. 6d. per week.

The appellants concede that the respondent's pre-accident average weekly wages should be re-calculated under s. 6 of the Workmen's Compensation Act, 1943, and they admit that since the accident the rates of remuneration obtaining in the class of employment in which the respondent was employed before the

accident have been changed (a) by the increase of the base weekly wage from 76s. to 96s. 6d. which, of course, will affect the sums in respect of overtime or night or Sunday duty worked by the respondent, and (b) by the increase of the Sunday duty rate from time and a half to time and three quarters. The respondent says that, besides these changes, the remuneration of the class of employment in which he was employed before the accident has been increased in two respects in consequence of the reduction of the hours of the guaranteed week from forty-eight to forty-four. First, the rate per hour before the accident was 76s. divided by forty-eight or 1s. 7d., but now it is 96s. 6d. divided by forty-four or 2s. 2½d. Secondly, whereas before the accident forty-eight hours of actual work a week, unless it was in part overtime or night or Sunday duty, was remunerated at the base weekly wage, now no more than forty-four of these hours of work is so remunerated and the forty-fifth to forty-eighth hours inclusive must be remunerated at a rate not less than time and a quarter or 96s. 6d. divided by forty-four, or approximately 2s. 2½d. The decision of the Court of Appeal in *Shaw v. Rootes Securities, Ltd.* (1) supports the second of these contentions.

In my opinion, both contentions fail for reasons which can be briefly stated. There is a clear distinction between rates of remuneration and hours and conditions of work. It is a distinction well recognised in contracts of employment and it is familiar in industrial disputes. In the very report of the court of inquiry which brought about an increase in the base rates and the introduction of the forty-four hour week the distinction is carefully observed. Section 6 of the Act of 1943 deals only with changes in the rate of remuneration. It is not concerned with changes of the hours of work. Nor is it concerned with the remuneration which the injured workman would have been earning at the date of the application for review. The section assumes that the whole other conditions of work in the relevant pre-accident period have remained unaltered, and that the rates of remuneration alone have changed. There is no warrant in the section for a re-classification of the hours of work or for treating them as anything but what they were when they were actually worked, so many ordinary working hours and so many hours of special duty of one sort or another. Finally, the contract between the respondent and the employer was on a weekly basis, though for the purpose of reckoning the wages in any week a rate per hour calculated from the base rate for a standard week was used. That the contract was a weekly contract for a weekly wage is evident from the use in it of such terms as "the standard week's work," "the standard week's wages," and "weekly rate of wage" and of tables in which the rates of pay of various categories of employees of the conciliation grade are shown as weekly wages.

I respectfully think that *Shaw v. Rootes Securities, Ltd.* (1) was wrongly decided, but I do not in anything that I have said intend to prejudice a case in which the remuneration is not based on a weekly rate of wages. I would allow the appeal.

LORD MORTON OF HENRYTON (read by LORD REID): My Lords, it is common ground between the parties that the increase of 7s. 6d. in the basic weekly rate of remuneration, as from June 30, 1947, was "a change . . . in the rates of remuneration obtaining in the class of employment in which the workman was employed during the relevant period before the accident" within s. 6 (1) of the Workmen's Compensation Act, 1943.

Counsel for the respondent workman put forward three arguments in this House. First, he submitted that the introduction of a forty-four hour "standard week," as from the same date, in place of a forty-eight hour standard week, was also "a change in the rates of remuneration etc.," within the same sub-section, both as regards the standard week and as regards work falling outside the standard week. Secondly, and alternatively, he submitted that, even if his first argument was too wide in its terms, there had at least been a change in the rate of remun-

eration for work falling outside the standard week. Lastly, counsel submitted, perhaps with less vigour, that by reason of the reduction of the "standard week's work" from forty-eight hours to forty-four hours, the respondent must now be regarded as having worked overtime, in the relevant period before the accident, from the beginning of the forty-fifth hour to the end of the forty-eighth hour.

A I can deal at once with this last argument. I cannot accept it because, as my noble and learned friend LORD NORMAND has said, there is no warrant in the section for a re-classification of the hours worked in the pre-accident period, or for treating these hours as anything but what they were when they were actually worked.

B Counsel's first argument, however, raises a question on which I have felt very great doubt. It is quite correct, as a matter of arithmetic, that every workman will receive more pay for every hour that he works, as a result of the reduction in the "standard week" from forty-eight to forty-four hours. I shall illustrate this by taking the case of a workman whose basic weekly wage has been raised, as from June 30, 1947, from 89s. to 96s. 6d. If the standard week had remained at forty-eight hours, that workman would have received C 96s. 6d. divided by forty-eight for each hour of work in the standard week, but as the standard week has been reduced to forty-four hours, he receives 96s. 6d. divided by forty-four for each hour of work in the standard week, and this is a higher rate of remuneration than 96s. 6d. divided by forty-eight per hour. Moreover, this higher rate of remuneration is carried into each hour of work which falls outside the standard week. I think that this change, D resulting from the reduction in hours, might well be described as a change in the workman's rate of remuneration, and I find it very difficult to determine whether it is a change in the rate of remuneration in the sense in which these words are used in s. 6 (1) of the Act of 1943. I have ultimately arrived at the conclusion that it is not, for two reasons. In the first place, the rate of remuneration "obtaining in the class of employment in which the workman was E employed during the relevant period before the accident" is a weekly rate, and the only change in that weekly rate has been the increase of 7s. 6d. already mentioned. The introduction of a forty-four hour week in place of a forty-eight hour week "without loss of pay" in no way affected the weekly rate. In the second place, I think that both employers and employed have throughout recognised a clear distinction between rates of remuneration on the one hand F and conditions of work, including the number of hours constituting the standard week, on the other. In these circumstances, although it is true that, as a matter of arithmetic, each workman will in fact receive more money for each hour of his standard week's work, I do not think that the introduction of a forty-four hour week is a "change in the rates of remuneration" within s. 6 (1) of the Act of 1943. It follows that, in my view, the case of *Shaw v. Rootes Securities, Ltd.* (1) was wrongly decided. G

Counsel's second and alternative argument also raises a difficult question. I think it is true to say that the workman is paid on an hourly basis in respect of time worked over and above the standard week, and, therefore, my first reason for rejecting counsel's first argument does not apply to his second argument. Nevertheless, I think that this argument must also be rejected, first H because, as I have already pointed out, a change in the conditions of work is not a "change in the rates of remuneration" within the section, and, secondly, because I think that according to the scheme of the Act of 1943 one and the same basis of calculation must be applied throughout. I cannot believe that if the rate of remuneration for an hour of ordinary duty is to be treated as x for the purposes of the necessary calculation under s. 6 (1), the rate of remuneration for overtime, at "time and a quarter," can be anything different from $1\frac{1}{4}$ times x . I would allow the appeal and restore the decision and award of the arbitrator.

LORD MACDERMOTT: My Lords, when the respondent was injured on Mar. 7, 1944, in the course of his employment as a loader, he was entitled under his contract of service to be paid each week the amount earned by him under each of the following heads:—1. A basic weekly wage of 76s., for a standard week of forty-eight hours, which was “guaranteed” or payable in full if the workman was available for duty throughout the standard week. 2. Day overtime at the rate of time and a quarter. 3. Night duty (ordinary time) at the rate of time and a quarter. 4. Night duty (overtime) at the rate of time and a half. 5. Sunday duty at the rate of time and a half. He was also entitled to receive, as part of his remuneration each week, a tonnage bonus. All overtime and Sunday duty (*i.e.*, turns commencing on a Sunday) were to be excluded from and paid independently of the guaranteed week. The respondent's average weekly earnings during the twelve months before his accident, calculated under these heads and including a tonnage bonus of 8s. 7d., were 95s. 6d., and after the accident compensation at the appropriate rates under the Workmen's Compensation Acts was duly paid to him. By June 24, 1947, the terms of service for loaders had been altered in two respects. The basic weekly wage had become 89s. and the Sunday duty rate had changed from time and a half to time and three quarters. These alterations entitled the respondent to an increase in his weekly compensation under s. 6 (1) of the Act of 1943, and an increase was in fact granted. It would seem that this did not take the change respecting Sunday duty into consideration. The omission, however, is not now important, it being conceded by the appellants that this change must be regarded in applying the provisions of the section. On June 24, 1947, two further changes touching the remuneration of loaders were made in their contracts. These gave effect to certain recommendations of a court of inquiry appointed under the Industrial Courts Act, 1919, and were as follows:—First, the basic weekly wage was advanced by 7s. 6d. to become 96s. 6d.; and, secondly, —and this is what led to the present dispute—the standard week of forty-eight hours was reduced to one of forty-four hours without loss of pay. The respondent having filed a request to review and increase his compensation on account of these changes and the application of s. 6 (1) thereto, the learned county court judge accepted the contentions of the appellants and made an award in their favour. The Court of Appeal, following its previous decision in *Shaw v. Rootes Securities, Ltd.* (1), allowed the respondent's appeal and remitted the matter for a new trial. It is from this order that the appellants now appeal.

The submissions advanced before your Lordships may be stated without entering on the detail of the computations referred to in the evidence. What the appellants said was, in essence, this. Section 6 (1) only operates where there has been a change in rates of remuneration. The change from forty-eight to forty-four hours is not such a change. It is but an alteration in the conditions of work and it leaves the only relevant rate, that is, the basic weekly rate, and the other heads of remuneration which are derived from it on the basis of time and a fraction, quite untouched. We admit that the increase of 7s. 6d. and the alteration from time and a half to time and three quarters for Sunday duty must be reckoned under the section, but these changes and the re-calculation they necessitate have nothing to do with an hourly rate or the reduction of working hours, and on the facts the result they produce is more than offset by an increase in the wages which the respondent is now earning.

The gist of the respondent's case, on the other hand, was to this effect: What-ever it is called, the basic wage is tied to a week of so many hours and can as readily be expressed as an hourly rate; that is how ordinary time is reckoned if a workman loses pay by absence and that is how all overtime and special duty must be reckoned. The hourly rate is, accordingly, the relevant rate for the purpose of s. 6 (1) and the comparable basic pre-accident and present rates are, therefore, 76s. divided by forty-eight per hour and 96s. 6d. divided

by forty-four per hour. The latter, must, in consequence, be substituted for the former in re-calculating my average earnings. In addition, I am entitled, in the course of that re-calculation, to be credited with overtime for the forty-fifth to forty-eighth hours (both inclusive) that I worked ordinary time in each week before the accident, for those are now overtime hours. The respondent also advanced an alternative argument which might be expressed thus: Even if I am wrong about the basic wage and it is to be regarded as a weekly rate and is not to be broken down into an hourly rate for the standard week for the purposes of s. 6 (1), nevertheless, for earnings in respect of time worked over and above the standard week an hourly rate must be the basis and that means that when the hours so worked have been equated to ordinary time the appropriate rate for them will be 96s. 6d. divided by forty-four.

My Lords, the respondent's contention regarding the forty-fifth to forty-eighth hours may conveniently be disposed of now. It turns on the provisions of s. 6 (1) which have already been read and which I need not repeat. As I understand this enactment it does not direct an inquiry as to what the workman would be earning after a change occurs in the rates of remuneration had he remained in the same employment. What it requires is an application of the new rates to the work he did during the pre-accident period. Normally, it merely involves (in the case of time rates) a re-costing of his time sheets by applying the new rates instead of those they replace. The categories of the pre-accident earnings and the time worked in each of them remain as they were. Thus, if in the twelve months before the accident the workman worked x ordinary hours and y overtime hours, the new ordinary and overtime rates must be applied to x and y respectively. There is no warrant in s. 6 for a process which makes these categories into $x-z$ and $y+z$ before applying the new rates. This was not the precise issue in *Hill v. Wolverhampton Corrugated Iron Co., Ltd.* (2), or *Trawlers (Grimsby), Ltd. v. Crouchen* (3), but I think the view just expressed follows from what was said by the Court of Appeal in those cases and approved by this House in *Paterson v. Beardmore (William) & Co., Ltd.* (4) ([1948] L.J.R. 1151). I am therefore of opinion that the respondent is wrong in claiming, as he does, that the forty-fifth, forty-sixth, forty-seventh and forty-eighth hours worked by him as part of each standard week before the accident should now be treated as overtime. Whatever the appropriate rate for re-costing may be, it must be applied to these hours as ordinary time.

This leaves for determination the question whether in a case like the present the "rates of remuneration" to be taken into account for the purposes of s. 6 (1) are weekly rates or hourly rates or both. I do not think this an easy problem having regard to the nature of the contract, and I doubt if there is any solution based, as it must be, on the true construction of the section which will produce an equally reasonable result in all the variations of circumstance that may come to be governed by the decision. From the provisions of the agreements fixing the terms and conditions of employment for the grade to which the respondent belonged I have no doubt that the guaranteed rate for ordinary duty is properly described as a weekly rate. That is how it appears in the relevant schedules, for the amounts therein are weekly amounts, and that, presumably, is why the increases in *basic rates*—the expression used in one of the adopted recommendations of the court of inquiry—have been made by an addition of so much per week. If, then, the contract of service for the grade in question had dealt only with ordinary duty and payment for overtime and special duty had not to be considered, the view that the rate proper to be regarded for the purposes of s. 6 (1) was the weekly rate and none other would march with the contract and have much to commend it on that account. This cannot, however, be taken as beyond debate. As I read *Shaw's* case (1), the Court of Appeal was not unanimous on the point. TUCKER, L.J., on the present hypothesis of nothing but ordinary duty, would have held, I think, in favour of a weekly rate, for he said ([1948] 2 All E.R. 170):

"I would agree that a mere change in the hours of a working week where no question of overtime is involved would not constitute a change in the rate of remuneration."

SOMERVELL, L.J., would have held likewise. ROMER, J., on the other hand, would have applied an hourly rate, though recognising that this was more doubtful for ordinary time than for overtime. In the course of his judgment he said (*ibid.*, 172):

"... a reward of 62s. 6d. for forty-four hours' work is, in my view, a different 'rate of remuneration' from a reward of 62s. 6d. for forty-seven hours' work."

Later, in reference to the submission of the employers, he added (*ibid.*):

"The argument is founded on a view which is, I think, erroneous, namely, that, because there has been no change in the standard time rate per week, the change in the standard time itself must, therefore, be regarded as irrelevant. To my mind, the duration of the standard time per week is just as relevant to the solution of the present problem as the *quantum* of the remuneration which is paid in respect of it."

My Lords, the limited question now under discussion is not, of course, the complete issue in this appeal. I have referred to it as a convenient approach to that issue and because the divergence of judicial opinion just mentioned sounds a warning against any too ready acceptance of the view that the rate as described in the contract must necessarily be the rate for s. 6. When one is dealing with rates for precisely measured time a good deal can, I think, be said for the view that the expression "rate of remuneration" looks to what is being remunerated no less closely than it looks to what is being paid, and, for my part, I doubt if a change, one way or the other, in the length of the standard week, *the weekly wage remaining as it was*, can be accurately described as merely an alteration in the conditions of work. It is, however, unnecessary, on the opinion I have formed on the case as a whole, to express any final conclusion on this vexed question and I refrain from doing so, but as the view favoured by ROMER, J., would, if accepted, determine not only that question but this appeal adversely to the appellants, I shall, for present purposes, proceed on the assumption, in their favour, that the learned judge was wrong and that, when nothing but ordinary time is concerned, a mere reduction in the number of working hours per week without loss of pay will not in itself spell any change of rate within the meaning of the section. So assuming, the question then becomes this—and it is a question quite distinct from that already considered respecting the forty-fifth to forty-eighth hours: Does the fact that the contract embraces overtime and special duty as well as ordinary duty make a difference? I think it does, at any rate in cases such as this where the terms of the contract and the public character of the service for which it provides make it clear that Sunday duty, night duty and overtime are not to be treated as merely occasional or incidental categories. In such circumstances the reduction in hours without loss of pay is no longer capable of meaning only so much less work; it means more pay for every hour of overtime or special duty worked or deemed to be worked. I am unable to find any convincing reason for holding that this does not import a change of rate. I think it would be regarded as so doing by the ordinary workman and his employer. By their very nature overtime and special duty must be remunerated according to the "time worked"—that is the expression used in the contract in respect of each of the special categories—and by the application of a unit of time which necessarily is much less than a week and is normally taken as an hour. I do not think it is an answer to say "overtime was and still is time and a quarter and, therefore, the rate for overtime remains the same." To speak of time and a quarter, or whatever the fraction may be, is not really to state a rate of remuneration. It is a well understood way of

saying how the rate is to be computed by reference to ordinary time rates. Let it be assumed, for the sake of simplicity, that in the present case the basic weekly rate of 76s. had not been increased and that Sunday duty had remained at time and a half throughout. The respondent before the accident got paid for each hour of Sunday duty 76s. multiplied by $1\frac{1}{2}$, divided by forty-eight, or 2s. $4\frac{1}{2}d$. At the date of his application for a review, however, a loader on Sunday duty in the same class of employment would have received for each hour of such duty (on the assumptions I have made) 76s. multiplied by $1\frac{1}{2}$, divided by forty-four, or 2s. 7d. That, I think, is a fair example and one which serves to show that, apart from any variation in the basic weekly rate, the reduction in the length of the standard week without loss of pay necessarily meant, as respects overtime and special duty, a change in what any workman would regard as his rate of remuneration.

My Lords, the considerations to which I have so far referred seemed at first to lend weight to the respondent's alternative argument and led me to examine the possibility of applying two rates of remuneration in the operation of s. 6 (1)—the first a weekly rate relating to ordinary time and being the current basic rate; and the second an hourly rate relating to the other time categories and based on the reward now actually paid in respect thereof. On reflection, however, I have come to the conclusion that the terms of the contract tie the ordinary, overtime and special duty rates together in a manner which makes this course impossible. The difficulty is best seen in regard to night duty. That duty may form part of the standard week and be ordinary time, or it may fall outside the standard week and be overtime. In the first case time and a quarter is paid, in the second time and a half. On the proper interpretation of the contract I do not think these computations can have other than a common basis. Ordinary night duty cannot well be at the rate of 96s. 6d. multiplied by $1\frac{1}{4}$ divided by forty-eight per hour while overtime night duty, possibly worked in the same turn, is at the rate of 96s. 6d. multiplied by $1\frac{1}{2}$ divided by forty-four per hour. I am, therefore, forced to conclude that only one rate can be used as the basis for computing night duty payments: and if this is the case I think it must follow that the basis for all categories of time remuneration must be the same. I am, accordingly, of opinion that the respondent's alternative contention cannot be accepted and that a choice must be made between a weekly rate and an hourly rate, the rate chosen being applied as the basis of computation throughout the categories.

My Lords, when, as here, a contract of service provides for a weekly wage rate it does not follow that nothing but a weekly rate can be used as a rate of remuneration for the purposes of s. 6 (1). In some cases, no doubt, nothing else will do. For example, the appropriate rate for a domestic servant who is simply employed at so much per week without any fixed hours of employment, cannot well be anything but a weekly rate. Section 6, however, covers a vast range of employment and in other cases it may not be so. Take, for instance, a workman employed at a guaranteed weekly wage, but with his actual earnings above the basic figure calculated according to the amount of work he does. There, a change in the piece rate may be no less relevant for the purposes of the section than the contractual weekly rate, and always, of course, it is necessary to bear in mind the provisions of s. 1 (3) of the Act of 1925 against contracting out. If agreement that the rate for the purposes of s. 6 will be a weekly rate cannot settle the matter, neither can agreement for the payment of remuneration at a weekly rate. I therefore approach the question for decision on the basis that the form of the contract and its stipulation for a weekly basic rate, though relevant and to be given due consideration, are not conclusive.

My Lords, I think the broad purpose of s. 6 (1) is reasonably clear. It aims at keeping the weekly compensation in step with post-accident changes in rates of pay occurring in the class of employment concerned; and it does this by providing for a notional adjustment of a matter of fact, namely, the average

weekly earnings of the workman during the relevant pre-accident period, which forms the foundation from which the computation of compensation must start. The method of adjustment has already been referred to. It calls for an answer to the question—What would the workman “have earned during that period” if the changed rates of remuneration had obtained throughout it? I respectfully agree with TUCKER, L.J., when he says ([1948] 2 All E.R. 169), in *Shaw's* case (1) that the words “rates of remuneration” should be “given the meaning which they would naturally convey to a worker or employer in industry.” So construing them I think that the choice now to be made must be determined according to which of the two possible rates furthers better the purpose of the enactment. After viewing the matter from the various standpoints suggested in the able and careful arguments presented on either side, I have come to the conclusion that the respondent's main argument should prevail and that the proper rate to apply is the hourly rate and not the weekly rate. I think the use of the former reflects the policy of the section more adequately and works it more fairly. Unless it is employed, what I consider the true new rates for overtime and special duty are not taken into consideration and the workman is held, as regards these categories, to rates which are no longer in touch with reality. I do not think this view creates any counter-balancing disadvantages. The basic rate per week can readily be reckoned as a rate per hour, as indeed has to be done whichever rate is taken. It may be, as the appellants pointed out, that had the workman not been injured he might not, after June 24, 1947, have been called on to work as many hours in the week as he did prior to the accident. I do not think that has been established as the fact at any material time, but even if it had it does not seem a relevant consideration, for it makes the test what the workman would have earned at the new rates after the accident instead of what he would have earned before the accident had the new rates then obtained. For these reasons I am of opinion that the Court of Appeal was right in sending the matter back for a new trial. I would, therefore, dismiss the appeal.

LORD REID: My Lords, s. 6 (1) of the Workmen's Compensation Act, 1943, directs that:

“For the purpose of calculating—(a) any weekly payment under the Workmen's Compensation Acts, 1925 to 1943 . . . the average weekly earnings of the workman before the accident shall, if and whenever a change occurs after the date of the accident in the rates of remuneration obtaining in the class of employment in which the workman was employed during the relevant period before the accident, be deemed, so long as the changed rates obtain without further change, to be the average weekly earnings which he would have earned during that period if the changed rates had obtained throughout that period.”

The respondent's average weekly earnings before his accident were 95s. 6d. In 1945 there was a review under this section so that his average pre-accident weekly earnings were then deemed to be 110s. 4d. Thereafter, as a result of the acceptance of the recommendation of the court of inquiry, two changes occurred in the conditions of service of the conciliation grades in which the respondent had been employed: the basic rate was increased by 7s. 6d. and a forty-four hour week was introduced in place of the previous forty-eight hour week. There is no doubt that the increase of 7s. 6d. was a change in the rates of remuneration. The question in this case is whether the reduction of hours involved any such change. I do not think that this is a simple question. The facts of the case are complicated and before coming to them I think it helpful to consider how the section applies to simpler facts. The section does not come into operation at all until there has been a change in the rates of remuneration, and when there has been such a change it requires the calculation of what the injured man's average weekly earnings would have been before the accident

if the new rates had then been in operation. Earnings can only be calculated, however, if both the rate of remuneration and the amount of work to be remunerated are known. So in order to work out the statutory provision some assumption must be made about the amount of work which the man is to be deemed to have been paid for at the new rates of remuneration. The natural assumption is that it shall be the same amount of work as that for which he was actually paid at the old rates of remuneration, but "the same amount of work" is ambiguous. If a man were simply paid a weekly wage for a week's work then I think that, when the section comes into operation, the statutory calculation must be made on the assumption that he would have done the same number of weeks' work in the relevant period at the new rate as in fact he did at the old rate. If I suppose a case where, since the accident, two changes have occurred, a rise in the weekly wage and an alteration of the definition of what constitutes a week's work, the former clearly brings the section into operation and must enter into the statutory calculation, but I see no reason why the latter change should come in. I do not think that the statute requires that the man must be supposed to have undergone the same amount of exertion as in fact he did but rather that he must be supposed to have done the same number of units of work. In the case I am supposing the unit of work for which he was paid was a week's work and a re-definition of the week's work does not matter. To put it in another way, the section only applies when there has been a change in the rate of remuneration. If a man were paid x shillings per week for a week's work defined in one way and then he is paid the same x shillings per week for a week's work defined in another way his conditions of employment have altered, but not his rate of remuneration. In what is now the common case a week's work is defined as so many hours' work, and arithmetically it may be said that a wage of say 96s. per week of forty-eight hours is equivalent to a wage of 2s. per hour. That does not mean, however, that the wage must necessarily be regarded as an hourly and not a weekly wage. The parties may have good reason for preferring to treat it as a weekly wage and if the terms of the contract show that they so intend I see no reason why that intention should not prevail unless there is something else in the contract which is inconsistent with that intention.

The injured man may have worked overtime in addition to his ordinary week's work, and have been paid overtime at an hourly rate. That hourly rate may have been a definite rate of say 2s. 6d. per hour or it may have been expressed as say "time and a quarter." In the latter case, in order to calculate what the man is to be paid for overtime his weekly rate must be broken down to an hourly rate, but this does not, in my view, necessarily imply that he can no longer be regarded as being paid at a weekly rate for his ordinary week's work. I see no difficulty in a man being paid for his ordinary week's work at a weekly rate and for overtime at an hourly rate derived from that weekly rate, but I have difficulty in seeing how a man can be paid at a weekly rate for overtime which is measured by the hour. I can illustrate the difference in this way. Let me suppose that a man is paid 96s. per week for a week's work of forty-eight hours and that in addition he works some overtime, say six hours on the average, at time and a quarter, and that then, without any change of the 96s. rate, the working week is reduced after his accident to a forty-four hour week. That, in my opinion, is not a change in the rate of remuneration for the ordinary working week, and, if he is to be regarded as having been paid for overtime at a weekly rate, I suppose that there would be no change in the rate of remuneration for overtime either. If, however, the man was paid before his accident for overtime at an hourly rate, he was entitled to 2s. 6d. per hour for overtime: 96s. for a forty-eight hour week is equivalent to 2s. per hour and, therefore, time and a quarter meant at that time 2s. 6d. per hour. When the working week was reduced to forty-four hours, 96s. per week became equivalent to approximately 2s. 2½d. per hour and time and a quarter then came to mean approximately

2s. 8½d. per hour. So, if the man's rate for overtime was an hourly rate the reduction of hours in the ordinary working week has caused a change in the rate of remuneration for overtime from 2s. 6d. to 2s. 8½d. per hour and s. 6 requires that this shall be taken into account. To put the matter more generally if a man was paid before his accident a weekly wage for a forty-eight hour week and time and a quarter for overtime and then the ordinary working week is reduced from forty-eight to forty-four hours, I think that, in the absence of special circumstances, the statutory calculation should be based on the assumption that during the relevant period he would have worked under the new conditions for the same number of weeks of ordinary work and for the same number of hours of overtime. The reduction of hours in the ordinary week's work would be left out of account.

Coming to the facts of this case, I have no doubt that the parties intended that men in the conciliation grades (in which the respondent was employed) should be paid at weekly rates. In the long series of agreements from 1919 onwards there is constant reference to a standard rate which is clearly a weekly rate and careful avoidance of any reference to an hourly rate, but it would be useless to express an intention that the rates should be weekly rates if the operative provisions of the agreements were irreconcilable with that intention and only consistent with the rates being truly hourly rates. My main difficulty in the case arises because it appears to have been assumed that there are only two alternatives—either all are weekly rates or all are hourly rates. The elaborate inter-relationships of the various categories of work and the various ways in which the guaranteed week could be made up have not been developed. The main part of the respondent's remuneration was for work within the guaranteed week and as to this I have little difficulty in holding that he was paid at weekly rates. That is sufficient to negative the main part of his claim based on the contention that for the purpose of the statutory calculation under s. 6 he must be regarded as having worked the same number of hours as in fact he worked during the relevant period. I have already given my reasons for thinking that that is not the proper basis for the calculation where the man was earning a weekly wage, but I have much more difficulty with regard to work outside the guaranteed week. I do not see how, *e.g.*, overtime, which is worked and remunerated on an hourly basis, can be paid for at a weekly rate.

I would put my opinion in this way. The parties intended that the respondent's whole remuneration should be at weekly and not hourly rates. If the agreements are construed in that way then the appellant's calculations are correct and the respondent's application must fail. It is for the respondent to show why that intention cannot receive effect. In the main he has failed, but on some matters which are of comparatively small importance in this case I am left in doubt. That being so I think that the appeal should be allowed.

Appeal allowed with costs here and below.

Solicitors: *M. H. B. Gilmour* (for the appellants); *Pattinson & Brewer* (for the respondent).

[Reported by J. D. PENNINGTON, Esq., Barrister-at-Law.]

**Re GOOD'S WILL TRUSTS. OLIVER AND ANOTHER v.
BATTEN AND OTHERS.**

[CHANCERY DIVISION (Wynn-Parry, J.), July 18, 19, 1950.]

Charity—Cy-près doctrine—General charitable intention—Unconditional gift for particular purpose—Purpose impracticable.

A By his will, dated Dec. 30, 1931, a testator, who died on Sept. 29, 1939, devised and bequeathed his residuary estate to his trustees on trust to sell the same and out of the remainder, after payment of expenses debts and legacies (*inter alia*) to set apart £2,500 in authorised trust investments and pay the income to his daughter during her life. The testator then purported to dispose of the capital of the fund so set apart by directing that (i) his
B trustees should, with the sanction of the court or a judge or of the Charity Commissioners, apply “£2,300 out of my residuary estate in purchasing a piece of land preferably in . . . Kingston-upon-Hull . . . and erecting thereon six or more rest homes each home consisting of a living room, sleep apart-
C ment (*sic*) and usual outside domestic conveniences all to be on the ground floor and all on one level. (ii) My trustees shall set apart and invest in authorised trust investments the sum of £200 and apply the income arising therefrom or if necessary the capital of such sum for the upkeep of such homes including the proper costs charges and expenses of and incidental to the administration and management of the trust.” On the death of the daughter, the fund being insufficient for the purpose specified, it was
D impracticable to give effect to the trusts, and the question arose whether the fund could be applied *cy-près*.

HELD: although the gift was not dependent on the fulfilment of a condition, the language was so particular as to exclude the possibility of finding that a general charitable intention was expressed so as to permit the application of the *cy-près* doctrine.

Re Wilson ([1913] 1 Ch. 314) and *Re Packe* ([1918] 1 Ch. 437), *applied*.

E [AS TO APPLICATION OF CY-PRÈS DOCTRINE, see HALSBURY, Hailsham Edn., Vol. 4, pp. 221-230, paras. 325-339; and FOR CASES, see DIGEST, Vol. 8, pp. 344-351, Nos. 1365-1460.]

Cases referred to:

- (1) *Re Wilson*, [1913] 1 Ch. 314; 82 L.J.Ch. 161; 108 L.T. 321; 8 Digest 313, 948.
F (2) *Re White's Trusts*, (1886), 33 Ch.D. 449; 55 L.J.Ch. 701; 55 L.T. 162; 50 J.P. 695; 8 Digest 333, 1188.
(3) *Re Packe*, [1918] 1 Ch. 437; 87 L.J.Ch. 300; 118 L.T. 693; 8 Digest 333, 1189.

G ADJOURNED SUMMONS to determine whether on the true construction of the will of Thomas William Good, deceased, the trusts thereof concerning “Good's Rest Homes Fund” failed, and, if so, whether the said fund ought to be applied *cy-près* or passed under the ultimate residuary gift or was undisposed of.

J. F. Bowyer for the plaintiffs, the administrators with the will annexed of the testator, and the administrators of the estate of Florence Annie Webster, deceased, the testator's daughter and residuary legatee under his will.

H *J. H. Lazarus* for the first defendant, who was beneficially interested in the estate of Florence Annie Webster.

Parbury for the second defendant, one of the persons interested on the testator's intestacy.

Denys B. Buckley for the Attorney-General.

WYNN-PARRY, J.: The question of construction which I have to decide arises as a result of a provision in the will of the testator by which he directed that, after the death of his daughter, which has happened, the sum of £2,500

should be held on certain trusts which, in my view, are clearly charitable trusts.

The trusts are set out in cl. 13 of his will and are headed "Trusts for Good's Rest Homes." He provides, first, that his trustees, with the sanction of the court or the Charity Commissioners, should apply £2,300 out of his residuary estate in purchasing a piece of land preferably in the eastern part of Kingston-upon-Hull and erecting thereon six or more rest homes, each home consisting of a living room, sleeping apartment and usual outside domestic conveniences, all to be on the ground floor and all on one level. He then directs that his trustees shall set apart and invest in authorised trust investments £200 which, with the £2,300, makes up the total sum of £2,500, and

"apply the income arising therefrom or if necessary the capital of such sum for the upkeep of such homes including the proper costs charges and expenses of and incidental to the administration and management of the trust."

There is then a heading "Inmates of the Homes." In six further paragraphs the testator sets out with more particularity directions as to the qualifications of the proposed inmates, and the powers which the trustees are to have in regard to such inmates, such as removing any inmate, and prescribing reasonable regulations for the management and government of the inmates.

The evidence clearly shows, and this is not in dispute, that in the circumstances it is impracticable to give effect to those trusts on the short ground that the fund available for purchasing the necessary land and erecting the proposed rest homes is quite insufficient for the purpose, and the capital sum directed to be set aside would be quite insufficient by its income to achieve the objects of keeping up the homes and paying the costs, charges and expenses of administration and management.

In those circumstances the first question which arises is whether or not, as this trust cannot be carried out, the fund should be applied *cy-près*, or whether the gift fails completely as a charitable gift, in which event a further question arises as to its ultimate destination. Whether or not the fund is to be applied *cy-près* depends on the answer to the question: Can there be discovered from the language of the will a general charitable intent on the part of the testator, or was his charitable intent confined to the particular scheme which is set out in cl. 13 of his will?

Since the judgment of PARKER, J., in *Re Wilson* (1) that case has been treated as providing the guide of approach to such a case as this. In the course of his judgment, PARKER, J., said ([1913] 1 Ch. 320):

"For the purposes of this case I think the authorities must be divided into two classes. First of all, we have a class of cases where, in form, the gift is given for a particular charitable purpose, but it is possible, taking the will as a whole, to say that, notwithstanding the form of the gift, the paramount intention, according to the true construction of the will, is to give the property in the first instance for a general charitable purpose . . . and to graft on to the general gift a direction as to the desires or intentions of the testator as to the manner in which the general gift is to be carried into effect. In that case, though it is impossible to carry out the precise directions, on ordinary principles the gift for the general charitable purpose will remain and be perfectly good, and the court, by virtue of its administrative jurisdiction, can direct a scheme as to how it is to be carried out. In fact the will will be read as though the particular direction had not been in the will at all, but there had been simply a general direction as to the application of the fund for the general charitable purpose in question. Then there is the second class of cases, where, on the true construction of the will, no such paramount general intention can be inferred, and where the gift, being in form a particular gift—a gift for a particular purpose—and it being impossible to carry out that particular purpose, the whole gift is held to fail.

In my opinion, the question whether a particular case falls within one of those classes of cases or within the other is simply a question of the construction of a particular instrument."

I do not propose to refer in any detail to the facts of that case. It was one in which PARKER, J., came to the conclusion, on the true construction of the will, that the gift fell within the second of the two classes which he defined in the passage which I have quoted. At a later stage of his judgment, he noticed one by one the details of the gift and commented on their particularity; but it appears to me that the submission of counsel for the Attorney-General as to the *ratio decidendi* of this particular case is correct, and that it is truly to be regarded as a case in which there was a conditional gift to charity, and it failed because the condition could not be fulfilled. That, I think, emerges from the following passage in the judgment (*ibid.*, 323):

"It appears to me that what the testator had in mind is, that he is dissatisfied with the provisions for the education in the district in certain respects, and that he desires that subscriptions shall be collected for the building of a school to teach certain other subjects which have not hitherto been taught, and if those subscriptions are made and a school house and a school are built, then he desires to endow or provide a salary for the schoolmaster subject to certain conditions as to certain scholars being admitted free and otherwise. I think that the whole gift is really in the testator's mind dependent upon it being feasible and possible to carry out these particular directions, and that I am not justified in reading into the will from this gift any such general intention of promoting higher education in the district or neighbourhood of the district as is suggested."

I think also that, as regards the earlier case of *Re White's Trusts* (2), which was relied on by counsel for the second defendant, that, on analysis, is really another example of a conditional gift. Of course, where one finds a conditional charitable gift, there is at once provided very strong reason for discounting the existence of a general charitable intent.

I must, however, advert to *Re Packe* (3). In that case a testatrix gave to the Poor Clergy Relief Corporation her freehold cottage known as The Retreat and £1,100, according to the headnote ([1918] 1 Ch. 437):

"... upon trust to use the said premises as a holiday home or house of rest for clergymen of the Church of England and their wives and to invest the sum of £1,100 and apply the income thereof in or towards the carrying on of the said premises as a holiday home or house of rest aforesaid provided that should the said corporation decline the devise and bequest of my cottage The Retreat I revoke the legacy of £1,100 to the said corporation and I give devise and bequeath the said premises known as The Retreat and the sum of £1,100 to my executors and trustees to convey and make over the same to any other society which my executors and trustees may in their discretion select upon trust to use the said premises as a holiday home or house of rest for ladies or gentlemen of limited means whom it may benefit.' The corporation renounced the devise and bequest of the cottage and sum of money, and the executors were unable to find any other society willing to undertake the trust, the reason being the distance of the cottage from a railway station and the insufficiency of the fund to carry on the premises as directed by the testatrix:—*Held*, that as the particular charitable purpose for which the bequest was made was impracticable, and no paramount general charitable intention was implied by the will, the charitable bequest failed."

In his judgment in that case, NEVILLE, J., quoted as his guide the passage from the opening of the judgment of PARKER, J., in *Re Wilson* (1), which I have cited,

and he came to the conclusion that the case before him fell within the second class.

It is to be observed on the facts of that case that there was nothing in the provision in the will which could be regarded as in the nature of a condition such as one finds in the language of the will in *Re Wilson* (1), to which I have referred. NEVILLE, J., in coming to the conclusion at which he arrived, did not rely at all on the existence of any such condition. The basis of his decision, I think, is to be found in the following words in his judgment (*ibid.*, 442):

"I can only say that, after studying this will with care, I cannot find on the part of the testatrix any hint of any general charitable intention. So far as anything is disclosed by the will, one cannot say whether she had any intention of any sort beyond the intention that the particular charitable purpose which she expressed should be carried into effect. It seems to me, therefore, to be playing with words in the case of a will of this kind to pretend to find a general charitable intention paramount to the particular directions given with regard to the house."

It, therefore, follows, in my view, that a case may fall within the second of the two classes, as stated by PARKER, J., in *Re Wilson* (1), notwithstanding that there is nothing in the nature of a condition such as was present in the will in that case, and that it may be sufficient to bring a case within that second class that the gift in question is so particular in its language as to exclude the possibility of saying that there is any intention of any sort beyond the intention that the particular charitable purpose should be carried into effect.

Turning back to the provisions in this will, it is first to be observed that no other part of the will provides any context for resolving the matter one way or another. The only previous reference to the fund in question is the provision in sub-cl. (2) of cl. 9 directing the trustees to set apart the £2,500 in question and to pay the income therefrom to his daughter during her life and afterwards, by cl. 10, to hold those investments on the trusts declared by cl. 13. Clause 13 is complete in itself and contains a scheme for the application of this sum of money for the charitable purposes there specified, headed, as I have already observed, "Trusts for Good's Rest Homes." I can find on the face of those provisions nothing which would justify me in coming to the conclusion that, according to the true construction of this will, the paramount intention of the testator was first to give the property for a general charitable purpose rather than a particular charitable purpose and then to graft on to that general gift a direction as to the desires or intentions of the testator as to the manner in which the general gift should be carried out, and, therefore, I am unable to see that the condition which must be satisfied before this gift can fall into the first of the two classes as stated by PARKER, J., is fulfilled. It appears to me that when one analyses the matter, the case before me is completely covered by the reasons and the decision of NEVILLE, J., in the later case of *Re Packe* (3).

I, therefore, come to the conclusion that there is no room in this case for the application of the *cy-près* doctrine. The question, therefore, remains as to the ultimate disposal of this fund. [HIS LORDSHIP heard further argument and held that on the construction of the will there was created a true residue, and that the fund passed as part thereof.]

Order accordingly. Costs of all parties as between solicitor and client to be taxed and paid out of the estate in due course of administration.

Solicitors: *Foss, Bilbrough, Plaskitt & Co.*, agents for *Gosschalk & Austin*, Hull for the plaintiffs, and for the defendants except H.M. Attorney-General); *Treasury Solicitor*.

[Reported by H. McL. MORRISON, Esq., Barrister-at-Law.]

KAT v. DIMENT.

[KING'S BENCH DIVISION (Lord Goddard, C.J., Hilbery and Byrne, JJ.), July 13, 14, 21, 1950.]

Trade Mark—False trade description—Description false, but recognised by trade—“Non-brewed vinegar”—“Intent to defraud”—Offence against statute—Merchandise Marks Act, 1887 (c. 28), s. 2 (1) (d).

A An information was laid against the appellant alleging that he had contravened the provisions of the Merchandise Marks Act, 1887, s. 2 (1) (d), by applying a false trade description, to wit, “non-brewed vinegar” to a synthetic product of acetic acid, caramel, and water. It was found that this product, though wholesome and frequently used for the same purposes as vinegar, was different from vinegar, which was manufactured by a process of double fermentation from malt, wine, cider, or spirits, and that the term vinegar, when used alone by those in the trade, meant malt vinegar. It was also found that the term “non-brewed vinegar” had long been recognised and accepted by the trade as a true description of the product sold by the appellant.

C HELD : (i) the fact that the description was known to and commonly used by the trade was immaterial, for, if a trade description was false it did not matter how generally it had been applied to the goods in question unless it was proved that such description had been lawfully and generally applied to those goods at the date of the passing of the Merchandise Marks Act, 1887, i.e., Aug. 23, 1887 ; there was evidence to support the finding that the product sold by the appellant was not vinegar but a solution of acetic acid; and, therefore, it was impossible to say that the magistrate was wrong in holding that a false trade description had been applied.

D (ii) by throwing the onus on a defendant of proving that he acted without intent to defraud s. 2 (1) of the Act assumed that the mere doing of the act alleged implied an intent to defraud; a defendant could escape if he showed that he did not do the act intentionally; but that the appellant had failed to prove, and, therefore, he was guilty of an offence under the sub-section.

E *Allard v. Selfridge & Co.* ([1925] 1 K.B. 129), *applied*.

[AS TO FALSE TRADE DESCRIPTIONS, see HALSBURY, Hailsham Edn., Vol. 9, pp. 421-424, paras. 721-723; and FOR CASES, see DIGEST, Vol. 43, pp. 239-244, Nos. 845-875, and 2nd Digest Supp.]

F Cases referred to:

(1) *Allard v. Selfridge & Co.*, [1925] 1 K.B. 129; 94 L.J.K.B. 374; 132 L.T. 377; 88 J.P. 204; 43 Digest 240, 850.

(2) *Starey v. Chilworth Gunpowder Co.*, (1889), 24 Q.B.D. 90; 59 L.J.M.C. 13; 62 L.T. 73 ; 54 J.P. 436; 43 Digest 240, 847.

(3) *Wood v. Burgess*, (1889), 24 Q.B.D. 162; 59 L.J.M.C. 11; 61 L.T. 593; 54 J.P. 325; 43 Digest 240, 846.

G (4) *Stone v. Burn*, [1911] 1 K.B. 927; 80 L.J.K.B. 560 ; 103 L.T. 540; 74 J.P. 456; 43 Digest 241, 858.

(5) *Mercer v. Pyramid Sand and Gravel Co.*, (1944) 109 J.P. 54 ; 2nd Digest Supp.

(6) *Re London and Globe Finance Corpn., Ltd.*, [1903] 1 Ch. 728 ; 72 L.J.Ch. 368 ; 88 L.T. 194 ; 10 Digest 985, 6819.

H (7) *R. v. Bennett, R. v. Newton*, (1913), 9 Cr. App. Rep. 146; *sub nom.*, *R. v. Newton and Bennett*, 109 L.T. 747; 15 Digest 1008, 11,319.

CASE STATED by the Chief Metropolitan Magistrate.

The appellant, Joseph Kat, was charged on an information preferred by the respondent under the Merchandise Marks Act, 1887, s. 2 (1) (d), with applying a false trade description, namely, non-brewed vinegar, to a synthetic liquid composed of water and four to six per cent. of acetic acid and caramel. It was

found as a fact that the appellant, who carried on business as the Premier Pickle Co., had been selling the product since 1923 and had since 1938 described it as "non-brewed vinegar," a term well known and understood by the trade to mean a liquid other than malt vinegar which was a fermented liquor entirely different from the synthetic product. The term "non-brewed vinegar" had been used by the Ministry of Food as an official description of the synthetic product, which was wholesome and suitable for the same purposes as malt vinegar. The appellant contended that the term "non-brewed vinegar," being the ordinary description used in the trade to describe the synthetic product, could not, in the absence of any evidence that it bore a different meaning to the public, be a false trade description, and also that he had applied the term without intent to defraud. The respondent contended that the use of the word "vinegar" in describing liquor which was not the result of a double fermentation was false; that the appellant's product, not, therefore, being vinegar, could not be "non-brewed" vinegar; and that the appellant had applied the description with intent to defraud. The magistrate convicted the appellant, who appealed.

Drewe, K.C., and K. R. H. Johnston for the appellant.

Sir David Maxwell Fyfe, K.C., and Vernon Gattie for the respondent.

Cur. adv. vult.

July 21. The following judgments were delivered.

LORD GODDARD, C.J.: This is a Special Case stated by the Chief Metropolitan Magistrate before whom the appellant was charged with unlawfully applying a false trade description to goods, namely, the false description "non-brewed vinegar." The magistrate convicted him, holding that a false trade description was applied to the goods and rejecting the contention of the appellant that he acted without intent to defraud. It will be necessary to deal with the two points quite separately.

On the first point the facts are that the appellant manufactures and sells in bottles a liquid which he labels "non-brewed vinegar." The liquid consists of water to which acetic acid and caramel have been added, the amount of acetic acid being between four per cent. and six per cent. of pure acetic acid, which is the percentage that analysts generally agree genuine vinegar should contain. The caramel is merely colouring matter. The Case finds that liquor of this description has been on sale since about 1890. It was originally sold as wood vinegar and then as table vinegar, and since 1937 it has been sold as non-brewed vinegar. The quantity sold is very large, amounting to several million gallons a year, and amounts to some three-eighths of the quantity of malt vinegar which is sold. The liquid is wholesome and can be used for the same purposes as other vinegar.

The magistrate has found that vinegar is a fermented liquor made by a process of double fermentation, in consequence of which a solution of acetic acid is naturally formed in the liquid. The real difference between the two liquids is that what is sold as "non-brewed vinegar" is a synthetic product, while true vinegar is the result of natural fermentation. It should be stated that he finds that the term "non-brewed vinegar" is understood and accepted in the trade to mean a liquid such as is prepared and sold by the appellant. It has been recognised by the Ministry of Food, but the magistrate found that vinegar is the product of double fermentation and that the liquor sold as non-brewed vinegar is not vinegar at all, but merely a solution of acetic acid, and that, as it was not vinegar, to describe it as such, although with the addition of the words "non-brewed," was to apply a false trade description. There was clearly evidence on which the magistrate could come to that conclusion, and we cannot review his findings of fact, nor do I wish to throw any doubt on his finding. In view of that finding, which there was evidence to support, it is impossible to say that the magistrate was wrong in holding that a false trade description had been applied to the goods. The fact that this description may be known to the trade and be commonly

used by them or may be known to the Ministry of Food is, in my opinion, quite immaterial. If the description is false, it matters not whether other people use it or how generally it may be used, unless it is proved that this description was lawfully and generally applied to the goods at the date of the passing of the Merchandise Marks Act, 1887, which was Aug. 23, 1887. Section 18 provides:

A "Where, at the passing of this Act, a trade description is lawfully and generally applied to goods of a particular class, or manufactured by a particular method, to indicate the particular class or method of manufacture of such goods, the provisions of this Act with respect to false trade descriptions shall not apply to such trade description when so applied . . ."

B The meaning of that section is perfectly clear and is that if at the time of the passing of the Act it was common in the trade to apply a particular description, although it was false, to certain goods, that description could still be used after the passing of the Act, but it also clearly shows that it will be no defence thereafter that a description is commonly used in the trade if in fact it is false. I am, therefore, of opinion that the magistrate was entitled to find here that a false trade description had been applied to the goods in question.

C The second point which is raised in the case is, perhaps, more difficult. Section 2 (1), which creates the offence in question, provides that:

"Every person who . . . (d) applies any false trade description to goods . . . shall, subject to the provisions of this Act, and unless he proves that he acted without intent to defraud, be guilty of an offence against this Act."

D In view of the authorities which have been cited to us and the reasons which the magistrate gave for his decision, it is necessary also to refer to s. 2 (2). That subsection deals with a person who sells or has in his possession goods to which any false trade description has been applied, and obviously contemplates, among other people, a retailer who may have bought goods to which a false trade description has been applied. He is given the opportunity of proving by way of defence that he has taken all reasonable precautions against committing an offence against the Act, that he had no reason to suspect the genuineness of the trade description, and that on demand made by the prosecutor he gave all the information in his power with respect to the persons from whom he obtained the goods, or that otherwise he has acted innocently. The magistrate rejected the contention that the appellant had acted without intent to defraud, on the authority of *Allard v. Selfridge & Co.* (1), which was a prosecution brought under s. 2 (2). He said that he thought there was no distinction to be drawn between the two sub-sections in respect of the onus laid on the defendant, and he relied particularly on the passage in the judgment of SHEARMAN, J., where he said ([1925] 1 K.B. 139):

F "I think the plain meaning of this statute is that guilt or innocence is determined by the answer to the question whether intentionally an act has been done which is contrary to the words of the statute."

G The only reported case in which the words "without intent to defraud" in sub-s. (1) were considered is *Starey v. Chilworth Gunpowder Co.* (2). There the defendants, who were under contract to the government to supply gunpowder of their manufacture, owing to an accident were unable to manufacture the powder themselves. They thereupon bought other powder which was in all respects similar to, and as good as, their own and put it into their barrels and delivered it bearing their marks, and it was argued on their behalf that in these circumstances they had no intent to defraud. LORD COLERIDGE, C.J., in his judgment, said (24 Q.B.D. 96):

H "The Act is directed against the abuse of trade marks, and the putting off on a purchaser of, not a bad article, but an article different from that which he intends to purchase and believes that he is purchasing. It would apply to

cases where a particular article, manufactured by a particular person, had acquired a wide-spread reputation . . . and someone supplied another and a different article under that name, so as to make the purchaser take something which he did not know he was taking. That I think is the meaning of the word 'defraud' as used in this Act of Parliament, and in that sense only there was in the present case an intent to defraud."

MATHEW, J., said (*ibid.*, 97):

"On the fair construction of the Act I am of opinion that the words 'intent to defraud' mean more than an intent to cheat a customer. . . . The words 'without intent to defraud' apply to cases where a person uses a particular mark without any intent in so doing to induce a buyer to accept goods which might otherwise be rejected."

Wood v. Burgess (3) was a case under s. 2 (2) where the respondent, a manufacturer of mineral waters, without authority filled with mineral water of his own manufacture certain bottles the property of and known by the name of another manufacturer with the intention of selling such mineral water to his (the first-named manufacturer's) customers. The magistrate found that the respondent had no intent to defraud the purchasers of the mineral water and that he must, therefore, be taken to have acted innocently, but that argument was rejected and the court remitted the case to the magistrate to convict.

Stone v. Burn (4) was a case in which the appellant, a bottler of beer, having come into the possession of certain bottles belonging to the Felinfoel Brewery Co. and embossed with their name, filled them with Bass's beer, placed Bass & Co.'s labels on them and sold the contents as being Bass & Co.'s beer. The court held that this was the application of a false trade description by reason of s. 5 (1) of the Act, and that the defendant was liable to be convicted although no one purchasing would believe that he was getting anything but Bass's beer. On the question whether he had acted innocently, LORD ALVERSTONE, C.J., said ([1911] 1 K.B. 931):

"Mere ignorance of the provisions of the statute does not amount to innocence for this purpose. The words 'acted innocently' point to some misapprehension of fact. And here the appellant did not labour under any mistake of fact, for he did what he did with full knowledge, and claiming that he had a right to do it."

LORD COLERIDGE, J., said (*ibid.*, 933):

"Such innocence can only exist where the infraction was committed by inadvertence or mistake of fact. And here the appellant knew all the facts—his only mistake was as to the effect of the statute."

Allard v. Selfridge & Co. (1), again, was a case under s. 2 (2). There it was found that on a sale of silk stockings the defendants had not taken all reasonable precautions against committing the offence, but that the shop assistant, in conducting the sale, had acted in good faith and had not been guilty of fraud. The court held that proof by the defendants of part of s. 2 (2) (a) could not be relied on by them as showing that "otherwise they had acted innocently" within para. (c). All the cases to which I have already referred were considered, and SHEARMAN, J., concluded his judgment by saying ([1925] 1 K.B. 139):

"I think the plain meaning of this statute is that guilt or innocence is determined by the answer to the question whether intentionally an act has been done which is contrary to the words of the statute."

That case was followed and applied by this court in *Mercer v. Pyramid Sand and Gravel Co.* (5), which was also a case under s. 2 (2). I cannot see that for the purposes of this Act there would be any real difference between saying that a person acted without intent to defraud and that he acted innocently. Considerations which apply to the latter expression must, I think, apply to the

former. I would state the proposition in this way. Where a statute forbids the doing of a certain act, the doing of it in itself supplies *mens rea*. It is no defence to say : "I did not know of the prohibition," or, "I did not think that what I was doing amounted to the doing of something forbidden by the Act." That would be allowing ignorance of the law to be set up as a defence. By throwing an onus on the defendant of proving that he acted without intent to defraud, it seems to me that the statute assumes that the doing of the act alone implies an intent to defraud, but the person charged can escape if he shows that he did not do the act intentionally. His motive does not matter. His understanding of the statute does not matter. There may be an act done by mistake or by accident, such as the delivery of some goods bearing a particular mark to a person who has ordered goods which should have borne another mark by a confusion of the cases, so that there was merely a misdelivery.

It is not necessary to consider all the cases in which such a defence may be open to a person charged under either sub-section, but if a sale has been deliberately made of goods which it has been shown bear a false description so that the seller intended that those goods should be delivered to the purchaser, there is no room, in my opinion, to set up this defence. The line of authority is unbroken and I am not prepared to depart from it. It should be borne in mind that this Act is intended to protect not only the public or traders who may purchase the goods but also the proprietors of trade marks and those who manufacture and deal in the genuine article. Prosecutions are, in fact, often brought by other manufacturers or trade associations, and, in my opinion, those who make what alone may properly be called "vinegar" are quite entitled to have it established that a solution of this character is not truly described as "vinegar" at all. It was intentionally sold as a particular sort of vinegar, which it is not, and I agree that there was no evidence upon which the magistrate could find that the appellant had established a defence. The appeal is dismissed with costs.

HILBERY, J. : I agree.

BYRNE, J. : I desire to add only a few words to the judgment delivered by my Lord, with which I entirely agree. The effect of s. 2 (1) of the statute is that a person who applies a false trade description is presumed to have done so with intent to defraud, but he can escape conviction by proving that he had no intent to defraud. The presence or absence of an intent to defraud is a question of fact, but to determine that question it is necessary to define the words "intent to defraud" and then to ascertain whether the facts come within that definition. In *Re London and Globe Finance Corpn., Ltd.* (6), **BUCKLEY, J.**, defined "intent to defraud" in the following way ([1903] 1 Ch. 732):

"To deceive is, I apprehend, to induce a man to believe that a thing is true which is false, and which the person practising the deceit knows or believes to be false. To defraud is to deprive by deceit: it is by deceit to induce a man to act to his injury. More tersely it may be put, that to deceive is by falsehood to induce a state of mind; to defraud is by deceit to induce a course of action."

That definition received the approval of the Court of Criminal Appeal in *R. v. Bennett, R. v. Newton* (7). The magistrate in this case found as a fact that the liquid was not vinegar and that the appellant intentionally sold it as a particular type of vinegar. That finding of fact brought the matter within the definition. I agree that this appeal should be dismissed.

Appeal dismissed with costs.

Solicitors : *Stephenson, Harwood & Tatham* (for the appellant) ; *Neve, Beck & Co.* (for the respondent).

[*Reported by F. GUTTMAN, Esq., Barrister-at-Law.*]

LONGDON-GRIFFITHS v. SMITH AND OTHERS.

[KING'S BENCH DIVISION (Slade, J., sitting with a jury), June 8, 9, 12, 13, 14, 15, 16, 19, 20, 29, 30, July 3, 4, 5, 1950.]

Friendly Society—Action against trustees—Tort—Libel—Competence—Friendly Societies Act, 1896 (c. 25), s. 94 (1).

Libel—Privileged occasion—Four co-defendants—Malice found against one only —Effect on privilege of other defendants. A

Libel—Damages—Special damages—Loss of employment following publication of libel—Determination of service not in breach of contract.

The four trustees of a friendly society, acting on behalf of the society, prepared a report on the activities of the society's general secretary, and caused it to be read by one of them at a meeting of the general committee of the society. The report was libellous, and after it had been read the meeting passed a resolution determining the secretary's appointment, in accordance with his contract of service, with a payment of three months' salary in lieu of notice. In an action for damages for libel brought by the secretary against the four trustees the statement of claim, after reciting the facts, stated: "By reason of the premises the plaintiff has been brought into hatred ridicule and contempt and his said service agreement was terminated on Nov. 6, 1947, and the plaintiff has suffered damage." The judge ruled that the occasion of publication of the libel was one of qualified privilege. The jury found that one of the four trustees was actuated by malice, but that the other three were not, and they awarded general and special damages. B C D

HELD: (i) the trustees could not be sued for the libel in their capacity as trustees under s. 94 (1) of the Friendly Societies Act, 1896, because the proceedings were not "any action or other legal proceeding . . . concerning any property, right or claim of the society" within the meaning of that subsection, but should be brought against the society in its registered name.

Taff Vale Ry. Co. v. Amalgamated Society of Railway Servants ([1901] A.C. 426), applied. E

Linaker v. Pilcher (1901) (84 L.T. 421), not followed.

(ii) the protection afforded by the qualified privilege of the three trustees not actuated by malice was not destroyed by the malice of the fourth because each acted under an independent duty to make the communication to the general committee of the society and so had an independent privilege of his own and not one derived from that of the fourth trustee. Moreover, a person who published a defamatory statement on an occasion which the law clothed with the protection of qualified privilege was not a tortfeasor and could not, therefore, be a joint tortfeasor. F

Smith v. Streetfield ([1913] 3 K.B. 764), and *Thomas v. Bradbury, Agnew & Co., Ltd.* ([1906] 2 K.B. 627), explained and distinguished. G

(iii) the plaintiff was entitled to special damages for the loss of his employment although the determination thereof was lawful and not in breach of contract.

[AS TO LEGAL PROCEEDINGS BY AND AGAINST FRIENDLY SOCIETIES, see HALSBURY, Hailsham Edn., Vol. 15, pp. 390, 391, paras. 732-735; and FOR CASES, see DIGEST, Vol. 25, pp. 334, 335, Nos. 354-374.] H

AS TO QUALIFIED PRIVILEGE, see HALSBURY, Hailsham Edn., Vol. 20, pp. 468-486, paras. 569-592; and FOR CASES, see DIGEST, Vol. 32, pp. 112-134, Nos. 1437-1648, and Digest Supp.

AS TO SPECIAL DAMAGE, see HALSBURY, Hailsham Edn., Vol. 20, pp. 521-524, paras. 648-653; and FOR CASES, see DIGEST, Vol. 32, pp. 169-174, Nos. 2082-2135.]

Cases referred to :

- (1) *Smith v. Streetfeild*, [1913] 3 K.B. 764; 82 L.J.K.B. 1237; 109 L.T. 173; 32 Digest 155, 1876.
- (2) *Linaker v. Pilcher*, (1901), 70 L.J.K.B. 396; 84 L.T. 421; 43 Digest 127, 1291.
- (3) *Taff Vale Ry. Co. v. Amalgamated Society of Railway Servants*, [1901] A.C. 426; 70 L.J.K.B. 905, n.; 83 L.T. 474; *revsd.*, [1901] 1 K.B. 170; 70 L.J.Q.B. 219; 83 L.T. 474; 64 J.P. 788; *restored*, [1901] A.C. at p. 434; 43 Digest 92, 957.
- (4) *Mersey Docks and Harbour Board Trustees v. Gibbs, Same v. Penhallow*, (1866), L.R. 1 H.L. 93; 11 H.L. Cas. 686; 35 L.J.Ex. 225; 14 L.T. 677; 30 J.P. 467; 11 E.R. 1500; *affg.* S.C. *sub nom.* *Gibbs v. Liverpool Docks Trustees*, (1858), 3 H. & N. 164; 27 L.J.Ex. 321; 31 L.T.O.S. 22; 22 J.P. 224; 43 Digest 871, 3161.
- (5) *Mercantile Marine Service Assocn. v. Toms*, [1916] 2 K.B. 243; 85 L.J.K.B. 311; 114 L.T. 124; 43 Digest 126, 1288.
- (6) *Vacher & Sons, Ltd. v. London Society of Compositors*, [1913] A.C. 107; 82 L.J.K.B. 232; 107 L.T. 722; 43 Digest 123, 1259.
- (7) *Osborne v. Amalgamated Society of Railway Servants*, [1909] 1 Ch. 163; 78 L.J.Ch. 204; 99 L.T. 945; *affd. sub nom. Amalgamated Society of Railway Servants v. Osborne*, [1910] A.C. 87; 79 L.J.Ch. 87; 101 L.T. 787; 43 Digest 104, 1089.
- (8) *Green v. Berliner*, [1936] 1 All E.R. 199; [1936] 2 K.B. 477; 105 L.J.K.B. 662; 155 L.T. 486; Digest Supp.
- (9) *Crozier v. Wishart & Co., Ltd. and Western Printing Services, Ltd.*, [1936] 1 All E.R. 1; *sub nom. Crozier v. Wishart Books, Ltd.*, [1936] 1 K.B. 471; 105 L.J.K.B. 257; 154 L.T. 363; Digest Supp.
- (10) *Smith v. National Meter Co., Ltd.*, [1945] 2 All E.R. 35; [1945] K.B. 543; 115 L.J.K.B. 321; 172 L.T. 379; 2nd Digest Supp.
- (11) *Thomas v. Bradbury, Agnew & Co., Ltd.*, [1906] 2 K.B. 627; 75 L.J.K.B. 726; 95 L.T. 23; 32 Digest 162, 1955.
- (12) *Pratt v. British Medical Assocn.*, [1919] 1 K.B. 244; 88 L.J.K.B. 628; 120 L.T. 41; Digest Supp.
- (13) *Eglantine Inn, Ltd. v. Smith and Smith (Trading as "The Cromac Printery")*, [1948] N.I. 29; 2nd Digest Supp.
- (14) *McKenna v. Frazer*, [1946] C.L.R. 343.
- (15) *Hayward v. Pullinger*, [1950] 1 All E.R. 581.
- (16) *Monk v. Redwing Aircraft Co., Ltd.*, [1942] 1 All E.R. 133; [1942] 1 K.B. 182; 111 L.J.K.B. 277; 166 L.T. 42; 2nd Digest Supp.

ACTION for damages for libel.

The plaintiff was the general secretary of the National Deposit Friendly Society, a friendly society registered under the Friendly Societies Act, 1896, of which the four defendants were at all material times the trustees and on behalf of which they acted in all the matters complained of in the statement of claim. The four defendants, both in their personal capacity and in their capacity as trustees of the society, prepared a report on the activities of the plaintiff. They caused it to be published by one of them, the president of the society, by reading it on behalf of the defendants and of the society to a meeting of the general committee of the society called to consider the general secretary's terms and conditions of service and tenure of office. After the report had been read a resolution was passed lawfully determining the employment of the plaintiff as general secretary of the society by a three months' payment of salary in lieu of notice. The report was admitted to contain a libel against the plaintiff, but SLADE, J., ruled that the publication took place on an occasion of qualified privilege. The jury, by their verdict, found that one of the defendants was malicious and that the others were not. They awarded the plaintiff £250 general damages and £625 special damages.

The plaintiff contended that he was entitled to judgment against the defendants in their capacity as trustees on the ground that they were sued under the Friendly Societies Act, 1896, s. 94 (1), and that the finding of malice against the one defendant deprived the other three defendants of the protection of the occasion of qualified privilege and made them jointly liable with the fourth defendant for the damages. The defendants pleaded that no action for libel lay against a friendly society in the name of the trustees, and that the society was not being sued in the action even though it was admitted that the defendants were acting for the society. They contended that the three defendants found not to have been actuated by malice were not deprived of the protection of their qualified privilege by the malice of the fourth defendant, and that no special damages were recoverable because it was not pleaded, because there was no evidence of special damage to go to the jury, and because it was too remote.

Salmon, K.C., and C. H. Duveen for the plaintiff.

Cairns, K.C., and J. P. Ashworth for the defendants.

SLADE, J.: This is an action for libel brought by Commander Clifford Henry Longdon-Griffiths, as plaintiff, against four defendants, Mr. Gerard H. Smith, Canon A. P. Pascoe, Mr. Val Gould and Mr. George F. Cooper. The statement of claim pleads, and the defence admits, that the four defendants were at all material times the trustees of the National Deposit Friendly Society, to whom I shall refer hereafter as "the society." The society is a friendly society registered under the provisions of the Friendly Societies Act, 1896. The statement of claim also pleads, and the defence admits, that in all the matters complained of in the statement of claim the four defendants were acting on behalf of the society. The cause of action on which counsel for the plaintiff relied was the publication referred to in paras. 4 and 5 of the amended statement of claim. In substance, those paragraphs allege that all the four defendants, both in their personal capacity and as the trustees of the society, participated in the preparation of a report on the activities of the plaintiff, who was at all material times the general secretary of the society, with a view to that report being communicated to the general committee of the society at a specially convened meeting to consider the general secretary's terms and conditions of service and tenure of office. The report was published to the members of the general committee, some twenty-eight in number, who were present at the meeting, by the defendant Smith, the president of the society, who read the report aloud to the meeting on Nov. 6, 1947. It was conceded by counsel for the plaintiff that the occasion of publication of that report was one of qualified privilege.

Counsel for the plaintiff rightly emphasised that the occasion of publication complained of was an occasion on which the words were spoken by the defendant Smith not only on his own behalf, but also on behalf of his three co-defendants and co-trustees, so that, while he actually published the words complained of, each of the defendants caused them to be so published. No point is taken as to whether the reading aloud of a defamatory document to persons present at a meeting constitutes the publication of a libel or that of a slander, and the case proceeded on the footing that it should be regarded as the publication of a defamatory written document. It was also expressly admitted that the defendant Smith, in publishing that document, and the other three defendants, in concurring in the publication, were acting not only in their personal capacity but also in their capacity as trustees of the society. After the document had been read at the meeting a resolution was passed, the terms of which were subsequently communicated to the plaintiff, lawfully determining his employment as general secretary by a three months' payment of salary in lieu of notice.

In those circumstances counsel for the plaintiff pleaded para. 8 of the amended statement of claim in these words:

"By reason of the premises the plaintiff has been brought into hatred ridicule and contempt and his said service agreement was terminated on Nov. 6, 1947, and the plaintiff has suffered damage."

A The case was tried with a jury who, by their verdict, found that the defendants Smith, Pascoe and Gould were not malicious but that the defendant Cooper was. Counsel for the defendants objected that no case of special damage had been pleaded, and in deference to that submission and to other submissions in the legal argument for the defendants I left the issue of damages to the jury in two sub-headings. They answered: "General damages, £250; special damages, £625." Counsel for the defendants also contended that no action for libel would lie against a friendly society in the name of its trustees and that any action for libel brought against a friendly society, either with or without some of its officers, must be brought, so far as the society is concerned, against the society in its registered name. Therefore, he said that, although it was expressly admitted on the pleading that the defendants were acting throughout as the trustees of the society, nevertheless the society itself was not sued in this action. I have no power, it was submitted, to give judgment against the friendly society even if malice had been found against each of the individual defendants, because C the action merely sues four gentlemen in two different capacities, and although, if malice was found, they would then be liable in their personal capacity, no judgment can be given against the society in the action as now constituted.

D The jury having found that at the time when the defamatory document complained of was published one of the defendants was malicious, a legal argument has taken place on three separate topics, all of which it is necessary for me to decide before I can enter judgment. The first point can be expressed in this way: Is counsel for the plaintiff right in saying that his client is entitled to judgment against the defendants in their capacity as trustees of the society? Counsel for the plaintiff conceded that, if his client were so entitled, the judgment against the defendants in that capacity would have to be so worded as to make it clear that they were only liable to satisfy such a judgment *quoad* the assets E of the society in their hands or which ought to be in their hands. The second point involves a very important point in the law of libel and a consideration of the well-known decision of BANKES, J., in 1913 in *Smith v. Streetfield* (1). Counsel for the plaintiff contends that, malice having been found by the jury against the defendant Cooper, the effect of that finding is to deprive the three co-defendants whom the jury found not to have been malicious of the protection F of the occasion of qualified privilege, and, therefore, to make them jointly liable with Cooper for the damages awarded by the jury. The third point that has been argued is upon the special damage found by the jury to have been sustained by the plaintiff in addition to the general damage which the law presumes from the mere publication of a libel.

G I will deal with those three points in that order. On the first point—whether the plaintiff is entitled to judgment against all the defendants as trustees of the society—the general rule, as I understand it, is that an unincorporated society cannot be sued. In some cases leave may be given to bring a representative action, but that does not apply to an action in tort. Therefore, one must look to see if there is any statutory authority for an action brought against a society, such as a friendly society, which is not incorporated. Counsel for the plaintiff H relies on s. 94 of the Friendly Societies Act, 1896, and, particularly, on sub-ss. (1) and (2) of that section. Section 94 (1) provides:

"The trustees of a registered society or branch, or any other officers authorised by the rules thereof, may bring or defend, or cause to be brought or defended, any action or other legal proceeding in any court whatsoever, touching or concerning any property, right, or claim of the society or branch, and may sue and be sued in their proper names, without other description than the title of their office."

By sub-s. (2):

"In legal proceedings brought under this Act by a member, or person claiming through a member, a registered society or branch may also be sued in the name, as defendant, of any officer or person who receives contributions or issues policies on behalf of the society or branch within the jurisdiction of the court in which the legal proceeding is brought, with the addition of the words 'on behalf of the society or branch' (naming the same)."

Provisions with regard to trustees of a friendly society appear in the earlier sections of the Act. Section 25 provides for their appointment. Section 34 deals with the transfer of stock standing in their names. Section 47 provides that all land shall be held in the name of the trustees. Section 49 provides that all property belonging to a registered society, whether acquired before or after the society is registered, shall vest in the trustees for the time being of the society. Section 50 provides for the devolution of property held by trustees on the death of the trustees. Section 51 provides for the property of the society being stated to be the property of the trustees in all legal proceedings whatsoever concerning any property vested in the trustees of the registered society.

Until a late stage in the argument on this point, counsel for the plaintiff based his contentions on cases decided under s. 9 of the Trade Union Act, 1871, and suggested that the language of s. 9 of the Act of 1871 was substantially the same as the language of s. 94 of the Friendly Societies Act, 1896. It was not until after he had closed his argument on that point and after counsel for the defendants had also argued that, in reply, counsel for the plaintiff emphasised an important difference, to which I shall have hereafter to refer, between the language of the two sections. I do not propose to read s. 9 of the Act of 1871 in full. It is preceded by s. 8 which appears to me substantially to enact in the case of trade unions some of the provisions to which I have shortly referred in the case of friendly societies in s. 25, s. 34, s. 47, s. 49, s. 50, and s. 51 of the Friendly Societies Act, 1896. Repeating s. 94 (1) of the Friendly Societies Act, 1896, and omitting immaterial words, the language is as follows:

"The trustees . . . may bring or defend . . . any action or other legal proceeding . . . touching or concerning any property, right, or claim of the society or branch . . ."

The words of s. 9 of the Act of 1871, again taking only the words which are material for the point I have to consider, are these:

"The trustees of any trade union . . . are hereby empowered to bring or defend . . . any action . . . touching or concerning the property, right, or claim to property of the trade union . . ."

Apart from substituting the definite word "the" property for "any," the sections are substantially identical except for the addition in the Act of 1871 of "to property" after "right or claim."

I propose, therefore, to deal with the argument of counsel for the plaintiff on this point by considering the authorities to which I have been referred on the Trade Union Act and then by considering whether the omission from s. 94 of the Act of 1896 of those two words which appear in s. 9 of the Act of 1871 makes any difference to the conclusion which I should have reached had I been dealing with the precise phraseology of s. 9 of the Act of 1871. So far as the construction of the Act of 1871 is concerned, counsel for the plaintiff contended that it was concluded in favour of the interpretation he put forward by the judgment of MATHEW, J., in *Linaker v. Pilcher* (2). Counsel for the defendants contended that the interpretation was concluded precisely the opposite way by the decision of the House of Lords in *Taff Vale Ry. Co. v. Amalgamated*

Society of Railway Servants (3), so it is clear that those two cases must be closely scrutinised.

A *Taff Vale Ry. Co. v. Amalgamated Society of Railway Servants* (3) decided that a trade union registered under the Trade Union Acts, 1871 and 1876, could be sued in its registered name. The cause of action was for procuring or inducing breaches of contract. It was, therefore, an action of tort not connected with property. It was alleged that the servants of the plaintiff company were beset, not by people who were trespassing on the plaintiff company's premises, but who were on approaches to those premises. The argument set up on behalf of the trade union when a summons to strike out came before FARWELL, J., appears from the first four lines in his judgment, where he says ([1901] A.C. 427):

B “The defendant society have taken out a summons to strike out their name as defendants, on the ground that they are neither a corporation nor an individual, and cannot be sued in a quasi-corporate or any other capacity.”

C In other words, they were claiming to be above the law. That argument was based on the contentions that they could not be sued in a quasi-corporate capacity and that the tort for which they were being sued was not an action which fell within the terms of s. 9 of the Trade Union Act, 1871, and, therefore, they could not be sued through the medium of the trustees. FARWELL, J., dealt with that argument when he said (*ibid.*, 430):

D “Now, the legislature in giving a trade union the capacity to own property and the capacity to act by agents has, without incorporating it, given it two of the essential qualities of a corporation—essential, I mean, in respect of liability for tort, for a corporation can only act by its agents, and can only be made to pay by means of its property. The principle on which corporations have been held liable in respect of wrongs committed by its servants or agents in the course of their service and for the benefit of the employer—*qui sentit commodum sentire debet et onus*—(see *Mersey Docks and Harbour Board Trustees v. Gibbs, Same v. Penhallow* (4)), is as applicable to the case of a trade union as to that of a corporation. If the contention of the defendant society were well founded, the legislature has authorized the creation of numerous bodies of men capable of owning great wealth and of acting by agents with absolutely no responsibility for the wrongs that they may do to other persons by the use of that wealth and the employment of those agents.”

G That meant that that would not be so unless the learned judge dealt with the liabilities of the trade union under s. 9 through their trustees, and he deals with the point a little later. After saying that he would require very clear and express words of enactment to induce him to hold that the legislature had legalised the existence of such irresponsible bodies—that is to say, bodies not responsible in their corporate capacity or quasi-corporate capacity and not responsible in any other way—FARWELL, J., said (*ibid.*, 431):

H “Not only is there nothing in the Acts to lead me to such a conclusion, but s. 15 and s. 16 of the Act of 1871 imposing penalties on the trade union, and s. 8 and s. 15 of the Act of 1876 point to a contrary intention; nor do I see any reason for saying that the society cannot be sued in tort in their registered name. Sections 8 and 9 of the Act of 1871 expressly provide for actions in respect of property being brought by and against the trustees, and this express intention impliedly excludes such trustees from being sued in tort. If, therefore, I am right in concluding that the society are liable in tort, the action must be against them in their registered name.”

The learned judge was dealing with the tort of procuring a breach of contract and his mind was directed to that point. I have no doubt that, had his mind been directed to torts arising from the occupation of property, for example, such as nuisance, he would have qualified the passage I have just read by saying that this express intention impliedly excludes such trustees from being sued in tort other than torts touching or concerning property. It is perfectly clear that FARWELL, J., is there deciding that the trustees of a registered trade union could not be sued for the tort of inducing breaches of contract under s. 9 of the Act of 1871. If, therefore, the trade union could not be sued in its registered name, it would be above the law, and, accordingly, he held that the trustees could not be sued, but that the union could be sued in its registered name. A

That decision was reversed by the Court of Appeal and the Court of Appeal were reversed by the House of Lords, who restored the order of FARWELL, J. In the House of Lords the EARL OF HALSBURY, L.C., said (*ibid.*, 436): B

"I am content to adopt the judgment of FARWELL, J., with which I entirely concur; and I cannot find any satisfactory answer to that judgment in the judgment of the Court of Appeal which overruled it."

LORD MACNAGHTEN began his opinion by saying that he was of the same opinion as the Lord Chancellor and that, although he would be well content to adopt the judgment of FARWELL, J., and the reasons he had given, he, LORD MACNAGHTEN, would add a few words of his own. He dealt with the possibility of a representative action being brought in cases of tort under the provisions of R.S.C., Ord. 16, r. 9. That rule has no application to tort, and certainly no application to the tort of libel. Those observations of LORD MACNAGHTEN are referred to by SWINFEN EADY, L.J., in the case I had in mind when I said that R.S.C., Ord. 16, r. 9, was inapplicable to tort, namely, *Mercantile Marine Service Asscn. v. Toms* (5). LORD SHAND in *Taff Vale Ry. Co. v. Amalgamated Society of Railway Servants* (3) said ([1901] A.C. 440): C D

"The admirable judgment of FARWELL, J., in whose reasoning I entirely agree, makes it unnecessary again to go over the provisions of the statutes of 1871 and 1876 . . ." E

LORD BRAMPTON began his speech by saying that he entirely concurred in the judgment and words of the Lord Chancellor in adopting the judgment of FARWELL, J. The only member of the House who did not in so many words expressly adopt the judgment of FARWELL, J., was LORD LINDLEY, and counsel for the plaintiff relied on a passage from his opinion where he said that after a careful study of the Act he had come to the conclusion that the Court of Appeal had rightly held that trade unions were not corporations, but that they had held further that, not being corporations, power to sue and be sued in their registered name must be conferred on them, and that the language of the statutes was not sufficient for the purpose, and he differed from them on that last point. He continued (*ibid.*, 445): F

"The Act appears to me to indicate with sufficient clearness that the registered name is one which may be used to denote the union as an unincorporated society in legal proceedings as well as for business and other purposes. The use of the name in legal proceedings imposes no duties and alters no rights: it is only a more convenient mode of proceeding than that which would have to be adopted if the name could not be used. I do not say that the use of the name is compulsory, but it is at least permissive." G H

Counsel for the plaintiff argued that all that LORD LINDLEY was deciding was that the union could be sued in its registered name and not that it could not be sued in the name of its trustees. I think, however, that that passage from the opinion of LORD LINDLEY has to be read in the light of the earlier passage (*ibid.*, 443) where he is dealing, not, indeed, with actions against trustees,

but with the possibility of a representative action being brought, such as had been canvassed by LORD MACNAGHTEN in his speech. It is significant that LORD LINDLEY in dealing with that point said (*ibid.*, 443):

"I have myself no doubt whatsoever that if the trade union could not be sued in this case in its registered name, some of its members (namely, its executive committee) could be sued on behalf of themselves and the other members of the society, and an injunction and judgment for damages could be obtained in a proper case in an action so framed. Further, it is in my opinion equally plain that if the trustees in whom the property of the society is legally vested were added as parties, an order could be made in the same action for the payment by them out of the funds of the society of all damages and costs for which the plaintiff might obtain judgment against the trade union."

That is to say, the judgment was to be against the trade union, and to secure its enforcement, if the trustees were joined, an order could be made against them to enable the property of the trade union to be attached to satisfy the judgment against it. Be that as it may, I am satisfied that that part of the judgment of FARWELL, J., which held that the procedure outlined in s. 9 of the Act of 1871 was inapplicable to a tort, or, at any rate, to a tort unconnected with property, was part of the reasons for the decision of the House of Lords, and had I been dealing with s. 9 of the Trade Union Act, 1871, I should have held that it followed from that part of the *ratio decidendi* that I was bound by the decision. I am satisfied in any event that counsel for the defendants is right in saying that the *Taff Vale* case (3) impliedly overruled the decision of MATHEW, J., in *Linaker v. Pilcher* (2), to which I will now refer.

Linaker v. Pilcher (2), which was decided before the decision of the Court of Appeal in the *Taff Vale* case (3) had been reversed by the House of Lords, is exactly in point. It was a libel action against a trade union sued in the persons of their trustees. The same arguments took place with regard to the interpretation of s. 9 in that case as have been advanced in the present case. MATHEW, J., said (84 L.T. 425):

"In support of that argument attention was called to s. 9 of the Trade Union Act of 1871. That statute in s. 8 contained the provision which is the provision for vesting the property. That is followed by s. 9, and my attention was called to that section as containing this very important provision, as it was suggested, for the protection of trades unions. Certainly, if the contention was well founded, it was a very important point in the interest of trades unions, because it would follow that for any breach of contract, or for any tort committed by them, for which their trustees were liable, the society were free of any liability and enjoyed complete immunity. I was therefore not surprised that this contention was urged at considerable length by those who represented the trade union society in this case. The first part of s. 9 provides thus . . . [the judge read it]. It was said that it is noticeable from that provision that what the trustees are empowered to do is to bring or to defend an action in respect of any right or claim or liability to the property of the trade union, to recover goods or land the property of the trade union, or to defend any proceeding against property belonging to the trade union; but that specific property it was alone intended to protect, and as there is no means of suing in respect of any other property—and this was not a case of specific property—this action and all analogous actions should therefore be actions the liability for which would rest where it fell—namely, upon the trustees or the executive committee, and could not be transferred to their principals, the trade union, if the trade union may be so described. I am of opinion that that would be an extremely narrow construction of the section. There seems to me to be no reason why there should be this disability imposed upon the trustees in respect

of anything but specific property, and it is difficult to conjecture why any such meaning should be attributed to the Legislature, and I am satisfied there was no such intention. In support of the argument reference was made to certain *obiter dicta*, as they appeared to be, in the course of the argument in the Court of Appeal in the case of *Taff Vale Ry. Co. v. Amalgamated Society of Railway Servants* (3). The suggestion appears to have been made there, in the course of the argument, by one of the learned lords justices that property might mean specific property, but attention was called to another passage in the argument where a totally different opinion was expressed by the same lord justice. I do hope that the process will not be adopted by the Bar of referring to what is said in the course of the argument by a judge as conveying his opinion. Such observations during the argument are only intended to convey to counsel as a general rule what is passing through the judge's mind, leaving counsel to argue against the view the judge is putting forward, with the result that the judge is frequently convinced that the view he had indicated is not the correct one. That appears to be what happened in the case of *Taff Vale Ry. Co. v. Amalgamated Society of Railway Servants* (3). In my opinion, 'property' in s. 9 of the Act of 1871 means property generally, and I think that an action to add to the assets of the society—for instance, an action brought for breach of contract entered into on behalf of the society—would be an action 'touching or concerning the property of the trade union.' So an action that threatened the assets of the society by a claim for damages, as in this case, would be an action that touched and concerned the property of the society. It follows, therefore, that, in my judgment, the construction sought to be put on that section is not the correct one, and that there is no objection to this action by reason of the language of that section."

The judge was impressed in that case by the position that then obtained having regard to the decision of the Court of Appeal that a trade union could not be sued in its registered name. If in those circumstances a libel was published on the plaintiff by or on behalf of the trade union, there was no redress to the plaintiff so long as the Court of Appeal decision remained unreversed except by his availing himself of the powers conferred by s. 9 of the Act of 1871. Counsel for the plaintiff relied on that decision very strongly. He also relied on the passage to which I have referred from the opinion of LORD LINDLEY in the *Taff Vale Ry. Co. v. Amalgamated Society of Railway Servants* (3), and he said that in substance that passage from the opinion of LORD LINDLEY was approved by LORD HALDANE, L.C., in *Vacher and Sons, Ltd. v. London Society of Compositors* (6) ([1913] A.C. 115). Counsel for the plaintiff also pointed to the speech of LORD ATKINSON in the same case where he said ([1913] A.C. 124):

"A proceeding against the trustees under s. 9 of the Act of 1871 is in fact, if not in form, a proceeding *in rem* against the property of the trade union. In that sense it is an action against the union itself. Judgments for damages against a trade union for torts committed by its agent, in whatever form the action might be brought, can only be satisfied out of the property vested in the trustees; and it was, I think, apprehended by the legislature that the wide and positive provisions of sub-s. (1) might be taken as practically repealing in part s. 9 of the Act of 1871, and thereby conferring on the trustees immunity as absolute as that conferred upon the union. This sub-section, while qualifying their liability to some extent by the introduction of the provisions common to s. 1, s. 2, and s. 3, was, I think, passed for greater caution to meet this possible danger, and, save as to that qualification, to preserve unimpaired the liability imposed on the trustees by s. 9 of the Act of 1871."

There LORD ATKINSON is dealing primarily with the difference in phraseology between s. 4 (1) and s. 4 (2) of the Trade Disputes Act, 1906, and the omission from sub-s. (1) of the qualifying words which appear expressly in sub-s. (2).

A It so happened that FARWELL, J., whose decision had been restored by the House of Lords in *Taff Vale Ry. Co. v. Amalgamated Society of Railway Servants* (3) and who by the year 1909 had become a lord justice, had to consider the effect of *Linaker v. Pilcher* (2) in *Osborne v. Amalgamated Society of Railway Servants* (7) when it came before the Court of Appeal. When that case went to the House of Lords it resulted in what was known as the famous "Osborne judgment." The decision of the Court of Appeal was affirmed in the House of Lords, and there is no reference in the House of Lords to *Linaker v. Pilcher* (2). In the Court of Appeal FARWELL, L.J., said this ([1909] 1 Ch. 193):

B "For example, if a trade union as such can run a newspaper, the proprietors of THE TIMES, for instance, can register themselves as a trade union and libel all and sundry with perfect impunity. It is said that MATHEW, J., decided that the union could do so in *Linaker v. Pilcher* (2). That case was decided under somewhat unfortunate circumstances and cannot be regarded as correct. It was heard while the judgment in the case C of *Taff Vale Ry. Co. v. Amalgamated Society of Railway Servants* (3) was reversed in the Court of Appeal and before it was affirmed in the House of Lords, and the proposition that the trustees of the union could be sued for such a tort as libel of which not they but the trade union were guilty cannot stand, whatever might be the case if the tort were the result of the use of the union's property vested in them, so as to cause, for example, D nuisance by obstructing ancient lights."

Counsel for the defendants contends that *Linaker v. Pilcher* (2) was impliedly overruled by the decision of the House of Lords in the *Taff Vale Ry. Co. v. Amalgamated Society of Railway Servants* (3), and I agree with that contention. I think that the passage that I have quoted from the judgment of FARWELL, J., was part of the reasons for the decision in that case, and as that passage is E inconsistent with the passage in the judgment of MATHEW, J., in *Linaker v. Pilcher* (2), I think the passage adopted by the House of Lords must overrule that of MATHEW, J.

Even if I were wrong in so holding, I should still feel justified in not following the decision of MATHEW, J., in *Linaker v. Pilcher* (2). I am not bound by it: see *Green v. Berliner* (8), and the case cited there by DU PARCQ, J. I should F feel justified, first, by the language of FARWELL, J., which, as I have said, is quite inconsistent with the decision of MATHEW, J.; secondly, by the agreement of LORDS HALSBURY, MACNAGHTEN, SHAND and BRAMPTON with the language of FARWELL, J.; and, thirdly, by the *dictum* of FARWELL, L.J., himself in *Osborne v. Amalgamated Society of Railway Servants* (7), in preferring the judgment of FARWELL, L.J., in that case to the judgment of MATHEW, J., in *Linaker G v. Pilcher* (2). I do not, however, think that the question of my being bound can arise in this case at all. Had this been a case under s. 9 of the Trade Union Act, 1871, I should have held that the point was concluded in favour of the contentions put forward for the defendants, and, that was the footing on which this legal argument started and continued for some time.

H Later on, however, counsel for the plaintiff took the point which has, I confess, caused me the greatest difficulty of all the points of law which have arisen in this case. The words in s. 94 of the Friendly Societies Act, 1896, are "touching or concerning any property, right, or claim of" the society, not "touching or concerning the property, right, or claim to property of" the trade union, which are the corresponding words in the Act of 1871. It was argued that the omission of those two words from the Act of 1896 shows a different intention from that which is to be deduced from the language of s. 9 of the Act of 1871. Counsel for the plaintiff also referred to the words "legal pro-

ceedings" which are the rubric, or marginal note, of the section. I do not think I am entitled to have regard to the rubric in interpreting a statute, and I disregard it on that ground. He also pointed to s. 94 (2), which provides:

"In legal proceedings brought under this Act by a member, or person claiming through a member, a registered society or branch may also be sued in the name, as defendant, of any officer or person . . ."

Counsel said that means "in addition to the remedy under sub-s. (1) of suing the trustees", and legal proceedings brought by a member, or a person claiming through a member, against persons who receive contributions and issue policies are not proceedings "touching or concerning the property". That subsection, it was submitted, fortifies the omission of the two words "to property" which appear in the Act of 1871 from the words in the Act of 1896 "right or claim of the society." So, it is necessary to read the words, "The trustees . . . may bring or defend . . . any action or other legal proceeding," (i) if it touches or concerns the property of the society (which, it was argued, is the only reference to property); (ii) if it concerns any right of the society; and (iii) if it concerns any claim of the society.

It would be an astonishing form of language if s. 94 (1) really meant that in any action or legal proceeding a registered friendly society could sue or be sued in the name of the trustees. Counsel for the plaintiff argues that the legislature is not normally economical in the language it uses in statutes, and that is, undoubtedly, so in a good many cases, but if there is given to the meaning of the words in s. 94 (1) the construction that it is sought to ascribe to them, there come, first, the words, "touching or concerning any property," which are completely otiose if the trustees can be sued in any action or legal proceeding as trustees. Then, following the words "the trustees may bring or defend," come the words, "right or claim of the society," which, apparently, only refer to "right of the society" or "claim of the society," not "liability of the society" or "claim against the society." Taking the words "bring or defend," counsel for the plaintiff, recognising, I think, that difficulty of language, said: "The trustees may bring or defend any action touching a right of the society." How they could bring an action is quite obvious, but why should they defend an action concerning a right of the society? Counsel for the plaintiff said: "That is the right of the society to publish a defamatory document." Sub-section (2), on which counsel for the plaintiff relied, says: "In legal proceedings brought under this Act . . . a registered society or branch may also be sued . . ." What are "legal proceedings brought under" the Act of 1896? Reference to s. 68 shows a number of matters as between members and the society which may not become the subject of litigation at all. At first sight it would look as though s. 94 (2) were limited to "legal proceedings brought under this Act," which I should take to be "which could not have been brought because they would not have lain except for the provisions of this enactment."

I have to make up my mind on this difficult point, which, put in a nutshell, is this: Are the words of s. 94 of the Act of 1896 to receive a wholly different meaning because a much wider construction than that which I have held has been put on the words of s. 9 of the Act of 1871 which differ from the words of s. 94 of the Act of 1896 for all material purposes only by the omission of the words "to property" after the words "right or claim"? On the one hand, I fully appreciate the force underlying the argument which counsel for the plaintiff has advanced—that the words "to property" do not appear in the Act of 1896 in the context in which they appear in s. 9 of the Act of 1871. I am fully alive to the fact that the construction which has been put on one section of an Act is not necessarily a guide to the construction which ought to be put on a section of another Act couched even in identical terms, because a section falls to be construed, not only by what it itself says, but also, it may be, by the

whole of the provisions of the Act of which it is part. On the other hand, I find it difficult on any construction of these words to accept them in their literal sense. Finally, I think of the obvious difficulties and inconveniences which might be caused if an action for libel such as the present one could be brought against the trustees in a dual capacity, that is to say, against them *qua* trustees of the society and against them *qua* individuals. I will give one or two illustrations. Where the trustees are different persons from those

A responsible for the actual publication of the libel, no difficulty arises, but in this case it is the very trustees of this society who were alleged to have been solely responsible for the publication of the document alleged to be a libel, albeit acting in their capacity as trustees. In the result, the jury have found a verdict against the defendant Cooper, whom they have found to be malicious, and they have awarded damages against him, both general and special. Some

B question may arise hereafter as to the right as between himself and the society to be indemnified from the consequences of having acted on behalf of the society, bearing in mind that the jury have found him to be malicious. I can very well imagine a case where conflicting defences would have to be put in, (i) by the defendants in their personal capacity, and (ii) by the defendants in their representative capacity. I am now being purely hypothetical. Supposing

C in publishing a defamatory document, either on an occasion when there was no privilege or on a privileged occasion where the jury found one or more of their number to be malicious, the society desire to contend that the defendants were not acting within the scope of their authority and the individual defendants were equally anxious to allege that they were so that if they were held liable to the plaintiff they might have a right to indemnity against the society, or,

D at any rate, a right to apply for some apportionment under s. 6 of the Law Reform (Married Women and Tortfeasors) Act, 1935. I appreciate that when persons are sued in a dual capacity they may apply to the court to be represented by separate solicitors in their respective capacities. What would happen if that right were carried to the extent of putting in separate defences? After all, the persons who give the evidence whether they were acting on behalf of

E the society in the circumstances in which the libel came to be published in this case are the individual defendants. Could they say, on the one hand, as individuals in the witness-box: "We were," and, on the other hand, as trustees: "We were not"? Might it not very well be that their interests as individuals would conflict with their duty as trustees? Suppose the society decided to apologise and make a payment into court, and the defendants as individuals

F wanted to plead justification, what is to happen then? Some of the difficulties of that kind in a case of an imposed representative action were pointed out by the Court of Appeal in *Mercantile Marine Service Asscn. v. Toms* (5).

Taking all those matters into consideration, bearing in mind the omission of the words from s. 94 of the Friendly Societies Act, 1896, which appear in s. 9 of the Trade Union Act, 1871, emphasising the words in s. 94 (1) "touching or concerning any property, right, or claim of the society," which I construe to mean "touching or concerning any property of the society, touching or concerning any right of the society, touching or concerning any claim of the society," giving full weight to the argument of counsel for the plaintiff in respect of s. 94 (2) in respect of "legal proceedings brought under this Act," whatever that may mean, and remembering the considerations of difficulty to which I

H have referred if such an action as this can be brought against defendants who are alleged to have published the libel complained of both as individuals and as trustees, I give the same construction to the words of s. 94 (1) of the Act of 1896 as FARWELL, J., and the House of Lords gave to the corresponding words of s. 9 of the Act of 1871 in the *Taff Vale* case (3). I arrive at that conclusion, furthermore, by noticing the position of the trustees under the Act of 1871 as set out in s. 8, immediately preceding s. 9, and almost exactly the same provisions in the Act of 1896, not, indeed, in the section immediately preceding s. 94,

but in s. 25, s. 34, s. 47, s. 49, s. 50 and s. 51, the sum total of them being substantially identical with the provisions of s. 8 of the Trade Union Act, 1871. Those provisions seem to me to point to trustees suing and being sued in respect of matters touching or concerning the property of the society, for the simple reason that by the very statute itself the whole of the property of the society is vested in them. That disposes of the first point.

I now come to what I refer to compendiously as the *Smith v. Streatfeild* (1) point. The jury have found that the defendant Cooper, in publishing the report complained of, was actuated by malice, and, therefore, he lost the protection afforded to an occasion of qualified privilege. Counsel for the plaintiff says that he is entitled to judgment against the three co-trustees individually on the ground that they were joint tortfeasors and that BANKES, J., in *Smith v. Streatfeild* (1) decided that where one of two or more joint tortfeasors was found to be malicious, that finding of malice destroyed the privilege, not only of the tortfeasor who was found to be malicious, but also of the other joint tortfeasors in respect of the publication complained of. Counsel for the plaintiff at a very early stage of the proceedings conceded that the occasion of publication, viz., when the report was read out by the defendant Smith at the meeting of the general committee of the society held on Nov. 6, 1947, was one of qualified privilege. I intimated that not only should I rule that the occasion was one of qualified privilege, but I should also rule that it was one of qualified privilege as regards each of the four defendants. *Smith v. Streatfeild* (1) still remains the law although it has not come through unscathed. In *Crozier v. Wishart & Co., Ltd. & Western Printing Services, Ltd.* (9) the Court of Appeal said that it would require careful consideration when it came before them. It was followed in *Smith v. National Meter Co., Ltd.* (10), where UTHWATT, J., said that, whatever view he might entertain as to the correctness of the decision in *Smith v. Streatfeild* (1), which he described as "a tottering authority," he was bound as a judge of first instance to follow it. I do not think UTHWATT, J., was bound to follow it, for the reasons I have given in discussing the decision of MATHEW, J., in *Linaker v. Pilcher* (2), but he did follow it. Counsel for the defendants has invited me to give the last push to this tottering authority. Had it been necessary for me to do so, I should have had to consider whether it was not my duty to refuse to follow that decision because, with the utmost respect for a most distinguished judge and mindful of the length of time which the decision has lasted, I feel that the decision was based on a false premise, namely, that a person who publishes a defamatory statement on an occasion of qualified privilege is a tortfeasor. In my judgment, a person who publishes a defamatory statement on an occasion which the law has clothed with the protection of qualified privilege is not a tortfeasor, and a person cannot be a joint tortfeasor unless he is a tortfeasor. I have particularly in mind the passage in the considered judgment of BANKES, J., in *Smith v. Streatfeild* (1), which is in these words ((1913) 3 K.B. 769):

"... the publication here complained of was a joint publication—that is to say, a single publication to each rural dean for which both defendants were jointly responsible. This publication was admitted by the printers. The finding of the jury establishes the fact that the defendant Canon Streatfeild was a tortfeasor as regards this publication. It necessarily follows, in my opinion, that the printers are joint tortfeasors with him."

Later, after referring to a rule of law, BANKES, J., said (*ibid.*, 769):

"In my opinion it follows from this rule of law that in the case of a joint publication of a libel each tortfeasor is liable for the malice of the other."

The question is whether he is a tortfeasor or not. If he is a tortfeasor, there is no need to worry about malice.

The first question that I have to consider is: What did *Smith v. Streatfeild* (1) decide? It is not uninteresting to inquire what the result would have been if,

instead of Canon Streatfeild having been found guilty of malice and the printers not guilty of malice, the jury had found that the printers had been guilty of malice and not Canon Streatfeild. Would it have been then argued that Canon Streatfeild had been deprived of the protection of his qualified privilege because, unknown to him, he had selected the one of the hundred thousand odd (I have assumed the number) printers in this country who happened to have a grudge against the plaintiff? Consider the position of solicitors. In the course of litigation dozens of letters containing remarks which are defamatory are written every day by solicitors on the instructions of their clients to the solicitors on the other side or to the other party in the litigation or the impending litigation. In such cases there is a publication by the sending solicitor to his typist or to the solicitors on the other side. Does a solicitor who writes such a letter on the instructions of his client lose all protection of privilege on the occasion if his client turns out to be malicious? Indeed, in those cases where the instructions which are given to the solicitors are diametrically opposed, it is almost certain that one of the clients would inevitably be held to be malicious. I need hardly point out how many letters written by solicitors in the furtherance of their clients' interests are necessarily couched in terms which are defamatory of the other party to a dispute. It shows, at any rate, the importance of seeing what *Smith v. Streatfeild* (1) really decided.

In *Smith v. Streatfeild* (1) the plaintiff was one of the diocesan surveyors for the diocese of Oxford, and his re-election to that office rested with the rural deans. The defendant, Canon Streatfeild, was desirous of bringing to the notice of the rural deans matters affecting the plaintiff in relation to a survey which the plaintiff had made of a rectory house and glebe in which the defendant, Canon Streatfeild, was directly interested as rector. It was conceded that the document containing those matters which was distributed by Canon Streatfeild among the rural deans, was published to each of those rural deans on an occasion of qualified privilege. It was also conceded or was found that, having regard to the number of persons to whom the document had to be transmitted, it was reasonable in the circumstances to have it printed, and the other defendants, the Robert Spennell Press, were employed by Canon Streatfeild to print the pamphlet which he proposed to disseminate among the rural deans. The pamphlet contained statements which were defamatory of the plaintiff, and the jury found as a fact that, in making the publications complained of, Canon Streatfeild was actuated by malice, but that the defendant printers were not actuated by malice. It was argued that the malice of Canon Streatfeild deprived the printers, who were innocent of malice, of their protection under the plea of privilege. The first and most important point to notice about *Smith v. Streatfeild* (1) is that the privilege of the printers was what I will call a derivative one. They had no privilege other than that which they derived from the privilege of Canon Streatfeild. Privilege entails a reciprocity of interest and duty between the publisher of a defamatory document and every person to whom the defamatory document is published. A glance at the arguments of Sir Frederick Low and of Mr. McCardie, shows that the difference between a derivative privilege and an independent privilege was present to the minds of counsel on both sides. Indeed, Mr. McCardie went so far as to argue that the mere printing and publication of the pamphlet by the printers in the ordinary course of business was sufficient to constitute an independent privilege in them, an obviously untenable argument which the learned judge refused to accept.

In the present case I have ruled that each one of these four defendants not only had a duty to publish the report complained of to the members of the general committee of the society, who had a duty to receive it, but that the report contained matters involving a common or corresponding interest between each of the trustees and the members of the general committee to whom the report was published. In other words, if Cooper had been malicious—and, indeed, if the other three defendants had known that Cooper was malicious—it would

still have been their duty to publish the document which they did publish. Malice has nothing to do with the creation of privilege. It has to do only with its destruction. Rightly or wrongly, I have ruled that each of these four had a separate duty independent of the others to make the publication which they made or caused to be made. *Smith v. Streatfeild* (1), as I understand it, decided only that where two persons are jointly responsible for the publication of a document defamatory of a plaintiff, but one of them is clothed by the law with the protection of qualified privilege because there is a reciprocity of interest or duty between him and the persons to whom he publishes it, and the other is afforded the protection which the law affords to the author of the document merely because the other defendant's publication is ancillary to and reasonably necessary for the discharge of the duty or the protection of the interest which creates the privilege, an ancillary privilege to enable the publication to be adequately made by the person whose interest or duty it is to make it is given to the person who assists him to that end—for example, by typing or printing the document, but the privilege is derived by that person only from the reciprocity of interest or duty which creates the privilege in the other. There is only that one privilege, a derivative one. I read *Smith v. Streatfeild* (1) as deciding that when that occasion of privilege is destroyed by the malice of the person for whose benefit it is created, there being only one privilege, the person who is responsible for the publication in the ancillary sense is necessarily deprived of his privilege because there is nothing left to protect him. He has no privilege of his own apart from that of his co-defendant, and, therefore, he, however innocent he is, loses the protection with which the law clothes the occasion of publication by his co-defendant. The present, I hold, is an entirely different case because each defendant had a right and a duty quite independently of the others to publish the document which he did publish on the occasion and to the persons to whom he published it. I ask myself what would be the position of such a person if, just as he was about to discharge his duty or to protect his interest, he was told by someone that someone else who had a like duty and interest to discharge or protect was likely to be held by some jury in the future to be malicious? Does his duty become any the less? Does his right to protect his own interest become any the less, because some other person who has a corresponding duty to discharge or a corresponding interest to protect may be prevented from discharging his duty or protecting his interest on the ground that he will be found to be malicious? I hold that the destruction as a result of the jury's finding of malice against him of the protection of the privilege with which the law clothed Cooper when he caused the publication by Smith in no way impairs the independent privilege which was enjoyed by Cooper's three co-defendants.

I should not do justice to the argument of counsel for the plaintiff if I failed to refer to *Thomas v. Bradbury, Agnew & Co., Ltd.* (11). It was said that that case must be taken to have decided the precise point which seven years later was thought to be decided by *Smith v. Streatfeild* (1), and that whereas I might not be bound to *Smith v. Streatfeild* (1) I was certainly bound by this decision of the Court of Appeal. Further, counsel for the plaintiff fortified that submission by referring me to a passage from the judgment of McCARDIE, J., in *Pratt v. British Medical Asscn.* (12) where he said ([1919] 1 K.B. 279):

"I may incidentally add that, had it been necessary to decide the point, I should hold that where persons are acting in combination to achieve such a purpose as that which is shown in the present case, then the proved malice of one or more may be attributed to the other participants in the combination. See the rule established in cases of defamation by *Thomas v. Bradbury, Agnew & Co., Ltd.* (11) and *Smith v. Streatfeild* (1)."

If the rule had already been established by the Court of Appeal in *Thomas v. Bradbury, Agnew & Co., Ltd.* (11) in 1906, it is rather remarkable that no one

pointed out to BANKES, J., seven years later that he need not trouble to decide the point because it had already been decided by the Court of Appeal. In *Thomas v. Bradbury, Agnew & Co., Ltd.* (11) a review of a book written by the plaintiff, the review being written by Sir Henry Lucy, was published in PUNCH, the proprietors of which were the defendants, Bradbury, Agnew & Company Ltd. Among other defences to an action for libel brought by the plaintiff in respect of that publication, the defendants pleaded fair comment. A defence of fair comment is destroyed by express malice in the same way as is a defence of privilege. Nowhere was the point discussed in any shape or form in *Thomas v. Bradbury, Agnew & Co., Ltd.* (11) which was subsequently decided by BANKES, J., in *Smith v. Streatfeild* (1) seven years later. I have not seen the pleadings in *Thomas v. Bradbury, Agnew & Co., Ltd.* (11) and the issues do not appear too clearly from the report. It is stated that Sir Henry Lucy was a contributor to PUNCH, but it does not say whether he was employed by PUNCH or whether it was alleged that he was employed by PUNCH, and there was no admission in the defence. In other words, it does not appear whether it was a question of the vicarious responsibility of a master for a servant acting within the scope of his employment, or even, possibly, of principal and agent, or what the issues were so far as that point was concerned on the pleadings. One thing that seems to be fairly clear is that no one took the point, and the defendants themselves were the last persons to desire any point to be taken as between themselves and Sir Henry Lucy. They were arguing in the Court of Appeal that there was no case against Sir Henry Lucy, not that if Sir Henry Lucy was rightly held liable they ought not to be. Counsel would certainly have brought *Thomas v. Bradbury, Agnew & Co., Ltd.* (11) to the notice of BANKES, J., in *Smith v. Streatfeild* (1) if he had thought that it was an authority binding on BANKES, J. I am satisfied that there is nothing contained in the decision in *Thomas v. Bradbury, Agnew & Co., Ltd.* (11) which gives the support of the Court of Appeal to the decision of BANKES, J., in *Smith v. Streatfeild* (1). Even if I thought there had been, I find that the facts of the present case and the law of privilege which arises in it distinguish the present case entirely from the principle which I find underlay the decision in *Smith v. Streatfeild* (1).

So that I may not to be said to have overlooked any of the authorities to which I was referred, I should, perhaps, add that counsel for the defendants referred me to a recent Irish case of *Eglantine Inn, Ltd. v. Smith and Smith (Trading as "The Cromac Printery")* (13), and to the judgment of ANDREWS, C.J., ([1948] N.I. 29); to the Australian case of *McKenna v. Frazer* (14), which was a case of conspiracy to injure; and to the passage from the judgment of EVATT, J. ([1946] C.L.R. 405).

That covers the second point. I now come to the issue of special damage, on which the law has been argued. Counsel for the defendants takes three points on that. First, he says that special damage is not pleaded. Secondly, he says there was no evidence of special damage to go to the jury. Thirdly, he says that, if he is wrong on both those submissions, the damage was too remote for the damages to be recoverable in law. Dealing with the first point first, the claim for special damage, if it is made at all, appears in para. 8 of the amended statement of claim. Counsel for the defendants relied on a recent decision of DEVLIN, J., in *Hayward v. Pullinger* (15), in which, following a decision of the Court of Appeal in *Monk v. Redwing Aircraft Co., Ltd.* (16), DEVLIN, J., held that no special damage was pleaded in an action for wrongful dismissal where the body of the statement of claim contained no reference to damages whatsoever but one of the sub-paragraphs of the prayer to the statement of claim said: "The plaintiff claims damages." I entirely agree with the decision of DEVLIN, J., on that point, but I find the pleading in para. 8 of the statement of claim in the present case quite different from the pleading in *Hayward v. Pullinger* (15). The function of pleadings is to make it clear to your opponent what case he has to

meet, and I cannot help feeling that anyone reading para. 8 and seeing the words: "By reason of the premises the plaintiff has been brought into hatred ridicule and contempt," which are common form in every defamation action to indicate general damage to reputation, followed by the words "and his said service agreement was terminated on Nov. 6, 1947" must have been aware that special damage was being claimed. Nov. 6, 1947, was the very day on which the alleged libel was published and the plaintiff's appointment was determined by the persons who alone had power to determine it at the very meeting at which the document was published to them. The words "and the plaintiff has suffered damage" must have conveyed to anyone that a claim for special damage was being made. I agree that where no special damages are claimed the defendant is well advised to let sleeping dogs lie, and he can hardly be expected to ask for particulars of the claim for special damages where none is alleged. Where the statement of claim suggests the probability that a claim for special damages is intended, I think it is a question of degree whether the statement of claim does not put forward a claim for special damages, albeit without the particulars which the rules of pleading strictly require, or whether it is so nebulous that the defendant can treat it as not being a claim for special damages at all. A statement of claim is supposed to be delivered with full particulars, but it is a rule which is more honoured in the breach than in the observance. Therefore, I find that there is here a claim for special damages, though I do not intend anything I have said to indicate that there can be laxity in pleading special damage, and still less that such laxity can justify insufficient discovery of documents. A defendant is not to be left to secure by means of discovery by interrogatories information which he ought already to have got by discovery of documents. This case has involved difficult questions and important questions of law, and I did not think it right that the plaintiff should run the risk of my having taken a wrong view on a point which I consider to be at all a technical one, and therefore, although I hold that special damage is pleaded in this statement of claim, and, therefore, it was not necessary to amend, I invited counsel for the plaintiff to apply for leave to amend para. 8 of the statement of claim, and he did so. Having heard counsel for the defendants, I gave leave for the amendment to be made, which only goes to the question of costs. I am satisfied that this is a case where an amendment can be made without a shadow of injustice to the defendants.

[HIS LORDSHIP examined the further submissions made by counsel for the defendants and held that there was overwhelming evidence of special damage to go to the jury, and continued:] Now I come to the third point, that the special damage was too remote to be recoverable in law. Counsel for the defendants said it was clear that loss of employment was said by all the text-books to be sufficient special damage, for example, to support an action for damages for a slander which was not actionable *per se*, or to enable a claim for special damages to be made in an action for libel in addition to the general damages which the law presumes. He said that, so far as his investigation of the cases had gone, there had been no case where special damage in the form of loss of employment had been proved except where a contract of employment had been unlawfully determined. I should have thought that there was a stronger case for claiming special damages in a libel action where the contract was lawfully determined by reason of the publication of the libel or slander complained of than where it was unlawfully determined. Indeed, if it were unlawfully determined it seems to me that the judge would be bound to direct the jury in the libel or slander action in which the special damages were claimed that they must give credit to the defendants, if they took the view that the defendants were liable to pay special damages at all, for the amount which the plaintiff could recover from them in an action for breach of contract. I hold that as a matter of law the damage which the jury found as a fact was sustained by the plaintiff in this case,

additional to the damage to his reputation which the law presumes in an action for general damages, was not so remote that special damages were not recoverable in law.

Judgment for the plaintiff against the defendant Cooper for the sum of £875 with seven-eighths of his costs as against the defendant. Judgment for the defendants Smith, Pascoe and Gould against the plaintiff with three-quarters of the costs incurred on behalf of all the defendants.

Solicitors: *Isadore Goldman & Son* (for the plaintiff); *Woolley, Tyler & Bury* (for the defendants).

[*Reported by F. A. AMIES, ESQ., Barrister-at-Law.*]

R. v. SMITH AND OTHERS.

[COURT OF CRIMINAL APPEAL (Humphreys, Finemore and Slade, J.J.), July 6, 7, 18, 1950.]

Criminal Law—Indictment—Amendment—Indictment not bad on its face—Amendment of matter of description—Charge of obtaining money by false pretences—Evidence that cheques, not money, obtained—Amendment to meet evidence—Responsibility of counsel for accuracy of indictment—Time to apply for amendment—Indictments Act, 1915 (c. 90), s. 5 (1).

The appellants were convicted on the first count of an indictment charging them with conspiracy to cheat and defraud a building society by obtaining loans on house property by various false pretences and on other counts of obtaining valuable securities, to wit, cheques, by false pretences. As originally drawn the indictment alleged that the appellants had obtained money by false pretences, but after the case for the prosecution had been closed and counsel for the defence had submitted that there was no evidence to support the charges of obtaining money by false pretences, an application was made by counsel for the Crown to amend the indictment by substituting in each of the counts for a charge of obtaining money one of obtaining a valuable security for a like sum. PRITCHARD, J., allowed the amendments.

HELD: to be "defective" within s. 5 (1) of the Indictments Act, 1915, an indictment need not be bad on its face as not charging any offence, but any amendment of an indictment with regard to matters of description (and probably in many other respects) may be made to meet the evidence in the case so long as the amendment causes no injustice to the person accused; in the present case the indictment was defective in the description of the thing obtained; and, therefore, PRITCHARD, J., had power to allow the amendments.

Per curiam: responsibility for the correctness of an indictment lies on counsel for the prosecution and not on the court. If amendment is required, application to amend should be made before the arraignment of the accused, and not at the close of the case for the prosecution, for such late amendments may be oppressive and embarrassing to the accused.

[AS TO DEFECTIVE INDICTMENTS, see HALSBURY, Hailsham Edn., Vol. 9, p. 139, paras. 182, 183; and FOR CASES, see DIGEST, Vol. 14, pp. 231-234, Nos. 2175-2196, and Digest Supp., and 2nd Digest Supp.]

Cases referred to:

(1) *R. v. Moland*, (1843), 2 Mood. C.C. 276; 15 Digest 983, 11,007.

(2) *R. v. Newlan*, (1839), 3 J.P. 677; 15 Digest 982, 11,001.

- (3) *R. v. Wickham*, (1839), 10 Ad. & El. 34; 8 L.J.M.C. 87; 113 E.R. 14; 15 Digest 987, 11,044.
- (4) *R. v. Smith*, (1855), Dears. C.C. 494; 24 L.J.M.C. 135; 26 L.T.O.S. 6; 19 J.P. 358; 15 Digest 966, 10,793.
- (5) *R. v. Cooke*, (1858), 1 F. & F. 64; 15 Digest 1006, 11,280.
- (6) *R. v. Garrett*, (1853), Dears. C.C. 232; 23 L.J.M.C. 20; 17 J.P. 774; 14 Digest 135, 1072.
- (7) *R. v. Kilham*, (1870), L.R. 1 C.C.R. 261; 39 L.J.M.C. 109; 22 L.T. 625; A 34 J.P. 533; 15 Digest 982, 10,997.
- (8) *R. v. Benson*, [1908] 2 K.B. 270; 77 L.J.K.B. 644; 98 L.T. 933; 72 J.P. 286; 14 Digest 235, 2218.
- (9) *R. v. Marston*, (1918), 13 Cr. App. Rep. 203; 15 Digest 983, 11,006.
- (10) *R. v. Errington*, (1922), 16 Cr. App. Rep. 148; 14 Digest 234, 2201.
- (11) *R. v. Hughes*, 20 Cr. App. Rep. 4.
- (12) *R. v. Tuttle*, (1929), 140 L.T. 701; Digest Supp.
- (13) *R. v. Jennings*, (1949), 33 Cr. App. Rep. 143; 2nd Digest Supp.

APPEALS against convictions at Winchester Assizes on counts in an indictment charging the appellants with obtaining valuable securities by false pretences, and against convictions on the first count of the indictment charging them with conspiracy.

The counts alleging false pretences set out that the appellants had obtained various sums of money from a building society, but after the close of the case for the prosecution and after counsel for the defence had submitted that there was no evidence to support the charges of obtaining money by false pretences counsel for the Crown applied to amend the indictment by substituting in each count an averment that the appellants had obtained valuable securities, to wit, cheques for the respective sums of money. PRITCHARD, J., allowed the amendments.

The first ground of appeal was that the jury had been misdirected on the count of conspiracy. The other grounds, on which the appellants were granted leave to appeal by PRITCHARD, J., were that the judge had no power under s. 5 (1) of the Indictments Act, 1915, to make the amendments which were made, and that there was no evidence to go to the jury on the indictment as amended. The case is only reported on the point arising under the Indictments Act, 1915, s. 5 (1).

Ian Hill and R. I. Gray for the appellant, Smith.

J. S. Henderson, K.C., and *Molony* for the appellant, Pople.

Brodrick and McLellan for the appellant, Dallimore.

Michael King for the appellant, Lord.

A. J. Jenkins for the appellant, Mallon.

Fox-Andrews, K.C., and *Humfrey Edmunds* for the Crown.

Cur. adv. vult.

July 18. HUMPHREYS, J., read the following judgment of the court. The five appellants appeal by virtue of a certificate granted by the trial judge against their convictions at Winchester Assizes on counts of an indictment charging them with obtaining valuable securities by false pretences with intent to defraud. They also appeal against their convictions on the first count of the indictment which charged them all with conspiracy to cheat and defraud the Dunfermline Building Society by obtaining from the society loans on the security of freehold premises situate in or near Portsmouth by various false representations.

[HIS LORDSHIP examined the evidence on the first count charging conspiracy, found that there had been no misdirection as to the law or the facts, and said that the convictions and sentences must stand, and continued]: We now turn to the other counts of the indictment. The certificate of the trial judge is

expressed as being granted to enable the accused to argue before this court two points—(i) that the trial judge had no power under s. 5 (1) of the Indictments Act, 1915, to make the amendments which were in fact allowed; (ii) that on the indictment as amended there was no evidence to go to the jury that any valuable security had been obtained by any of the appellants from the society. As originally drawn, counts 2, 3, 4, 5 and 7 (there was no conviction on count 6) alleged against certain of the appellants the offence of obtaining various sums of money from the society by the false pretences set out in the various counts. The case was a long one occupying twelve days, and at the close of the case for the prosecution objection was taken that there was no evidence to support the charges of obtaining money by the different accused. The matter having been argued, the prosecution applied for leave to amend those counts by altering in each count the sum of money alleged to be obtained to “a valuable security, to wit, a cheque for” that sum of money. That application was granted and the question argued before us on this appeal was whether the judge had any jurisdiction to direct that amendment.

The power to amend an indictment has been contained since 1915 in s. 5 (1) of the Indictments Act, 1915. That enactment, as is generally known, was passed mainly for the purpose of doing away with the technicalities and redundancies of pleading in criminal cases. Up to that time the powers of amendment had been very limited, and the sub-section in question provides, and, as we think, was intended to provide, that in future the power should be very considerably extended. The sub-section is as follows:

“Where, before trial, or at any stage of a trial, it appears to the court that the indictment is defective, the court shall make such order for the amendment of the indictment as the court thinks necessary to meet the circumstances of the case . . .”

Then follow the all-important words:

“ . . . unless having regard to the merits of the case, the required amendments cannot be made without injustice . . .”

The argument for the appellants appeared to involve the proposition that an indictment, in order to be defective, must be one which in law does not charge any offence at all, and, therefore, is bad on the face of it. We do not take that view. In our opinion, any alteration in matters of description, and probably in many other respects, may be made in order to meet the evidence in the case so long as the amendment causes no injustice to the accused person. There is the most ample power in such a case, or in any case where the court is of opinion that a person accused may be prejudiced or embarrassed in his defence by any such amendment, to direct that one person should be tried separately from others, or the trial may be postponed. It is to be observed that in this case the matter in respect of which the prosecution suggested that the indictment was defective was in the mere description of the thing obtained. In substance, the charge was the same, but in the view of the prosecution it was necessary to show that what was referred to in the count was not the actual sum of money obtained but the cheque, *i.e.*, the valuable security with which in fact the society parted. We have no hesitation in this case in supporting the action of the judge in amending the indictment.

[His LORDSHIP examined the ground of appeal that the evidence failed to prove that any valuable security had been obtained by any of the appellants as alleged in the amended indictment, and found that in respect of the offences charged in counts 2, 4, 5 and 7 the securities were handed to the solicitor acting for all the appellants who received the cheques in his capacity as agent for the society but that in respect of count 3 the cheque was received by the solicitor as agent for the appellant, Smith. Accordingly, the convictions of Smith on counts 2, 4 and 5, of Pople on counts 2, 4 and 5, of Dallimore on counts 4 and 5,

of Lord on counts 2, 4 and 5, and of Mallon on count 7 must be quashed and the convictions of Smith and Dallimore on count 3 upheld. His LORDSHIP continued]:

A feature of this case which obviously troubled the learned judge, as it does this court, is the omission from the indictment of any charge framed on the language of s. 32 (1) of the Larceny Act, 1916, which was expressly inserted, as it seems to us, in order to meet such a case as the present. The sub-section enacts that every person who by any false pretence

“ . . . with intent to defraud obtains from any other person any chattel, money, or valuable security, or causes or procures any money to be paid, or any chattel or valuable security to be delivered to himself or to any other person for the use or benefit or on account of himself or any other person . . . ”

shall be guilty of a misdemeanour. Had counts been inserted for causing and procuring under the latter part of that section, it is difficult to see what possible defence would have been open to the accused. In opening the appeals, counsel for the appellant, Pople, stated frankly that the case of his client was devoid of merits, and that he relied on the defects in an indictment which was badly drawn in the first place and was made worse by subsequent amendments. The court was not informed whether the indictment in this case was drawn in the office of the clerk of assize* or whether it was submitted to counsel for revision before being signed, but we think it desirable to point out that the responsibility for the correctness of an indictment lies in every case on counsel for the prosecution and not upon the court. No counsel should open a criminal case without having satisfied himself on that point. If in his opinion the indictment needs amendment, the necessary application should be made before the accused are arraigned and not, as in this case, after all the evidence for the prosecution has been called. There may well be amendments which would be properly made at the commencement of a trial which would be oppressive and embarrassing to the accused if made at the close of the case for the prosecution.

This was a badly drawn indictment. As soon as the learned judge heard the first count read he rightly directed an amendment of the statement of the date intended to be charged. The amendments made at the close of the prosecution did not improve matters. These mistakes have resulted in great loss of time and expenditure of money, and it is to be hoped will not occur in the future.

In the circumstances we direct that the sentence on Dallimore of five years' imprisonment on count 3 shall be reduced to one year, to be served consecutively to the two years passed on count 1, and in the case of Smith that his sentence of three years' imprisonment on count 3 be reduced to one of six months to follow the twelve months passed on count 1. The sentences to be served are, therefore, as follows:—Pople, two years' imprisonment, and the order for costs stands; Dallimore, three years' imprisonment; Lord, twelve months' imprisonment; Smith, eighteen months' imprisonment; and Mallon, twelve months' imprisonment.

Convictions quashed in part. Sentences reduced.

Solicitors: *Registrar Court of Criminal Appeal* (for the appellants Smith, Lord and Mallon); *White, Nash & Brooks*, Winchester (for the appellant Pople); *Macdonald, Jacobs & Oates*, Portsmouth (for the appellant Dallimore); *Director of Public Prosecutions* (for the Crown).

[Reported by H. McL. MORRISON, ESQ., Barrister-at-Law.]

* The indictment was drawn by counsel and not in the office of the clerk of assize for the Western Circuit.

GARNER v. BURR AND OTHERS.

[KING'S BENCH DIVISION (Lord Goddard, C.J., Hilbery and Byrne, JJ.), July 21, 1950.]

Street Traffic—Trailer—Poultry shed drawn by tractor—"Land Implement"—Road Traffic Act, 1930 (c. 43), s. 1—Motor Vehicles (Construction and Use) Regulations, 1947 (S.R. & O., 1947, No. 670), reg. 3 (1).

A An empty poultry shed, which had no brakes or braking system, was not equipped with pneumatic tyres or tyres of soft or elastic material, and had no distinguishing mark exhibited on the back, was drawn along a public road by a tractor. The tractor was driven by the respondent who was charged under the Road Traffic Act, 1930, s. 3 (1) and (3), with having used on a road "a trailer which did not comply with the regulations applicable to the class or description of vehicles to which the vehicle belonged, as to construction, weight and equipment thereof." The justices were of opinion that the shed was not a vehicle because it was not an instrument or thing by which persons or goods were conveyed, and so did not fall within the definition of a "trailer" in s. 1 of the Act of 1930, *viz.*, a vehicle drawn by a motor vehicle. They were, further, of opinion that, even if the poultry shed was a vehicle, it was a "land implement" within the meaning of reg. 3 (1) of the Motor Vehicles (Construction and Use) Regulations, 1947 (S.R. & O., 1947, No. 670) and, therefore, excluded from the requirements of the regulations. Accordingly, the justices found the respondent Not Guilty of the offence charged.

D HELD: the decision of the justices was wrong because (a) for the purposes of s. 1 of the Act of 1930 anything on wheels which was drawn by a motor vehicle was a "trailer," and, therefore, the shed was a "trailer" within the meaning of the section; and (b) the shed was not a "land implement" within reg. 3 (1) of the regulations of 1947, and, therefore, was not excluded from the requirements of the regulations.

E [FOR THE DEFINITION OF TRAILER, see HALSBURY, Hailsham Edn., Vol. 31, pp. 764-766, paras. 1187, 1188, and 1950 Supplement.]

CASE STATED by Norfolk justices.

F At a court of summary jurisdiction sitting at Aylsham on Mar. 28, 1950, an information was preferred by the appellant, William Garner, against the first respondent, Lawrence Godfrey Burr, that he used on a road "a trailer which did not comply with the regulations applicable to the class or description of vehicles to which the vehicle belonged, as to construction, weight and equipment thereof contrary to s. 3 (1) and (3) of the Road Traffic Act, 1930." Informations were also preferred against the second respondent, Edmund Burr, that he permitted "the above-mentioned offence contrary to s. 3 (1) and (3) of the said Act of 1930," and against the third respondent, Thomas Atlee Grix, that he "aided and abetted the said Lawrence Godfrey Burr to commit the offence [under the Road Traffic Act, 1930, s. 3 (1) and (3)] contrary to s. 5 of the Summary Jurisdiction Act, 1848."

H Before the justices it was proved or admitted that on Mar. 5, 1950, Lawrence Godfrey Burr, accompanied by Grix, was, with the consent of Edmund Burr, driving along a road a tractor which was towing an empty poultry shed fitted with four iron bogie wheels. The poultry shed had no brakes or brake system and was not equipped with pneumatic tyres or tyres of soft or elastic material, and there was not exhibited on the back of the shed a distinguishing mark in the form set out in the diagram contained in sched. II to the Motor Vehicles (Construction and Use) Regulations, 1947 (S.R. & O., 1947, No. 670).

The appellant contended that the poultry shed was a "trailer" within the meaning of s. 1 of the Act of 1930, and that it did not comply with regs. 49, 50, 51 and 60 of the regulations of 1947. The respondents contended that the poultry

shed was a land implement within the meaning of reg. 3 (1) of the regulations of 1947. The justices dismissed the informations, being of opinion that the poultry shed did not fall within the definition of a "trailer" in s. 1 of the Act of 1930 since it was not a vehicle, *viz.*, an instrument or thing by which persons or goods are conveyed, and, even if it was a vehicle, it was a land implement, and, therefore, excluded from the requirements of regs. 49, 50, 51 and 60 of the regulations of 1947. The appellant appealed.

Southall for the appellant.

The respondents did not appear.

LORD GODDARD, C.J.: This is a Case stated by justices for the county of Norfolk. It raises the short point whether an empty poultry shed fitted with iron bogie wheels is, when drawn by a motor vehicle, a "trailer" within the meaning of the Road Traffic Act, 1930, s. 1. This poultry shed was being drawn along a road by a tractor.

Section 1 of the Act of 1930 provides:

"This Part of this Act shall apply to all mechanically propelled vehicles intended or adapted for use on roads (in this Act referred to as 'motor vehicles') and to vehicles (in this Act referred to as 'trailers') drawn by motor vehicles."

If this shed while being drawn along the road was a "trailer," there is no doubt that the offence charged was committed because it did not comply with the Motor Vehicles (Construction and Use) Regulations, 1947, which govern, *inter alia*, the use of trailers on a highway. These regulations are designed, among other things, to protect road surfaces. This poultry shed had ordinary iron tyres, and not, as required by reg. 51 of the regulations, pneumatic tyres. It was, therefore, liable to damage roads.

In my opinion, the justices have put too narrow an interpretation on the word "vehicle" for the purpose of the Act of 1930. It is true that according to the dictionary definition a "vehicle" is primarily a means of conveyance provided with wheels or runners and used for the carriage of persons or goods and also a receptacle in which anything is placed to be moved. This poultry shed was being taken to market. The justices do not find that there were any poultry in it at the time. The Act of 1930 is, however, clearly aimed at anything which will run on wheels and is being drawn by a tractor or other motor vehicle, and, accordingly, an offence was committed.

One must assume that the regulations are *intra vires* for this purpose, and the regulations of 1947 that have been made by the Minister of Transport under the Act of 1930 clearly deal with many vehicles which are not designed for the carriage of goods or passengers. They deal with drying or mixing plant for the production of asphalt and vehicles for road construction. Many things are "trailers" for the purpose of this Act, and it cannot really be doubted that a "trailer", being a vehicle drawn by a motor vehicle, envisages anything which can be drawn on wheels. Therefore, I think the justices ought to have found that this poultry shed was a vehicle drawn by a motor vehicle within the meaning of s. 1 of the Road Traffic Act, 1930, and, therefore, a "trailer" within the meaning of the section. There is an exception in the regulations of 1947 taking out from their requirements a "land implement," which by reg. 3 (1) is defined as

"any implement or machinery used with a land locomotive or a land tractor in connection with agriculture, grass cutting, forestry, land levelling, dredging or similar operations and includes a living van and any trailer which for the time being carries only the necessary gear or equipment of the land locomotive or land tractor which draws it."

This poultry shed is not an implement or machinery used in connection with agriculture within the meaning of that definition, which is designed to deal with such things as reapers, binders, rakes and harrows.

For these reasons I think the justices were wrong and the case must go back with an intimation that the offence was proved.

HILBERY, J.: I agree. Having regard to the mischief and the purpose of the Act to which my Lord has called attention, I am satisfied we ought to give a generous construction to the words which are brought for consideration in this case. I am satisfied that for the purposes of the Act this poultry house on wheels, being drawn, as it was, by a motor vehicle along the highway, was a "trailer" within the meaning of s. 1 of the Act of 1930, and, for the reasons given by my Lord, I come to the same conclusion as he did. With regard to the finding of the justices that the poultry shed could be regarded as a land implement, I do not think that it could possibly be so regarded when one looks at the definition given in the Motor Vehicles (Construction and Use) Regulations, 1947, reg. 3 (1), which defines "land implement" as "any implement or machinery used with a land locomotive or a land tractor in connection with agriculture." A poultry shed is certainly not an implement or machinery. It is not within the words of the definition, and nobody, I should have thought, by any ordinary process of reasoning, could bring it within those words. I agree that the Case must go back for conviction.

BYRNE, J.: I agree.

Appeal allowed. Case remitted with direction to convict.

Solicitors: *Sharpe, Pritchard & Co.*, agents for *H. O. Brown*, Norwich (for the appellant).

[*Reported by F. GUTTMAN, Esq., Barrister-at-Law.*]

DUNN v. FIDOE.

[COURT OF APPEAL (Tucker and Asquith, L.J.J., and Hodson, J.), July 24, 1950.]

Agriculture—Agricultural holding—Notice to quit—"Aggregate of agricultural land"—Inn and orchard land and pasture—Inn buildings used in connection with agricultural trade—Agricultural Holdings Act, 1948 (c. 63), s. 1 (1).

In 1943 the landlord's predecessor in title let to the tenant under a tenancy agreement an inn, outbuildings, and land, which together were twelve acres in area, on a yearly tenancy at a rental of £60 per annum. The inn and garden occupied 0.381 acre, and the remainder of the land consisted of orchard and pasture. The landlord purchased the property for £5,500, of which £600 was attributable to the value of the land, and the net rateable value of the premises was £22, the land being de-rated. The inn was fully licensed and did a substantial trade, but the tenant also made substantial profits from the land, mainly by the sale of fruit. The house was not a farm-house, but had been adapted for use with the land. The landlord gave the tenant notice to quit the premises expiring on Sept. 29, 1949, but, as the consent of the Minister of Agriculture had not been obtained, the tenant served a counter-notice under the Agricultural Holdings Act, 1948, s. 24 (1). The landlord obtained the Minister's consent, but, on a reference under s. 25 (4), the agricultural land tribunal refused consent. The landlord now claimed possession on the ground that, nevertheless, the notice to quit was effective.

HELD: the inn buildings were used in connection with the agricultural trade carried on by the tenant, and as, in view of s. 1 (1) of the Act of 1948, the test for ascertaining whether premises were an agricultural holding was no longer the dominant or main user, the whole of the premises, including

the inn, constituted an "agricultural holding" within s. 1 (1), and, therefore, in the absence of the Minister's consent, the notice to quit was invalid.

Quaere whether in a case where premises are used partly for agricultural purposes only and partly only for purposes unconnected with the agricultural user, a notice to quit the whole (without the consent of the Minister of Agriculture) might, on the construction of the Act of 1948, be invalid as regards the agricultural part, but valid as regards the remainder.

[FOR THE AGRICULTURAL HOLDINGS ACT, 1948, s. 1, see HALSBURY'S STATUTES, Second Edn., 1948 Continuation Vol., pp. 26, 27.]

Cases referred to:

- (1) *Re Lancaster and Macnamara*, [1918] 2 K.B. 472; 87 L.J.K.B. 1250; 119 L.T. 440; 2 Digest 42, 232.
- (2) *Re Joel's Lease*, [1930] 2 Ch. 359; 99 L.J.Ch. 529; 143 L.T. 765; Digest Supp.

APPEAL by the landlord from an order made by His Honour JUDGE LANGMAN at Tenbury County Court on June 6, 1950, dismissing the landlord's claim for possession of an inn and certain pasture and orchard land.

JUDGE LANGMAN held that the land and inn together constituted an agricultural holding within the definition contained in the Agricultural Holdings Act, 1948, s. 1 (1), and that, as the consent of the Minister of Agriculture to the notice to quit had not been obtained, the notice was invalid. The facts appear in the judgment of TUCKER, L.J., and are summarised in the headnote.

E. G. H. Beresford for the landlord.

N. A. Carr and *G. Green* for the tenant.

TUCKER, L.J.: This is an appeal by the landlord from a reserved judgment of His Honour JUDGE LANGMAN, delivered by him on June 6, 1950, in an action in which the landlord was seeking to recover possession of certain licensed premises known as the Live and Let Live Inn, together with certain land at Neen Sollars in the county of Salop. The licensed premises and land had been let by the landlord's predecessor in title for a tenancy from year to year, a notice to quit had been served expiring on Sept. 29, 1949, and the landlord claimed possession. The tenant's defence was that the land in question was an agricultural holding within the meaning of the Agricultural Holdings Act, 1948, and that the necessary consent to the notice to quit had not been obtained, and, therefore, that it was invalid and ineffective, and the learned judge so held.

The validity of the notice to quit had been raised by the tenant, who claimed that consent should not be given. The matter was dealt with by the county agricultural executive committee, who advised the Minister to give his consent, but the matter was taken by way of appeal to the agricultural land tribunal under the provisions of s. 25 (4) of the Act of 1948. The land tribunal refused consent, and so the position is that, if this is an agricultural holding within the meaning of the Act and if the agricultural holding includes the licensed premises, the notice to quit is invalid.

The question turns primarily on the proper construction of the definition of "agricultural holding" in s. 1 (1) of the Act of 1948, which provides:

"In this Act the expression 'agricultural holding' means the aggregate of the agricultural land comprised in a contract of tenancy, not being a contract under which the said land is let to the tenant during his continuance in any office, appointment or employment held under the landlord."

By sub-s. (2):

"For the purposes of this and the next following section, the expression 'agricultural land' means land used for agriculture which is so used for the purposes of a trade or business and includes any other land . . ."

These definitions must be considered in the light of the previous legislation on this subject and the cases decided thereunder. In the Agricultural Holdings Act, 1908, s. 48 (1), the definition of "holding," which is the term used there, was:

A " . . . any parcel of land held by a tenant, which is either wholly agricultural or wholly pastoral, or in part agricultural and as to the residue pastoral, or in whole or in part cultivated as a market garden, and which is not let to the tenant during his continuance in any office, appointment, or employment held under the landlord."

Under that statute, *Re Lancaster and Macnamara* (1) was decided, and the headnote to that case is as follows ([1918] 2 K.B. 472):

B "Where under a single agreement of tenancy at an entire rent a farm is let together with an inn upon which a business entirely separate from the farm is carried on, the subject of the letting is not a 'holding' within the meaning of s. 48 of the Agricultural Holdings Act, 1908, in respect of which the tenant is entitled, on the expiration of his tenancy, to claim compensation for improvements under the Act."

C I pause there to observe that under the Act of 1908 there were no similar provisions whereby notices to quit were rendered ineffective by reasons of the absence of the Minister's consent, and *Re Lancaster and Macnamara* (1) was dealing only with the tenant's right to obtain compensation. At the conclusion of his judgment LORD SWINFEN EADY, M.R., said (*ibid.*, 481):

D "In my judgment, where you have a holding comprising substantial business premises with a going business as part of one demise, although a farm and lands are let with it, such a holding is not within the provisions of the Agricultural Holdings Act."

The basis of the decision is shortly stated by SCRUTTON, L.J., where he says (*ibid.*, 483):

E "But if you find any substantial part of the land used for a purpose which is neither agricultural nor pastoral, Parliament for some reason, into which I have not troubled to inquire, has not thought right, in my view, to give compensation either in respect of the whole land, or in respect of that part of it which is wholly devoted to pasture."

F There you have the test whether or not a substantial part of the land is or is not used for agricultural or pastoral purposes.

In the Agricultural Holdings Act, 1923, s. 57, there was the same definition of "holding," but s. 33 was inserted, apparently to deal with the *Macnamara* case (1). Section 33 provided:

G "Where the land comprised in a contract of tenancy is not a holding within the meaning of this Act by reason only of the fact that the land so comprised includes land (hereinafter referred to as 'the non-statutory land') which, owing to the nature of the buildings thereon or the use to which it is put, would not, if it had been separately let, be a holding within the meaning of this Act, the provisions of this Act relating to compensation for improvements and disturbance shall, unless otherwise agreed in writing, apply to the part of the land exclusive of the non-statutory land as if that part were a separate holding."

H *Re Joel's Lease* (2) was decided under the Act of 1923, and it was held that a holding let for the breeding of pedigree horses was not necessarily an agricultural holding within the meaning of that Act, because the main purpose of the letting was the breeding of horses, and, although there were in most of the fields plots of grass or portions of pasture land, the holding was not wholly pastoral. MAUGHAM, J., said ([1930] 2 Ch. 366):

"In my view it is clear that the precise language of the section stating that the provisions of the Act in such a case relating to compensation for improvements and disturbance shall apply only to what is called the 'part of the land exclusive of the non-statutory land,' shows beyond reasonable doubt that the rest of the provisions of the Act do not apply; and accordingly I see no reason for supposing that s. 23 of the Act under which the tenant is entitled to not less than one year's written notice of the intention of the landlord to terminate the tenancy applies where part only of the holding is an agricultural holding. Now is it true to come to the conclusion, which I think must be a conclusion of fact on the evidence that has been adduced in this case, that those parts of the premises which are not pasture land in the ordinary sense can fairly be described as a holding of a pastoral character so that the whole holding is an agricultural holding? I think, in considering that, I have got to bear in mind the purpose of the letting as evidenced by the circumstances in relation to the nature of the property and to the terms of the lease."

The Agriculture Act, 1947, s. 31, for the first time in permanent form introduced provisions for the Minister giving or withholding his consent to notices to quit, although similar provisions had existed under war-time regulations. Part III of the Act of 1947, which deals with agricultural holdings, has been repealed, and the Act of 1948 has taken its place. It is to be observed that the definition contained in s. 1 (1) of the Act of 1948 is wholly different from the definitions in the previous Acts, and that it clearly contemplates a contract of tenancy which comprises in part agricultural land and in part land which is not agricultural, and it enacts that the "agricultural holding" is to mean the aggregate of the agricultural land comprised in such contract of tenancy. It is remarkable that in the remaining provisions of the Act no provision seems to have been made, at any rate in express terms, for severance of that part of the land which is agricultural from that part which is not agricultural where both are comprised in the same contract of tenancy.

The learned judge found that the premises were let under one tenancy at a rental of £60 a year. The premises comprised a village inn with outbuildings, garden and six enclosures of pasture and orchard land, the total area being twelve acres of which the house and garden occupied 0.381 acre and the remainder was orchards and pasture. The pasture land had until recently been sub-let to a tenant who did not have the use of the house and premises. The price of the property when purchased by the landlord was £5,500, of which £600 was attributable to the value of the land, and the net rateable value of the premises was £22, the land being de-rated. Having stated those facts the learned judge continued:

"The inn is fully licensed, and does a substantial trade. The house is not a farm-house, but has been adapted for use with the land. The tenant has made substantial profits from the land mainly owing to the sale of fruit in recent years."

The tenant had only let off the grazing of the pasture land, which was hilly, and had himself carried on the business of the sale of fruit on the premises which he occupied. Later in his judgment the learned judge said:

"The word 'land' includes buildings, and although the buildings are designed as an inn they are also used to a small extent for the tenant's agricultural business . . . Although the inn provides the larger and more constant part of his income he has made substantial profit from the fruit and pasture . . . Although the inn provides the main business of the tenant and the land is of very small value compared with the inn, it cannot be held that the agricultural portion is so small in extent or value that it should be disregarded."

A In my view, those findings, taken with the rest of his judgment, clearly indicate that he regarded the premises in which the tenant lived as a necessary part of the land, which would have admittedly been an agricultural holding if it had been let by itself. It is true that he finds that the most profitable user of the premises was that as licensed premises, but none the less the inn was used, and, I think, necessarily used, in connection with the agricultural trade or business carried on at the premises by the tenant. Therefore, unless counsel for the landlord is right in saying that the test is still what is the dominant or main user, the whole of these premises including the inn must be regarded as an agricultural holding. I can find no authority for the proposition that the primary or dominant user is now the test, because s. 1 of the Act of 1948 seems to me to enact the contrary by its plain language. Counsel for the landlord, however, strongly contended that the learned county court judge's judgment may give rise to difficult and harsh results in many cases—results which could not have been contemplated by the legislature. He says, for instance, that you may have a large hotel and some small portion of the land used for agricultural business purposes totally unconnected with the hotel. Or you might even have a large factory with a certain amount of land from which the produce was sold. He says that it cannot have been intended by the legislature that, in a case of that kind, a notice to quit relating to the whole premises, including the hotel or the factory, comprising the major portion of the premises, should be held to be invalid by reason of the absence of the consent of the Minister of Agriculture or the land tribunal (who are primarily interested of course in matters of agriculture), with the result that the landlord could not recover possession of the hotel or factory. It is not necessary to express any concluded view on that question, having regard to the facts found in this case by the county court judge. I am by no means convinced that our decision upholding the county court judge would necessarily result in those hardships, because I think it is a possible view that, having regard to the scheme of the Act of 1948, the language of s. 1, and the provisions of s. 31 and s. 32, it may be that a notice to quit premises of that nature could be held to be invalid without consent in so far as it applies to the agricultural portion but valid for the remainder. True that such a construction would be contrary to the common law rule that a notice to quit part of premises is bad, but none the less it may be a necessary inference from this Act that that result was intended in the case of a building, for instance, which is totally unconnected with the agricultural land with which it is let. It would not, however, be right in this case to express a concluded view on that matter, which is obviously one of considerable difficulty. It would appear from the Act as a whole that the legislature had not envisaged questions of this kind arising, and have certainly not made express provisions for dealing with them when they do arise. On the facts of this case as found by the learned county court judge I think this appeal fails.

G ASQUITH, L.J.: I agree that the appeal fails. The findings of fact of the learned county court judge make it unnecessary to decide some of the interesting and critical questions of law around which the argument revolved.

HODSON, J.: I also agree.

Appeal dismissed with costs.

H Solicitors: *Stafford Clark & Co.*, agents for *W. Stanley Mobberley & Son*, Lye (for the landlord); *Bell, Brodrick & Gray*, agents for *Ivens, Morton & Greville-Smith*, Kidderminster (for the tenant).

[*Reported by J. D. PENNINGTON, Esq., Barrister-at-Law.*]

EARL OF RADNOR v. FOLKESTONE PIER AND LIFT CO. AND ANOTHER.

[CHANCERY DIVISION (Vaisey, J.), July 20, 21, 1950.]

Requisition—Land—Compensation—Application of compensation—Land subject to mortgage—Land leased to company—Covenant by lessee to insure against fire—Insurance money to be laid out in re-building—Mortgage by lessee—Property destroyed by fire while requisitioned—Insurance policy not kept up—Whether compensation to be applied in same manner as money receivable under policy—Compensation (Defence) Act, 1939 (c. 75), s. 2 (1) (b), s. 14.

By a lease, dated July 9, 1891, property was demised for a term of nine hundred years, at a rent of £25 a year, with a licence for the lessee, a statutory company, to maintain and use thereon a pier. By cl. 16 the lessee covenanted to keep the pier continually insured against fire during the term of the lease in the joint names of the lessor and lessee, and, by cl. 17, to apply any money received under a policy of fire insurance in re-building and reinstating the pier. In 1894 the lessee created a mortgage, by way of assignment of its undertaking, to secure a sum of £2,940 with interest. From Sept. 3, 1940, until June 24, 1945, the property was requisitioned by the Crown, and the policy of fire insurance was allowed to lapse. In May, 1945, while the property was still requisitioned, the pier was completely destroyed by fire. Compensation in respect of the damage became payable by the Crown under the Compensation (Defence) Act, 1939, and the landlord contended that, as, under s. 2 (1) (b) of the Act, the compensation was to include "a sum equal to the cost of making good any damage to the land which may have occurred during the period for which possession thereof" was retained by the Crown, there was a contractual duty on the lessee to apply the compensation money, so far as it would extend, in restoring the pier, in the same manner as if the compensation had been money payable under a fire insurance policy, and that the mortgagee, as the assignee of the lessee's undertaking, could not claim the right to the money under s. 14 of the Act of 1939 except subject to the obligations contained in cl. 17 of the lease.

HELD: although the compensation payable was closely analogous to money payable under an ordinary fire policy, the provision in s. 14 of the Act that if at the time the compensation accrued due the property was subject to any mortgage, the sum so paid should be deemed to be comprised in that mortgage, was unqualified, and, therefore, the compensation payable was not subject to the obligations contained in cl. 17 of the lease.

[FOR THE COMPENSATION (DEFENCE) ACT, 1939, see HALSBURY'S STATUTES, Second Edn., Vol. 3, p. 988.]

Case referred to:

(1) *Borthwick-Norton v. Collier*, [1950] 2 All E.R. 204; 114 J.P. 375.

ACTION by the lessor claiming (a) a declaration that the compensation money payable by the Crown under the Compensation (Defence) Act, 1939, in respect of the requisitioning of certain property, including the Folkestone pier, should be impressed in the hands of whichever of the defendants should be held to be entitled to it with a trust to lay out the money, so far as it might suffice, in repairing and re-building the pier and works in accordance with a covenant by the first defendant, the lessee, contained in the lease whereby it held the property, in respect of money receivable under a fire insurance policy; and (b) an order that the money be so laid out when received.

The lease, which was dated July 9, 1891, contained *inter alia* covenants by the lessee, Folkestone Pier and Lift Co. (the first defendant), to keep the pier and works insured against fire during the term of the lease, and to apply any

money received under the fire insurance policy in re-building, repairing, and reinstating the insured property. When the pier was requisitioned by the Crown in September, 1940, the fire insurance policy was allowed to lapse. The pier was destroyed by fire while it was requisitioned and a sum of about £10,000 was payable under the Act of 1939. The action was originally brought against the defendant company alone, but, on realising their interest in the matter, the second defendants, the British Transport Commission, who were the present mortgagees under a mortgage created by the defendant company in 1894, obtained an order that they be added as defendants, having, in the meanwhile, commenced an action against the defendant company to enforce the security of the mortgage, and having obtained an order from ROXBURGH, J., dated May 20, 1949, for the appointment of a receiver of the defendant company. The second defendants claimed that, under s. 14 of the Act of 1939, the compensation was to be deemed to be comprised in their mortgage. The plaintiff contended that, as the second defendants were the assignees of the defendant company's undertaking under the mortgage, they could not claim the right to the money under s. 14 except subject to the obligations contained in the lease. The facts appear in the judgment.

Sir Andrew Clark, K.C., and *Newsom* for the plaintiff.
Russell, K.C., and *H. E. Francis* for the second defendants.
 The first defendant did not appear.

VAISEY, J.: This is a strange action in some ways and the result is something which could not easily have been foreseen, and I doubt whether it was ever in the contemplation of the legislature that such a conclusion could be reached as that to which I have come in the present case. I have, however, to decide the matter as a question of law, and, although I might be able to cast my judgment into a more attractive form if I reserved it, having made up my mind I cannot see that any good purpose would be served by withholding from the parties the decision which I am about to state.

The plaintiff, the Earl of Radnor, may be regarded as the lessor and owner of the ground on which a pier stands, or stood, on the sea front at Folkestone, and, I think, also of the pier itself. The pier was constructed under a private Act—the Folkestone Pier and Lift Act, 1884. That Act, which incorporated certain general provisions of the Companies Clauses Act, 1863, and other Acts, enabled the defendant company, Folkestone Pier and Lift Co., to construct, maintain and regulate the pier in question. It is rather strange to find that, notwithstanding that Act, the defendant company were obliged to become the lessees under a lease, dated July 9, 1891, and made between the plaintiff's predecessor in title, the then holder of the earldom of Radnor, of the one part, and the defendant company, of the other part. The pier is not specifically named in the endorsement on the document. I describe it as a lease, but it is, admittedly, both a lease and a licence. It is, in part, a lease of certain adjoining pieces of ground on the sea front at Folkestone and also, possibly, of some part of the ground on which the pier stood, but, besides being a lease of such property as that, it is also a licence which empowered the defendant company to deal with the pier in a certain way and in no other way. Indeed, the effect of it is very much the same as though there had never been the private Act which I have mentioned, and Lord Radnor had leased the ground to the company, retaining such rights over the site of the pier as are thereby reserved to him in the capacity of landlord.

The lease begins by demising the ground on the sea front which abutted on the landward end of the pier. It also demised "full liberty and licence to maintain and use the said pier and the works connected therewith as now constructed"—i.e., as constructed at the time when the lease was granted—according to certain plans and elevations to which the lease refers. The term of the demise and the licence is said to be nine hundred years from June 1, 1894, the rental

being £25 a year which was subsequently, by certain other accretions being made to the structure, increased to a larger amount. The obligations of the lessee, *i.e.*, the defendant company, were, many of them, of the usual kind, *viz.*, to pay the rent, to pay the outgoings, to keep the approaches to the pier as an ornamental garden and in good order, to maintain the pier in its then existing form and not to turn it into a solid structure which would interfere with the flow of the tide or the passage of boats underneath it, and generally to maintain the pier as a pier, not to allow the pier to become an eyesore through being covered with advertisements, and generally to keep it in repair, not to assign the lease, and at the end of the term granted by the lease or its sooner determination to surrender and yield it up to the lessor with all buildings, improvements, and so forth. Clause 16 of the lessee's covenants is a covenant to insure, and the obligation laid on the company is, during the term of the lease

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"... to insure and keep continually insured from damage by fire the said pier and works and all other buildings [which might be erected on the pier] in the sum of £5,000 in the Phoenix Fire Assurance Co. or such other of the public offices for insurance against fire in London or Westminster or in the county of Kent as the lessor shall direct in the names of the lessor and of the company..."

Then there is the usual obligation to produce the policy and the receipts for the current premiums. Clause 17 is in these terms:

"And also will as often as the said pier and works and buildings or any part thereof shall be destroyed or damaged by fire or other accident lay out and apply the money to be received by virtue of any such insurance as aforesaid and all such other sums of money as shall be necessary for that purpose such other sums to be provided by the company in re-building repairing and reinstating the same under the inspection and to the satisfaction of the architect or surveyor for the time being of the lessor."

Then there is a proviso for re-entry if the rent should be unpaid or the lessee's covenants should in any respect be in breach. It is, perhaps, somewhat strange to observe that the lessor does not covenant to do anything.

On Sept. 3, 1940, possession was taken by the Crown of the whole of the demised premises and the whole of the pier "in the exercise of emergency powers," that being the phrase used in the Compensation (Defence) Act, 1939, s. 1, and that possession, so taken, was continuously retained until June 24, 1945. On May 28, 1945, while the pier was still in the possession of the representatives of the Crown, a disastrous fire broke out, and the pier (except those parts of it which were indestructible by fire) was for all practical purposes completely destroyed, and so it remains to this day. I need not go in detail into the reasons for it. It will suffice for me to state the fact that the insurance for which the lease provides in cl. 16 was not kept up. No policy in the joint names of the landlord and the pier company was in existence as from 1941. That came about, so far as one can discover, in these circumstances. Inasmuch as under the Act of 1939 the Crown was liable to compensate the owners for damage to property of which it had taken possession, the authority concerned, the War Office, represented to the defendant company that it was useless for them to continue to insure, and, rightly or wrongly, and with whatever object it may be, the defendant company did not insure. The War Office intimated that they were no longer prepared to reimburse the premiums under the Phoenix policy of insurance. There was no policy in existence, and, therefore, there is no money receivable under any policy in respect of the fire which took place on May 28, 1945.

This action was originally an action between the plaintiff, as landlord, and the defendant company. It was, however, subsequently realised that the British Transport Commission, as successors to the undertaking of the South Eastern Railway Co., and the Southern Railway, were the mortgagees under a mortgage

dated May 4, 1894, created by the defendant company to secure a sum of £2,940 with interest, and that the British Transport Commission was obviously interested in the matter. The Crown having intimated that a sum, which is somewhere in the neighbourhood of £10,000, would be paid, or was likely to be paid, in respect of the damage occasioned by the fire, an action to enforce the security of the mortgage was brought by the British Transport Commission against the defendant company and the Public Trustee, who was sued on behalf of

A himself and other debenture holders in the company. In that action—to which, of course, the plaintiff in this case is not a party—an application was made for the appointment of a receiver, in order that the compensation money payable, as it was supposed, primarily and normally to the defendant company, should be negotiated as regards the amount and taken over and claimed by the British Transport Commission. The appointment of the receiver was made by ROXBURGH, J., on May 20, 1949, in the other action to which I have referred. I believe that some notification was made to the Crown authorities that, in view of the plaintiff's claim, they should not part with the money but should allow it to remain pending the decision of this action. In any case, the receiver appointed in that action has not been able to obtain possession of the compensation or any part of it.

C In the action now before me it was originally said that the plaintiff, as landlord, was the proper person to receive the compensation as being the "owner" of the land within the meaning of that word as defined in the Compensation (Defence) Act, 1939, s. 17 (1) (a), that definition stating that "owner" means:

D "in relation to land, the person who is receiving the rackrent of the land, whether on his own account or as agent or trustee for any other person, or who would so receive the rackrent of the land if it were let at a rackrent."

The plaintiff's original contention was that he would be the proper person to receive the rackrent of this pier if it had been let at a rackrent (I interpose parenthetically to say that the defendant company appears to be completely derelict), but that contention, unfortunately, before this action came on for trial, was made completely unsustainable by the decision of the Court of Appeal in *Borthwick-Norton v. Collier* (1), which was to the effect that the person who must be regarded as receiving the rackrent must be the person who, in the case of a lease, was capable of being so described at the date of the lease. It was quite obvious that the plaintiff could not be said to have been a rackrent landlord

F at the date of the lease of July 9, 1891, under which all his rights arose.

Section 14 of the Act of 1939 provides:

G "Where any sum by way of compensation is paid in accordance with any provisions of this Act requiring compensation to be paid to the owner of any property, then, if at the time when the compensation accrues due, the property is subject to any mortgage, pledge, lien or other similar obligation, the sum so paid shall be deemed to be comprised in that mortgage, pledge, lien or other obligation."

That is a qualification of what appears in s. 2 (3), which says that, *prima facie*, the person entitled to receive the money is the person who is then the owner of the land. Having been deprived of his first avenue of approach, the plaintiff now puts his case in this way. He says that, for all practical purposes, the compensation money stands, or ought to stand, in exactly the same position as the money which would have been received under the policy of insurance contemplated as existing under the lease, and that there is really no difference (and there ought to be regarded as being no difference in equity) between that compensation money and the money which would have been paid under the policy taken out under the lease.

H Section 1 (1) of the Act of 1939 provides that where land has been taken possession of on behalf of His Majesty:

"... then, subject to the following provisions of this Act, compensation assessed in accordance with those provisions shall be paid out of moneys provided by Parliament, in respect of the taking possession of the land. . ."

By s. 2 (1) (b) the compensation is to include

"a sum equal to the cost of making good any damage to the land which may have occurred during the period for which possession thereof is so retained (except in so far as the damage has been made good during that period. . ."

The conditions under which this compensation money is payable are very closely analogous, in a case such as the present, to a claim made under an ordinary fire policy. When, however, it is said that the compensation money is subject to all the qualifications introduced as between landlord and tenant it is very difficult to see how that contention can be justified, because the compensation which has to be paid under the Act is, as appears from the provisions I have already read, compensation which is to be paid in accordance with the other provisions of the statute, among which is the provision in s. 14 that, if at the time when the compensation accrues due, the property is subject to any mortgage, the sum so paid shall be deemed to be comprised in that mortgage. That statement is apparently quite unqualified. The mortgage under which the British Transport Commission are the present mortgagees is in the form of a mortgage created by a statutory company and contains an assignment of "the undertaking of the company . . . and all the estate right title and interest of the company in the same"—which, I think, must mean "in the undertaking." The provisions of the Companies Clauses Consolidation Act, 1845, with respect to the borrowing of money by statutory companies, are incorporated, and for all practical purposes it seems to me that the British Transport Commission, as successors to the South Eastern Railway Co., are really in the position, so far as this action is concerned, of ordinary mortgagees.

The plaintiff says that, as a matter of equity, and regard being had to what would have happened if this had been money payable under a policy of insurance, there is a contractual duty on the part of the defendant company to apply this money for the purpose of making good the pier and restoring it so far as that money would extend—and, indeed, to restore it without any limitation, although his rights against the company, as it is without funds, appear to be completely worthless. Counsel for the plaintiff contends that the British Transport Commission, as mortgagees and assignees of the undertaking, are entitled to the entirety of the undertaking, and that they cannot claim the right to this money except subject to the obligations originally attaching to that money, *viz.*, the obligations under cl. 17 of the lease. Up to a point it certainly looks as if these compensation moneys ought to be in the same position as the policy moneys would have been if there had been no war, no Compensation (Defence) Act, and the pier had been burnt down in those imaginary circumstances. Unfortunately, however, those are not the facts, and although the name of equity and the great principle of equity have been called in aid, whilst I confess at once that I should like to be able to make use of that principle, I do not think it is possible. The money payable is not fire insurance money, but compensation under an Act of Parliament—and, just as it might be argued that, if it had been money under the lease, regard would have to be had to all the clauses in the lease, so, I think that, if this money is to be paid at all, it must be paid on all the terms of the compensation provisions, and those terms include in the plainest possible language the statement that, if the property—in this case the pier which is part of the undertaking—is at the moment when compensation is due (*i.e.*, when the fire occurred) subject to a mortgage, the sum so paid shall be deemed to be comprised in the mortgage. That is a very strong provision because it envisages a case in which the compensation money was not, in fact, comprised in the mort-

gauge. Counsel for the plaintiff has pressed me (and I think I agree with him) to say that the policy moneys would not have been affected by the mortgage for two reasons: (i) because the mortgagees would have had to take the money under cl. 16 subject to the obligations in cl. 17, and (ii) because the policy would have stood in the joint names of lessor and lessee, so that, as a matter of practical possibility, no use could have been made of it except with the lessor's consent. I have said that I do not think this situation can have been envisaged by the Act which, of course, was passed at a moment of great emergency and probably drafted in general terms and in a hasty manner, but I do comment (and I think it is a very curious position) that, even if a mortgagor had in the most express terms excluded from the scope of the mortgage this particular compensation money, yet it appears that, if the property is subject to any mortgage, the sum paid as compensation under the Act shall be deemed—contrary to the fact and disregarding the express intentions of the parties—to be comprised in the mortgage which expressly excluded it. That, of course, is the kind of position which arises when legislation is carried through in an emergency, but, although one has long ceased to be shocked at the consequences which flow from legislation passed in exceptional circumstances and at an exceptional time, it does seem to me to be a most extraordinary invasion of the ordinary rights of the subject. I have to decide the action on the true meaning of the statute, regard, of course, being also had to the terms of the lease, and it seems to me that I have no option but to dismiss the action. I am rather troubled about the costs, because it seems to me that the British Transport Commission are getting a very handsome present owing to the very curious language of s. 14 of the Act. In the circumstances, although it is very unusual to deprive successful defendants of their costs, I shall make no order as to the costs of the action and dismiss it without costs.

Action dismissed. No order as to costs.

Solicitors: *Bischoff & Co.* (for the plaintiff); *M. H. B. Gilmour* (for the second defendants).

[Reported by R. D. H. OSBORNE, Esq., Barrister-at-Law.]

TETAU v. O'DEA.

[KING'S BENCH DIVISION (Lord Goddard, C.J., Byrne and Donovan, JJ.), July 24, 1950.]

Bastardy—Child born abroad of foreign mother domiciled abroad—Putative father British subject domiciled in England—Jurisdiction to make affiliation order—Bastardy Laws Amendment Act, 1872 (c. 65), s. 3.

A German woman, domiciled in Germany, was delivered in Germany of an illegitimate child, the father of which she alleged was an Englishman domiciled in England. On an application by her for an affiliation order against this man,

HELD: the order could not be made in respect of a child born abroad of a mother domiciled abroad.

R. v. Blane (1849) (13 Q.B. 769), *still good law.*

[AS TO THE REQUISITES FOR JURISDICTION IN AFFILIATION PROCEEDINGS, see HALSBURY, Hailsham Edn., Vol. 2, pp. 582, 583, paras. 802, 803; and FOR CASES see DIGEST, Vol. 3, pp. 387, 388, Nos. 253-269.]

Cases referred to:

(1) *R. v. Blane*, (1849) 13 Q.B. 769; 18 L.J.M.C. 216; 13 L.T.O.S. 257; 13 J.P. 825; 116 E.R. 1458; 3 Digest 387, 257.

- (2) *R. v. Humphrys, Ex p. Ward*, [1914] 3 K.B. 1237; 84 L.J.K.B. 187; *sub nom. R. v. Humphrys, Ex p. Ward*, 111 L.T. 1110; 79 J.P. 67; 3 Digest 387, 258.

CASE STATED by the appeal panel of the County of London Quarter Sessions.

On Feb. 21, 1950, on a complaint made by the appellant that she had been delivered of a bastard child of which the respondent was the father, an affiliation order was made against the respondent by the magistrate sitting at West London magistrate's court. The appellant was a single woman for the purpose of the Bastardy Laws Amendment Act, 1872, and on Aug. 15, 1949, she gave birth to a male child, James Edward Braune, at Hamburg, Germany. The appellant was born a German in Germany, and at the date of the birth of the child she was domiciled and resident in Germany. On Nov. 11, 1949, she came with her child to England at the instance of the respondent and had resided here ever since. The respondent appealed to quarter sessions where it was contended on his behalf that, as the said child was born abroad of a foreign mother who had a foreign domicile at the date of his birth, in view of the decision in *R. v. Blane* (1) the magistrate had no jurisdiction to make the order. It was contended for the appellant that the decision in that case was no longer good law and that there was nothing in the Act of 1872 which need be taken to limit jurisdiction in the circumstances of the present case. Quarter sessions allowed the respondent's appeal and quashed the order.

I. H. Jacob and Langdon-Down for the applicant.
Craymer for the respondent.

LORD GODDARD, C.J.: This is a Case stated by the appeal panel of the County of London Quarter Sessions who allowed an appeal and quashed an affiliation order made by the magistrate at the West London magistrates' court. The chairman of the appeal panel, having stated the facts, expressed his opinion in this way:

"On the facts above related, we came to the conclusion, and so found, that the said facts were indistinguishable from those in *R. v. Blane* (1) and that we were bound by that decision, and that, therefore, neither we nor the said magistrate had the power to make an affiliation order under the said Act. The said appeal panel, therefore, allowed the appeal and quashed the said order."

Counsel for the appellant has asked us to distinguish *R. v. Blane* (1) in view of the decision in *R. v. Humphrys, Ex p. Ward* (2). It is important to look at the statute in force at the time of the decision in *R. v. Blane* (1). It was s. 2 of the Poor Law Amendment Act, 1844, and was in these terms:

"And be it enacted, that any single woman who may be with child, or who may be delivered of a bastard child, after the passing of this Act, or who has been delivered of a bastard child within the period of six calendar months before the passing of this Act, may either before the birth, or at any time within twelve months from the birth of such child, or at any time thereafter, upon proof that the man alleged to be the father of such child has within the twelve months next after the birth of such child paid money for its maintenance, make application to any one justice of the peace acting for the petty sessional division of the county, or for the city, borough, or place in which she may reside, for a summons to be served on the man alleged by her to be the father of such child; and if such application be made before the birth of the child the woman shall make a deposition upon oath stating who is the father of such child, and such justice of the peace shall thereupon issue his summons to the person alleged to be father. . ."

That was the law in 1849 when a Frenchwoman domiciled in France brought

bastardy proceedings against a man in this country, and the court decided that the bastardy laws did not apply. LORD DENMAN, C.J., giving a very short judgment in *R. v. Blane* (1), said (13 Q.B. 772):

A “Assuming that the magistrate who made this order has examined the law of France, and ascertained that according to that law the child is a bastard, we are clearly of opinion that children born out of this country are not the subject of our bastardy laws. I will only add that the principles of humanity are not concerned in this decision; for every destitute person in this country has a right to maintenance as casual poor.”

B Observe that the learned Lord Chief Justice said that, even assuming that the child was a bastard according to French law, in his opinion, children born out of the country were not the subject of the bastardy laws. COLERIDGE, J., gave a long judgment, and, having pointed out that the bastardy laws in their origin were designed to relieve the parish where the child was born of the obligation to maintain it, said (*ibid.*, 773):

C “The legislature in all these statutes is obviously dealing with bastards born in some parish; that is, in this country. The word ‘bastard’ therefore has always been used by the legislature in a sense known to our law; and as denoting all the incidents which belong to the status of bastardy according to our law. If the word ‘bastard’ is, on the other hand, to comprehend any bastard born in any part of the world, an immense field of inquiry must be traversed respecting the status of children according to the different laws of different countries. On this ground, I am of opinion that this order is bad.”

D ERLE, J., said (*ibid.*, 774):

“It is quite clear that our statutes relating to bastardy never contemplated the case of a child born a bastard in a foreign country.”

E Those judgments seem to me to lay down in the clearest possible terms—by a court of very considerable authority—that the bastardy laws of this country have no application where a bastard or a child appearing to be a bastard is born out of the country.

F Then comes *R. v. Humphrys, Ex parte Ward* (2), a case which in some respects is somewhat difficult to understand. The highest at which, it seems to me, that decision can be put is that the majority of the court considered that, if the applicant was an English subject and was domiciled in this country, she could obtain a bastardy order notwithstanding that she was actually delivered of the child out of the country. The odd thing is that BANKES, J., having laid that down, quotes the judgment of LORD DENMAN, C.J., in *R. v. Blane* (1) and says ([1914] 3 K.B. 1241):

G “The Lord Chief Justice meant that the case in question was clearly one in which the status of the child had to be ascertained according to French law, and that, even assuming that the magistrate had examined the law of France and ascertained that according to that law the child was a bastard, he still thought that the case was not subject to the bastardy laws. With that I entirely agree.”

H I can only think that the learned judge entirely agreed with that, having regard to the rest of his judgment, for one of two reasons. First, he may have taken the view he did because it had not been made clear in the affidavit on which *certiorari* was moved that the woman was not domiciled in this country and she was assumed to be a British subject. I think also that he may have meant that he agreed with *R. v. Blane* (1) because in that case the mother was a foreigner and was domiciled out of the country, whereas in the case which he was considering the mother was an English subject and domiciled in this country. LUSH, J., who agreed with BANKES, J., after saying that he could see nothing

in the language of the statute to indicate that the Act did not apply, unless the child were born in England or Wales, went on ([1914] 3 K.B. 1243):

"If the mother domiciled and resident in England goes to Scotland and is confined there and then returns to the place where she was formerly resident, I see nothing to suggest that in that case the statute does not apply. On the other hand, there is much to indicate that the Act would not apply when the mother is a foreigner and the child is born abroad."

AVORY, J., dissented from that and said that, in his opinion, the case was entirely covered by the judgments in *R. v. Blane* (1).

The matter which impresses me is that the legislature, which must be presumed to have had knowledge of the decision in *R. v. Blane* (1), passed the Bastardy Laws Amendment Act, 1872, but did not in any way purport to overrule the decision in *R. v. Blane* (1) or to make any provision that would have the effect of enabling the courts to distinguish *R. v. Blane* (1). I notice that they provided in the Act that the application could be made at any time within twelve months after the return to England of the man alleged to be the father of the child. That provision was not in the Poor Law Amendment Act, 1844, so the legislature were considering the case of one parent returning to this country and providing for what was to happen if the father were out of England and within what time after his return an application could be made. No provision was made with regard to the mother who was out of England when the child was born, and no right was given to her to apply to the court on her return.

In my opinion, *R. v. Blane* (1) must be regarded as good law. It has never been reversed. The grounds on which it was distinguished in *R. v. Humphrys, Ex parte Ward* (2), do not exist in this case. Some day it may have to be considered whether the grounds on which it was distinguished are correct, and if so, which line of authority the court should follow, but that does not arise in the present case because the grounds on which the court distinguished *R. v. Humphrys, Ex parte Ward* (2) from *R. v. Blane* (1) do not exist here. Accordingly, in my opinion, quarter sessions were right in considering that they were bound by *R. v. Blane* (1), and this appeal must be dismissed.

BYRNE, J.: I agree.

DONOVAN, J.: I agree. With diffidence, I would say that, in my view, *R. v. Humphrys, Ex parte Ward* (2) is not irreconcilable with *R. v. Blane* (1), if one bears in mind the difference in the facts. In *R. v. Blane* (1) there was no question of the woman being domiciled here. She was a Frenchwoman, described as a native of France, whose domicile of origin was, therefore, presumably French. There was no evidence of her having acquired a new domicile of choice. Obviously, to my mind, a domiciled Englishwoman ought to have the right to apply because, as is pointed out in *R. v. Humphrys, Ex parte Ward* (2), she may have gone to France merely to hide her shame and to come back after the birth. In my view, she should have such a right, because under s. 3 of the Act of 1872 it must be ascertained whether the child is a bastard child. That means a bastard subject to English law. If the mother's domicile is English, English law applies to her personal status and also to that of her child, and, therefore, the child is a bastard within the meaning of s. 3. In the present case, the domicile of the mother is German, and so her child is not a bastard child within the meaning of s. 3. The appellant wants to show that the child is a bastard under German law, but, in my opinion, s. 3 contemplates no such inquiry.

Appeal dismissed; no order as to costs.

Solicitors: *Samuel Dalton* (for the applicant); *Cliftons* (for the respondent).

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

NOEMIJULIA STEAMSHIP CO., LTD. v. MINISTER OF FOOD.

[COURT OF APPEAL (Tucker, Cohen and Asquith, L.JJ.), July 10, 11, 12, 17, 24, 1950.]

Shipping—Charterparty—Loading—"Ready to load"—Stowage space occupied by bunkers—Mainmast and after derricks not in position.

A Under her voyage charter a ship was required to be ready to load a cargo of grain in bags or bulk by 6 p.m. on Dec. 27, 1948, the time specified in the cancelling clause (cl. 12). By cl. 6 of the charter the charterer was "to have the full reach and burthen of the steamer including 'tween and shelter decks, bridges, poop, etc. (provided same are not occupied by bunker coals and/or stores)." By cl. 17 it was provided that the cargo was to be brought to and taken from alongside at the charterer's expense and risk. At the time specified in cl. 12 the No. 3 lower deck hold (which was designed as reserve bunker space, but was capable of carrying cargo) contained bunker coal and the ship had no mainmast or after derricks, without which it might have proved impossible to load certain of the holds. In these circumstances the charterer claimed to be entitled to cancel the charterparty on the ground that the ship was not ready to load. The charterparty did not give the charterer the right to use any part of the ship's gear, or prescribe or permit the charterer to select the method of loading.

D HELD: (i) on the construction of cl. 6, the charterer was entitled to have the use of the No. 3 lower deck hold providing that it was not occupied by bunker coals; even if the hold was to be treated primarily as cargo space, the charterer had to establish that the coal therein was not reasonably required for the whole voyage; and he had failed to do so.

E (ii) to support his allegations of unreadiness by reason of the insufficiency of loading gear the onus was on the charterer to prove that at the cancelling date the ship was in such a condition that the shipowner would necessarily (and not merely that he might) be unable to comply with his obligation to load some cargo which the charterer was entitled under the charterparty to call on him to take on board at the first or some subsequent port, and that onus had not been discharged.

F *Dictum of SWINFEN EADY, L.J., in Armement Adolf Deppe v. Robinson (John) & Co., Ltd. ([1917] 2 K.B. 207) applied.*

Decision of DEVLIN, J., ([1950] 1 All E.R. 985) affirmed.

[AS TO READINESS TO LOAD A SHIP, see HALSBURY, Hailsham Edn., Vol. 30, pp. 427, 428, paras. 593, 594; and FOR CASES, see DIGEST, Vol. 41, pp. 447-450, Nos. 2804-2819.]

Cases referred to:

- G (1) *Groves, Maclean & Co. v. Volkart Bros.*, (1884), 1 Cab. & El. 309.
 (2) *Sociedad Anonima Commercial de Esportacion E Importacion (Dreyfus & Co.) v. National S.S. Co.*, [1935] 2 K.B. 313; 104 L.J.K.B. 529; 153 L.T. 180; Digest Supp.
 (3) *The Vortigern*, [1899] P. 140; 68 L.J.P. 49; 80 L.T. 382; 41 Digest 473, 3043.
- H (4) *Sun Shipping Co., Ltd. v. Watson & Youell Shipping Agency, Ltd.*, (1926), 42 T.L.R. 240; 41 Digest 449, 2812.
 (5) *Vaughan v. Campbell, Heatley & Co.* (1885), 2 T.L.R. 33; 41 Digest 448, 2805.
 (6) *Grampian S.S. Co., Ltd. v. Carver & Co.*, (1893), 9 T.L.R. 210; 41 Digest 448, 2807.
 (7) *Armement Adolf Deppe v. Robinson (John) & Co., Ltd.*, [1917] 2 K.B. 204; 86 L.J.K.B. 1103; 116 L.T. 664; 41 Digest 529, 3568.

APPEAL by the charterer from an order of DEVLIN, J., dated Apr. 5, 1950, and reported [1950] 1 All E.R. 985, on a Special Case stated by an umpire.

The charterer, the Minister of Food, claimed to be entitled to cancel the charterparty on the ground that the ship was not ready to load at the time for loading specified in the option clause in the charterparty by reason of the presence of bunker coal in No. 3 lower deck hold and the absence of mainmast and after derricks. The shipowners contended that there was a right to use No. 3 lower deck hold for bunkers under the charterparty when reasonably necessary to carry sufficient coal for the whole voyage (and the charterer had not shown that it was not necessary), and that readiness to load did not involve the presence of gear which might in certain circumstances, but would not necessarily, be required. DEVLIN, J., upheld the shipowners' contentions, and awarded them damages assessed at £19,607 6s. 1d. The facts appear in the judgment of Tucker, L.J.

Scott Cairns, K.C., and *Mocatta* for the charterer.

Sir Robert Aske, K.C., and *E. W. Roskill* for the shipowners.

Cur. adv. vult.

July 24. The following judgments were read.

TUCKER, L.J.: This is an appeal from a judgment of DEVLIN, J., given on the consideration of an award stated in the form of a Special Case for the decision of the court under the Arbitration Act, 1934, s. 9 (1) (b).

In the arbitration proceedings the claimants were the Noemijulia Steamship Co., Ltd. (hereinafter called "the shipowners") and the respondent was the Minister of Food (hereinafter called "the charterer"). The claim arose under a charterparty dated Oct. 15, 1948, under which it was agreed that the steamship San George should proceed to certain Argentine ports, there load a full and complete cargo of wheat and/or maize and/or rye in bags and/or bulk and carry same to the United Kingdom. The charterer had cancelled the charterparty under an option clause in the charterparty whereby he was entitled to cancel it if the steamship was not ready to load at the first loading port ordered by the charterer by a specified date. The shipowners contended that such cancellation was wrongful and claimed damages. The umpire awarded that the San George was not ready to load by the cancelling time and that the charterer was entitled to cancel, but in an alternative award he assessed the damages at £19,607 6s. 1d., if the court should hold that the cancellation was wrongful. The learned judge upheld the alternative award for damages.

The charterparty, the material clauses of which are set out in para. 1 of the Case, is annexed thereto. I do not, therefore, consider it necessary to repeat them here. The umpire held that the ship was not ready to load at the material time, namely, 6 p.m. on Dec. 27, 1948, at San Lorenzo, on the River Parana, in two material respects. First, her No. 3 'tween deck and No. 3 lower hold contained bunker coal, and, secondly, she had no mainmast or after derricks.

With regard to the presence of bunker coal, the question largely depends on the proper construction of cl. 6 of the charterparty, which reads as follows:

"Charterers have the option of shipping other lawful merchandise, cotton, sugar, quebracho wood, quebracho extract, and distillery residue excluded. The charterers are to have the full reach and burthen of the steamer including 'tween and shelter decks, bridges, poop, etc. (provided same are not occupied by bunker coals and/or stores)."

The umpire has found that both No. 3 'tween deck and No. 3 lower hold were designed as reserve bunker space, but that if not used for this purpose were capable of carrying cargo. The question at issue really concerns No. 3 lower hold as there was no evidence that on any view No. 3 'tween deck was not reasonably required for bunkers. So far as cargo carrying holds are concerned, it is, I think, well settled that as stated by LOPES, J. (1 Cab. & El. 311) in *Groves, Maclean & Co. v. Volkart Bros.* (1):

"A ship . . . must be completely ready in all her holds . . . so as to afford the merchant complete control of every portion of the ship available for cargo."

The argument for the charterer was that No. 3 lower hold is within the full reach and burthen of the steamer and that the proviso does not apply since it is confined to 'tween decks, shelter decks, bridges, poop, etc., which items do not include No. 3 lower hold. On this the learned judge said ([1950] 1 All E.R. 986):

- A "Counsel for the charterer argues that No. 3 lower hold is within the full reach and burthen of the steamer, and that the proviso does not apply since on its true construction it is restricted to 'tween and shelter decks, bridges, poop, etc., which items do not include No. 3 lower hold. I do not agree with this construction of the proviso and I think that in any event it is rendered ineffective by the presence of the word 'etc.' That word must bring in at the least other parts of the ship similar to 'tween and shelter decks, bridges and poop. The only general description which can be given of these spaces is that given by BRANSON, J., in *Sociedad, etc. (Dreyfus & Co.) v. National S.S. Co.* (2) ([1935] 2 K.B. 319), namely, that they are 'spaces which might in the ordinary course be used for bunker coals and/or stores.'
- B
- C A reserve bunker space certainly comes under that description. It would, indeed, be curious if the proviso applied to all the 'tween decks and to such places as bridges and poop, while excluding a space specially designed as a reserve bunker space."

I agree with this construction. The word "including" is, I think, intended to embrace the enumerated spaces which follow within the ambit of the full reach and burthen of the ship, which expression standing alone is ambiguous and might be read as excluding or including the enumerated spaces. The word "same" must, I think, from its position refer either to the full reach and burthen plus the enumerated spaces or to the enumerated spaces alone. If it refers to both, No. 3 lower hold is clearly covered under one head or the other. If it refers only to the enumerated spaces, then I think No. 3 lower hold is included in "etc.", which is an expression apt for including in the spaces enumerated space sometimes used for cargo but often also used for reserve bunker coal and denominated in the capacity plan as "No. 3 reserve."

- On this construction, and assuming that No. 3 lower hold is to be treated primarily as cargo space, the question arises whether the presence of coal was reasonably required for the voyage. As to this, the learned judge has held that
- F the onus is on the charterer, who seeks to cancel, to show that it was not reasonably required for the whole voyage, and that he does not discharge this burden by showing that the quantity was in excess of that which was required to reach the first available coaling port at which he had liberty to call on the voyage. It was contended by the charterer that the learned judge had erred in placing the onus on him and that once the presence of coal was established in a part of
- G the vessel not exclusively appropriated to bunkers, the onus shifted to the shipowners to justify its presence. No authority for this proposition was cited to us, and it seems to me to be contrary to the principle that he who seeks to enforce a forfeiture clause, which in effect this is, must strictly prove the existence of all the matters on which he relies as justification of his conduct, and in my view DEVLIN, J., rightly placed the onus on him. Furthermore, I think the
- H right test is what is required for the whole voyage. It is true that it has been decided that the shipowner is not in breach of the warranty of seaworthiness if the master has elected to divide his voyage into stages for coaling purposes and only carries sufficient coal to carry the vessel on its first stage (see *The Vortigern* (3)), but this doctrine is in relief of the shipowner's liability under his warranty that the ship is seaworthy for the whole of the charter voyage and cannot, in my view, be used as imposing on him an obligation, at any rate in the absence of any election on his part so to do, to bunker in stages. For these

reasons I agree with the conclusion of the learned judge on this part of the case.

The second question is, I think—as DEVLIN, J., said—more difficult. The duty to load was by the charterparty on the shipowners, the charterer being required to bring the cargo alongside at his risk and expense. The charterer had the option to load in bags. The Case finds that after loading at the up-river ports, which could have been carried out without the ship's gear, namely, by means of elevator, chute or belt conveyor in case of bulk cargo, and by use of shore loading gear in the case of bags, the vessel, not being able to cross the bar at Martin Garcia with a full cargo, would have had to have completed the loading at ports below the bar, and such completion would have entailed the loading of some cargo in bags either by shore crane, if alongside, or by ship's gear from lighters in the river. Owing to a fire which had occurred on board the *San George*, the vessel had lost her mainmast and the after derricks attached thereto, and it had been decided to defer permanent repairs to the mast until the vessel's return to the United Kingdom. Consequently, she was unable to load by ship's gear into Nos. 4 and 5 holds. As already indicated, this gear would only have been required in the event of the vessel not being able to obtain a berth in port below the bar and consequently being compelled to load from lighters.

The Case finds at the end of para. 5 (ii) (a) as follows:

“There was no evidence before me which method of loading would have been used at San Lorenzo or elsewhere, or to which other ports in the permitted range the vessel would have been sent. Nor was there evidence before me whether the mainmast could have been re-erected after loading at San Lorenzo, with or without removing the part cargo, and, if so, with what delay.”

The concluding words are, I think, of first importance. The learned judge decided that the charterer was not entitled to cancel for this reason on the ground that the rule as to readiness to load applicable to cargo space ought not to be so stringently applied in the case of gear required for loading and that, on the facts found by the umpire, the ship was not proved to be unready in the business sense because of the possibility of her not being able to meet this somewhat remote contingency. I have reached the same conclusion though I would venture to express my view in slightly different language. It seems to me that there is a real distinction to be drawn between the cargo space and the gear. The charterer is entitled to the control of the whole of the cargo space from the outset of the voyage. His rights in this respect are stated in HALSBURY'S LAWS OF ENGLAND, 2nd edn., vol. 30, p. 427, in these words:

“The ship must be ready to load, that is to say, the shipowner must be in a position to place the whole of the chartered space at the charterer's disposal.”

The loading gear had not to be placed at the charterer's disposal, and he had no rights with regard thereto, save in so far that it was necessary to enable the shipowner to perform his contractual obligations under the charterparty. Provided the shipowner was able when required to load any cargo which the charterer was entitled to tender to him alongside, it was a matter for him to decide by what means he would carry out his contractual obligations.

I am unable to draw the distinction for which counsel for the charterer contends between gear which is part of the ship's normal tackle and any other gear which may be required for what he calls “unusual cargoes.” He argues that the charterer is entitled to cancel if any of the “ordinary equipment” is not ready at the first loading port at the cancelling date even if it will not be required at that port or at any subsequent port. Alternatively, he contends that it must be ready at the cancelling date if it *may* be required at some future date to deal with some cargo which the charterer is entitled to load. As regards equipment for what he calls an “unusual” cargo, he was, I think, inclined to concede that

he might not be entitled to require that this should be ready in the absence of notice that it would be required. On the other hand, counsel for the ship-owners contended that the charterer was not entitled to cancel unless he proved what kind of cargo he intended to load, in what form it was to be (for example, in bags or bulk), and in what way he intended to bring his cargo to the vessel. No authority relating to ship's gear was cited to us which supports to the full the contention of either side. In *Sun Shipping Co., Ltd. v. Watson & Youell Shipping Agency, Ltd.* (4), there is nothing to show that the court was concerned with any cargo except grain in bulk. For this purpose shifting boards were required in the holds. They were not all in position at the first loading port. It was held that she was not ready to load for the purpose of calculating the lay days. It is to be observed that the charterers in their contentions had argued that there was a distinction between the degree of readiness to load for the purpose of lay days and the degree of readiness required for creating their right to cancel. The case is no authority for the proposition that if the shifting boards would not have been required until the vessel reached a later loading port the fact that they were not in position at the first loading port would have been a good ground for cancellation. In *Vaughan v. Campbell, Heatley & Co.* (5) the charterparty provided for shipment of a full and complete cargo of wheat and/or flour in bags and/or other lawful merchandise. The ship was not at the cancelling date lined in the manner usual and necessary for the protection of a wheat or flour cargo. The charterers cancelled and it was held they were not entitled to do so. The case is very briefly reported, but it appears that LORD ESHER, M.R., based his judgment on the ground that the charterparty required the ship to be "ready" to load, not "fit" to load. COTTON and LINDLEY, L.JJ., however, added that the charterparty left it open to the charterers to load any kind of cargo and that many kinds of cargo would not require the ship to be lined. There was no evidence as to what kind of cargo it was intended to load, but the additional ground on which the lords justices based their decision negatives the idea that so far as equipment is concerned the shipowner has to be ready from the outset to deal with any kind of cargo which the charterer is entitled under the charterparty to call on him to take on board.

In *Grampian S.S. Co., Ltd. v. Carver & Co.* (6) the charterparty required the shipowners to provide the necessary mats for a cargo of cotton, seed, wheat, beans, maize or other grain. DAY, J., decided that it was not obligatory on the shipowners to have the mats laid down in order to be ready to load, but it was sufficient if they had the mats ready to lay if required and that the charterers were not entitled to cancel. In *Armement Adolf Deppe v. John Robinson & Co., Ltd.* (7), in dealing with the question of readiness to discharge, SWINFEN EADY, L.J., said ([1917] 2 K.B. 207):

"It is the duty of the merchants to co-operate with the owners in the receipt of cargo, and upon the facts I am satisfied that the only reason why the ship did not take on board the gang and rig the gear to fulfil the owners' duty in discharging was that the receivers were not desirous of receiving the cargo at the buoys, and so were not willing to co-operate in her discharge there and made no preparations for doing so. The ship was lying at a waiting berth, her voyage being ended; it would have been an idle form to take on board men and open hatches and make other preparations at the buoys when there was no desire or intention of the merchants to receive cargo until the ship was berthed at the quay. The ship was ready to discharge in a business and mercantile sense, and the idle formality of incurring useless expense was not necessary as a condition precedent to the commencement of the lay days."

These observations are, I think, equally applicable to a case where the charterer is seeking to justify a cancellation on the ground of unreadiness to load.

In this state of the authorities I am of opinion that, in principle, a charterer,

who has cancelled on the ground of unreadiness to load by reason of the insufficiency of the loading gear, in a case where the obligation to load is on the shipowner, and where there is more than one port of loading and different kinds of cargo which may be loaded at the option of the charterer, must at least prove that at the cancelling date the ship was in such a condition that the shipowner would necessarily be unable to comply with his obligation to load some cargo which the charterer was entitled under the charterparty to call on him to take on board at the first or some subsequent port. It is, in my view, not enough for him to show that at the cancelling date the shipowner *may* be unable to load some particular cargo. He must prove that he could not do so. In the present case the charterer failed so to do. There is nothing in the facts found by the umpire to indicate that the shipowner could not have devised some temporary equipment to take bags on board from lighters in the unlikely event of his being required to load in this manner. For these reasons I agree with the judgment of DEVLIN, J., and would dismiss this appeal. A B

COHEN, L.J. (read by ASQUITH, L.J.): I am of the same opinion. The charterer seeks to justify his notice of cancellation on two grounds: (i) the fact that bunker coal was at the material time to be found in No. 3 'tween deck and No. 3 hold; and (ii) the fact that at the material time the mainmast was cut away and two wooden derricks dismantled and out of use. I do not desire to add anything to the reasons given by TUCKER, L.J., for thinking that DEVLIN, J., reached the right conclusion on the first point. I also agree with what my brother said on the second point, but as, like DEVLIN, J., I find it more difficult, I will state shortly in my own language my reasons for my conclusions. C

Counsel for the charterer urged that there was no difference in principle between the requirements as to cargo space and those as to ships' gear. The authorities establish that "the ship" must be completely ready in all her holds so as to afford the charterer complete control of every portion of the ship available for cargo: see *Groves v. Volkart* (1). So, said counsel, any portion of the ship's gear—or at any rate of its ordinary gear—which might be required at any loading port for loading any cargo which the charterer was entitled to bring alongside must be ready when notice of readiness is given, and if it is not, the charterer is entitled to give notice of cancellation. I am unable to accede to this argument. I agree with the learned judge that there is a difference, if not in principle, at least in the application of the principle between space in the hold and readiness of ship's gear. The charterer is responsible for bringing the goods alongside, but the method of loading the goods when brought alongside is a matter for the shipowner. As the learned judge said, some of the ship's gear may not be required at all, some of it may not be needed until an advanced stage of the loading, and the keeping of it in constant readiness from the first moment to the last may involve labour and expense unnecessarily without any advantage to the shipowner. D E

Where a charterer gives notice of cancellation, the onus is on him to prove the existence of a state of circumstances which justify him in giving such a notice. As regards ship's gear, I do not think he discharges that onus by proving that a part of the gear was not available at the first port of loading if it is established, as in substance it was in the present case, that it could not be required for use at that port; nor do I think that the mere fact that it might be required at a subsequent loading port is enough to discharge the onus of proof which rests on the charterer or shift it to the shipowner. The charterer must, I think, at least prove that it might be required at the subsequent port and that it or a substitute for it would not be available if required. Like the learned judge, I derive some support from the cases which he cited. If the strict rule which counsel for the charterer advocated was in fact the law, it seems to me that the charterer would have been entitled to succeed in *Vaughan v. Campbell, Heatley & Co.* (5), since wheat was a permitted cargo and the ship was not lined to receive it. Counsel F G H

for the charterer relied particularly on *Sun Shipping Co., Ltd v. Watson & Youell Shipping Agency, Ltd.* (4), but in that case the shifting boards were required at the first port of loading and it was found that some were not available. Moreover, the question at issue was when lay days commenced. Had the issue been as to the validity of a notice of cancellation, and had the charterers sought to rely on the fact that shifting boards were required at a second port of loading, I do not think they would have succeeded without proving that probably the shifting boards would not be available on arrival at that port.

If I have correctly stated the law, it necessarily follows that the learned judge reached the right conclusion, since the arbitrator has found that there was no evidence to prove the material fact that the loading gear would have been defective when required: see para. 5 (ii) (a) of the award. For these reasons I agree that the appeal should be dismissed.

ASQUITH, L.J: I agree entirely with both the judgments, and do not think it necessary to add anything of my own.

Appeal dismissed with costs.

Solicitors: *Treasury Solicitor* (for the charterer); *Holman, Fenwick & Willan* (for the shipowner).

[*Reported by J. D. PENNINGTON, Esq., Barrister-at-Law.*]

D HARTWELLS OF OXFORD, LTD. v. BRITISH MOTOR TRADE ASSOCIATION.

[COURT OF APPEAL (Somervell, Singleton and Jenkins, L.JJ.), July 26, 27, 1950.]

Sale of Goods—Non-delivery—Delivery to be within reasonable time—Refusal by manufacturer to supply dealer except subject to conditions regarding sale by dealer unacceptable by purchaser—Liability of dealer.

The plaintiffs, motor car dealers, were members of the British Motor Trade Association, the object of which was to "protect the interests of the motor trade and safeguard the purchasing public against unfair treatment and discrimination." As from Jan. 1, 1946, the system whereby a government permit containing a condition against re-sale was necessary for the purchase of a new motor car came to an end, and on Aug. 15, 1946, to meet the difficulties caused by the shortage of cars, the association brought into operation a rule that no member should sell or deliver a new motor car without obtaining a covenant by the purchaser to use it for a period of six (and, later, twelve) months for his private, professional or trade purposes only, and not to re-sell, hire, or give it away during that period. Between Jan. 1, 1946, and Aug. 15, 1946, contracts between the plaintiffs and their customers contained the following terms: "1. The purchaser agrees to the 'conditions of sale' of the manufacturers of the car as incorporated in the lists issued by them. 2. The seller will use his best endeavours to secure delivery of the goods on the date agreed, but he shall not be liable for any damages, or claim of any kind, which may arise in case of delay." No date was ever agreed, and the contract contained no covenant by the purchaser against re-sale. From Aug. 15, 1946, until July 6, 1950, the plaintiffs introduced into their contracts with their customers a covenant against re-sale in accordance with the association's rule. The agreement between the plaintiffs and the F. Motor Co., Ltd., motor car manufacturers, for the supply of cars to the plaintiffs contained *inter alia* terms (a) that during the currency of the agreement the plaintiffs were to remain members of the British Motor Trade Association and observe its rules, and that a

breach by the plaintiffs of a rule of the association was to constitute a breach of the agreement; and (b) that the manufacturers should have the right instantly to terminate the agreement if the plaintiffs appeared on the association's stop list. Contracts between the plaintiffs and other manufacturers contained similar terms. On June 16, 1950, the F. Motor Co., Ltd. wrote to the plaintiffs informing them that delivery of cars to them was conditional on their enforcing a priority scheme when carrying out their contracts with their customers so that the needs of individual customers should be considered. On July 6, 1950, after the decision of the High Court in *Monkland v. Jack Barclay, Ltd.* ([1950] *post*, 715) the plaintiffs wrote to the association informing them that in future they would complete all orders for new cars in strict rotational order without following any system of priority and without requiring a covenant from the purchaser against re-sale, whether or not the order had been received before Aug. 15, 1946, when the covenant scheme came into operation. The association replied that, if the plaintiffs carried out their proposals, they might be put on the association's stop list, a course which would put the plaintiffs out of business. The plaintiffs sought an injunction restraining the association from putting them on their stop list for failure to carry out the priority scheme and to observe the association's rule in regard to the covenant against re-sale in respect of contracts made by them before the rule came into force, on the ground, *inter alia*, that observance of the scheme and the rule would involve them in actions by their customers for damages for breach of contract.

HELD: as no date for delivery was ever agreed by the plaintiffs in a contract with a customer during the material time, the contract was for delivery within a reasonable time, and that had to be calculated with regard to all the circumstances of the contract one of which was that, if the F. Motor Co., Ltd., refused to deliver except on the terms which they had laid down, the plaintiffs would be unable to deliver any car, within a reasonable time or at all, or (*per* JENKINS, L.J.) as each contract was for the sale of goods which were not yet in existence and were to be made by a third party over whom the plaintiffs had no control, the plaintiffs were not liable for any delay if the manufacturer refused to deliver a motor car to the plaintiffs except on conditions which the plaintiffs' customer was unwilling to accept; and, therefore, the plaintiffs were not entitled to the injunction as they had failed to show that they would be liable to their customer for a breach of contract if they failed to observe the rule in regard to the covenant against re-sale and the manufacturer's condition in regard to the system of priority.

[AS TO TIME OF DELIVERY, see HALSBURY, Hailsham Edn., Vol. 29, p. 123, para. 147; and FOR CASES, see DIGEST, Vol. 39, p. 551, Nos. 1596-1599.]

Cases referred to:

- (1) *Monkland v. Jack Barclay, Ltd.*, (1950), *post*, p. 715.
- (2) *Hick v. Raymond & Reid*, [1893] A.C. 22; 62 L.J.Q.B. 98; 68 L.T. 175; 12 Digest 308, 2547.
- (3) *Egerton v. Brownlow (Earl)*, (1853), 4 H.L. Cas. 1; 23 L.J.Ch. 348; 21 L.T.O.S. 306; 10 E.R. 359; 12 Digest 240, 1971.

APPEAL by the plaintiffs, motor car dealers, from an order of DANCKWERTS, J., dated July 19, 1950, whereby he refused to grant an injunction restraining the defendants, the British Motor Trade Association, from putting the plaintiffs on the "stop list" if they failed to observe (a) a system of priorities on the sale of motor cars, and (b) a rule of the association requiring the purchaser of a new car to enter into a covenant against re-sale for a specified period. The plaintiffs, who were members of the association, contended, *inter alia*, that their agreement to be bound by the rules of the association must be held subject to an implied term that they were not, by any retrospective alteration of the rules, to be

compelled to commit breaches of contracts lawfully entered into by them before such alteration, and that, by putting them on the stop list, the association would be committing a breach of that implied term. The facts appear in the judgment of SOMERVELL, L.J.

Shelley, K.C., and *J. Brewis* for the plaintiffs.

Pritt, K.C., and *Aldous* for the defendants.

A **SOMERVELL, L.J.:** This is an appeal from a decision of DANCKWERTS, J. The plaintiffs are Hartwells of Oxford, Ltd., who carry on the business of dealers in motor cars, and the defendants are the British Motor Trade Association, an association of which the plaintiffs are themselves members. The objects of the association, as stated at the beginning of their rules, are

B “... to encourage, promote and protect the interests of the motor trade and safeguard the purchasing public against unfair treatment and discrimination.”

How those objects are to be carried out is particularised in the words which follow. The plaintiffs seek an injunction against the defendant association which is, they say, threatening to put them on a “stop list”—which would, in effect, put them out of business—for carrying out their contracts with their customers. C DANCKWERTS, J., refused the injunction, and the plaintiffs appeal.

The trouble between the plaintiffs and the association arises in these circumstances. During hostilities, to acquire a new motor car the purchaser had to obtain a government permit, and the permits issued contained a condition against re-sale. When hostilities came to an end many applications for new cars were outstanding, and very many further applications were made with the result that it became impossible to deal with them under the procedure which had operated sufficiently well during hostilities. That system, therefore, was abandoned and came to an end, as from Jan. 1, 1946, under the Emergency Powers (Defence) Acquisition and Disposal of Motor Vehicles (Revocation) Order, 1945 (S.R. & O., 1945, No. 1577). It is clear from the evidence that it was contemplated by those D in the trade and by the government that a scheme would be devised and operated by the trade so that applications for motor cars could be dealt with to some extent according to their merits, and, in particular, so as to prevent persons from buying or getting cars, not because they wanted a motor car either for business or pleasure, but simply for re-sale. It was realised that motor cars were in short supply, and they remain in short supply. There were some figures showing that, E on the present allocation of cars to the home market, it would take many years to satisfy the orders which have already been received. On Aug. 15, 1946, the defendant association, which has been in existence for many years, brought into operation a rule, the present form of which—we were told that the original rule was similar in all respects to the present rule—is as follows:

G “No member shall sell or deliver a new motor car or new commercial vehicle to any person without obtaining from him a covenant duly executed in a form appropriate to the transaction approved and supplied by the association and subsequently lodging it with the association.”

Then the word “new” is defined. There was, therefore, a period (which has been called in this argument the *inter-regnum*) between the end of the statutory H permit scheme and the appearance of that rule in the rules of the association, and this appeal is concerned with orders placed with the plaintiffs during that period. We have before us a specimen of the form which the customer signed. It sets out the make of the car, and so on, and the terms and conditions, cl. 2 of which is:

“The seller will use his best endeavours to secure delivery of the goods on the date agreed, but he shall not be liable for any damages, or claim of any kind, which may arise in case of delay.”

Some argument was based on that clause, but I do not think that it is maintainable, because no date ever was agreed. I think that clause is inoperative, and the contract remains, therefore, one for delivery within a reasonable time. That form of contract contains no reference to a covenant.

After the rule came into operation the plaintiffs, in common with other dealers, introduced a form of order under which the customer undertook to sign a covenant against re-sale. We have a form of such a covenant before us under which the customer (as owner) covenanted with the association and (as a separate covenant) with the dealer that he would not within a period, initially of six months, later of twelve months

"... without the consent in writing of the association which consent shall not be unreasonably withheld use the said vehicle or permit the same to be used for any purpose whatever other than for the private, professional or trade purposes of the owner so that (without prejudice to the generality of the foregoing) the owner shall not during the said period without the consent in writing of the association sell, give, pledge, hire (whether by way of hire purchase or otherwise) or otherwise deal with the said vehicle in any manner whereby the property therein is or may be transferred to any other person."

We are concerned, in the first place, with the orders placed in the *inter-regnum*. We are also concerned with orders placed after the *inter-regnum* in this respect. The broad issue that has emerged here is this. The association is seeking to enforce, not only the covenant scheme, *viz.*, asking purchasers of motor cars to sign a covenant, but also, through the manufacturers and dealers, a scheme by which the needs of individual customers for motor cars are considered. The plaintiffs' contention is that under their contracts, whether made during the *inter-regnum* with no reference to the covenant, or whether made after the *inter-regnum* with reference to a covenant, they are bound to have regard only to the dates on which those orders were placed, and that the principle of "first come, first served" must be applied to their contracts.

The first point that was argued by counsel for the defendant association was that that was wrong. First, he submitted that in law there is no general principle applicable to those who sell articles by which they must supply the purchaser who gives his order on Monday before the purchaser who gives his order on Tuesday. Secondly, he said that in the circumstances of this trade—certainly at all material times—no such right to be dealt with in rotation could be implied. In fact, he submitted that the implications must be the other way. I will deal with this point later. I will now continue with the history, because I think that this case should be disposed of on another point, which counsel for the association put second. We have before us the agreement made between Ford Motor Co., Ltd., and the plaintiffs. It was common ground that this settled the legal position as between the parties at the material date, and was in a similar form to agreements made by other manufacturers with dealers. Clause 1 reads:

"The manufacturer during the term of this agreement agrees to sell and the dealer agrees to buy cars commercial vehicles chassis and parts (hereinafter unless specifically named called 'the products') upon the terms and conditions hereinafter provided."

Clause 20 (to which JENKINS, L.J., drew attention) reads:

"Nothing contained in this agreement imposes upon the manufacturer any obligations to accept any order for any of its products from the dealer or to deliver any of its products to the dealer."

Clause 30 is:

"The dealer agrees that during the currency of this agreement he shall be and remain a member of the British Motor Trade Association and shall be bound by and observe the objects bye-laws and rules of the said associa-

tion in force from time to time. In the event of such breach by the dealer of any object bye-law and/or rule of the British Motor Trade Association such act shall also constitute a breach of this agreement and notwithstanding and in addition to any other provision hereof the matter may be dealt with by the British Motor Trade Association in accordance with the rules of the said association."

A Before I come to cl. 32 (*d*), which is also relevant, I will refer to a letter, dated June 16, 1950, which preceded *Monkland v. Jack Barclay, Ltd.* (1), a decision of HUMPHREYS, J., which led to the present proceedings. On June 16, 1950, Ford Motor Co., Ltd., wrote to dealers, including the plaintiffs, and, after opening paragraphs about public policy and what the government desire, and so on, it said:

B "The Ministry of Supply consider it essential that each case should be studied in detail by dealers before delivery is arranged and allocations to you are conditional upon this action being taken. The delivery sequence must be as follows."

A scheme of what may be called priorities is then set out. The first class of customers to whom delivery should be made are doctors sponsored by the C British Medical Association, and midwives sponsored by the Ministry of Health, and then there is a reference to veterinary surgeons. The letter goes on to say this, which I think is important:

D "It is imperative that you should take the greatest care to ascertain your customer's need, condition of present transport and other material circumstances, in order that you may be fully armed with all relevant facts to enable you properly to exercise the discretion entrusted to you. If, however, you feel you have entered into contractual obligations which run counter to this directive, you should refer the details of the order to us."

E The plaintiffs, with other dealers, were carrying out this scheme until the decision of HUMPHREYS, J., in *Monkland v. Jack Barclay, Ltd.* (1). In that case the plaintiff sued the defendant company for delivery of a Bentley motor car. The company refused to deliver it on some of the grounds raised in the present appeal. HUMPHREYS, J., decided in favour of the plaintiff and gave him damages, and that case is subject to appeal. After the decision in that case, the plaintiffs wrote to the secretary of the defendant association on July 6, 1950, saying:

F "In view of a recent High Court decision we have been considering in what order we should deliver new cars to our customers in the future and have decided to adopt the following course. All orders for new cars received and accepted by us whether before or after the date when the covenant scheme came into force will in future be completed by us in strict rotational order, G that is to say, the customer who placed his order first will be the first to receive delivery of the particular make of car he has ordered irrespective of whether he is prepared to sign a deed of covenant or not (except when he has expressly agreed so to do when giving the order) or whether he requires the car for his own use or for immediate re-sale. Moreover we do not intend to alter our list in any way to give priority to some customers, such as H doctors, who are in more urgent need of cars than other customers as we are advised that we are not entitled to discriminate in this manner."

That, of course, if carried out by all the dealers in the country, would, undoubtedly, have brought the whole scheme to nothing. It was agreed by counsel for the plaintiffs that that letter might be read as going further than he wished to go in suggesting that, even after the covenant rule had come into force, the plaintiffs were going to disregard the question whether they had stipulated for a covenant in the order or not. He asked leave this morning to amend the

injunction which he claims, and obviously no one would object, because he was restricting what he asked for. A reply to that letter was sent on July 7, and was as follows:

"The proposals you put forward indicate a course of conduct that would be contrary to the objects and rules of the association. I must advise you that if you commit a breach of the rules the matter will be referred to the price protection committee which, if it finds that a breach of the rules has been committed, may insert your name upon the association's stop list."

The association's rule as to the stop list is:

"The secretary shall compile and maintain a record known as 'the stop list' containing the names of all persons placed upon the stop list under the provisions of these rules."

Then there is a further rule, r. 14, which says:

"No member of the association shall supply, directly or indirectly, any new or used trade goods (or, in a particular case the specified goods) to, or have trade relations in respect of any new or used trade goods (or, in a particular case the specified goods) with, any person whose name is placed upon the stop list except under a contract already existing which the member is, by law, obliged to fulfil."

That, I think, would indicate that being placed on the stop list would probably put a dealer out of business. Rule 3 (5), which deals with membership of the association, says:

"Any person elected to membership of the association shall be supplied with a copy of these rules and shall be deemed to have agreed to be bound by them."

Rule 28 reads:

"These rules may be amended by a two-thirds majority of the council, not less than ten being present in person; provided that no amendment by the council shall come into operation until fourteen days after notice thereof has been posted to members."

The price protection committee is dealt with in r. 17, which sets out the constitution of it, and r. 20 provides that any person aggrieved by the decision of the price protection committee shall have a right of appeal to an appeal committee appointed by the council.

After receiving the association's reply to their letter, the plaintiffs issued their writ and claimed an injunction

"... to restrain the defendants whether by themselves their servants agents or otherwise from taking any steps with a view to having the plaintiffs' name placed on their stop list or from taking any other steps to prevent the plaintiffs from allocating new cars to their customers in the manner set forth in the letter of July 6, 1950."

Counsel for the plaintiffs contends that, as regards orders placed in the *inter-regnum*, the plaintiffs must deliver in rotation without demanding the covenant, and, as regards orders placed after that date, though he agrees that the covenant must be demanded, he also says that, under their contracts, the plaintiffs must deliver in rotation. He says that the plaintiffs are put in the dilemma that they have entered into a large number of contracts which have the construction for which he contends, and, if they are not allowed to do what they state in their letter, they will be sued by a large number of people, and may have to pay heavy damages. Therefore, they should be entitled to an injunction against the association to prevent it setting the price protection committee stop list procedure in motion. In my view, therefore, the plaintiffs have to show that they are in danger of being sued for breach of contract if they carry out the rules which the association are seeking to enforce, because if they are not breaking their contracts, no trouble will arise.

I will now deal with the order form current during the *inter-regnum*. The plaintiffs have undertaken to take reasonable steps to obtain a car in the first instance, and to deliver it within a reasonable time. A reasonable time for delivery cannot arise so long as they are unable to obtain one, and the suppliers, Ford Motor Co., Ltd. (and, we were told, other suppliers) are saying to them: "We will not let you have a car for any of your customers unless in dealing with your customers you carry out the rules of the association," one of the rules of the association being that the customer should sign a covenant not to part with it within a year. The suppliers are also imposing a condition, which they are, in my view, entitled to impose, in the broad terms of the letter I have read, as to considering each individual case and dealing with it.

This appeal, of course, inevitably raises the contractual position and the rights and obligations as between the plaintiffs' customers and the plaintiffs. Clearly those rights cannot be finally determined, so far as the customers are concerned, in these proceedings. This decision would not make *res judicata* any issue that might arise between a customer and the plaintiffs. Indeed, there may be circumstances in cases which have not in any way been brought to our attention to-day. Indeed, in *Monkland v. Jack Barclay, Ltd.* (1), there were some very special circumstances which, when that case goes to appeal and is decided, may or may not be relevant as distinguishing it from the ordinary type of case which counsel for the plaintiffs has put before us. We have, however, to decide whether the plaintiffs are in such jeopardy as to entitle them to an injunction. I think that the form of the Ford agreement and the letter of July 7 from the defendant association—*prima facie*, at any rate—would afford a good answer to the type of claim which the plaintiffs are contemplating and on which their application to the court is based. Clause 32 (d) of the Ford agreement is:

"The manufacturer shall have the right instantly to terminate this agreement . . . if the dealer shall at any time appear on the stop list of the British Motor Trade Association or if he sells or offers for sale or supplies directly or indirectly the manufacturer's products to any person or firm or any employee of any person or firm whose name appears on such stop list."

In view of that clause, I think that the plaintiffs' claim for an injunction fails, and, that being the strongest point of counsel for the association, I think it is right that I should decide this case on that point.

A great deal of argument was devoted to what I may call the contractual position under a contract of the kind which the plaintiffs made with their customers, having regard to the circumstances, but disregarding the fact that the manufacturer is now saying: "Unless you will enforce this scheme, you will not get any cars." If I have taken a right view of the documents, that point does not arise. This is one of those happy cases where counsel on both sides rely on the same authority, which is, in this case, *Hick v. Raymond and Reid* (2). That case decided that a reasonable time under a contract for unloading a ship, or, indeed, for other purposes, depends on the circumstances prevailing at the time. One does not, as it were, say: "Ordinarily you take a week to unload this ship, and, therefore, if you exceed a week, necessarily you are in default." The man who has undertaken to unload the ship is entitled to say: "There was a strike on, and I could not get any workmen for such and such a time." Counsel for the plaintiffs relies on the fact that LORD HERSCHELL, L.C., after stating the general principle ([1893] A.C. 29), says that the delay must not be due to any act or default on the part of the respondents. Counsel for the plaintiffs says that the carrying out of this scheme (where one is dealing with a motor car, and giving a doctor or a midwife priority over a customer who wants to buy merely to re-sell, or a customer who merely wants his car for pleasure, or who merely wants a better car to replace one that is in quite reasonable running order) is an act or default on the part of the dealer within those words of LORD HERSCHELL, L.C. What I would say first is that, when he was referring to the act or default

of the respondents, LORD HERSCHELL, L.C., was, to my mind, plainly not directing his mind to the issue that has arisen in this case as between the plaintiffs and the association. I quite agree that the substance of the decision has relevance, but I am quite certain that LORD HERSCHELL, L.C., had in mind the ordinary case where, *e.g.*, a defendant had failed to take reasonable steps to engage workmen, or to engage stevedores, though he knew that the ship was coming along at a certain time, or where he took men from one ship to unload another ship because he thought it would pay him to unload that ship first. If the matter ever arose—it may possibly arise and be dealt with to some extent in the *Monkland* case (1)—as between a customer who placed an order in 1946 for a motor car and a dealer who, without anything in the nature of the Ford contract to rely on, was seeking to say: “Motor cars being in short supply, and it being clear that certain people need motor cars to carry out essential duties for the State, as you are not one of those people I am in no way committing a breach of my contract with you if I put such people before you,” I think that there is a great deal to be said for the view that some such implication might well be made. I do not, however, find it necessary to express any opinion on that point. As we, in effect, have not to deal with rights as between customers and dealers, there being no customer before us, I think it desirable that, if there is a narrower ground on which the appeal can be decided, we should not express opinions on the wider issues involved.

That applies with even greater force to a third point which counsel for the association took. He submitted that, even if there was an express term in a contract that the customer should be supplied in rotation according to the date when he placed his order, it would in present circumstances be contrary to public policy to allow the customer to enforce that term or condition. He quoted to us statements on that general subject from the speeches in *Egerton v. Earl Brownlow* (3). I find it unnecessary, however, to express any opinion on that point, because I think that the point with which I dealt first disposes of this appeal.

DANCKWERTS, J., I think, disposed of it on a somewhat different ground. I think he took the view that, if the plaintiffs have entered into a contract with a customer, and are and remain members of an association and bound by its rules, and those rules compel them either to break a term of their contract with their customer, with the consequences which follow on that, or to break the rules of the association by which they have agreed to be bound, then they have put themselves in an unfortunate position, but that would not entitle them to an injunction against the association. I do not dissent from the reasons which DANCKWERTS, J., gave for his decision, but I prefer to rest my view that the appeal should be dismissed on the grounds which I have stated.

SINGLETON, L.J.: I am of the same opinion. The plaintiffs, Hartwells of Oxford, Ltd., dealers in motor cars, are anxious to know what their position is, and that is the reason that they started this action, in which they claim an injunction. That injunction, as claimed, was, as SOMERVELL, L.J., has said, in wide terms, much wider than counsel for the plaintiffs put it when he asked for an amendment this morning. The defendants, the British Motor Trade Association, publish a little book in which their rules appear, and before their rules they state their objects:

“The objects of the association are to encourage, promote and protect the interests of the motor trade and safeguard the purchasing public against unfair treatment and discrimination, and for this purpose (a) to take such steps as may be deemed expedient to prevent price cutting or price inflation of trade goods.”

Everyone agrees that in taking the steps which they have taken they seek to promote the good of the motor trade and (apart from one consideration which counsel for the plaintiffs raised) that they are seeking to act in accordance with public policy and public weal.

After a judgment given in the King's Bench Division in *Monkland v. Jack Barclay, Ltd.* (1), a position arose which caused the plaintiffs to write the letter of July 6 to the defendant association, and which brought in reply the association's letter of July 7. [HIS LORDSHIP read the relevant terms of the letter, and continued:] I am not surprised that that letter was sent, in view of the wide terms of the letter of July 6. The plaintiffs thereafter commenced this action.

A It is clear beyond measure that in hearing and deciding this appeal we are doing so on the evidence before us and on nothing else. The case as put to us at first was that the plaintiffs were in the position either of being put on the stop list by the association or of committing breaches of contract, which would involve them in hundreds of thousands of pounds worth of damages. I am not satisfied, for myself, that that is the true position on the evidence before this court. It may be that the plaintiffs will have actions for breach of contract against them, but it is impossible to say without knowing the terms of each order which has been given to them and which they have accepted. Before us it was stated that their contracts for the supply of motor cars to customers were all on the same form, as exhibited. The two parts of that which were said to be of importance are cl. 1 and 2:

C "1. The purchaser agrees to the 'conditions of sale' of the manufacturers of the car as incorporated in the lists issued by them. 2. The seller will use his best endeavours to secure delivery of the goods on the date agreed, but he shall not be liable for any damages, or claim of any kind, which may arise in case of delay."

D There was no date agreed, and so it is said that the duty of the plaintiffs in this action was to deliver the car in a reasonable time. Counsel for the plaintiffs said that, if they did not deliver in ordinary rotation, they would have claims against them for damages for breach of contract which they could not well meet.

E I was attracted by the statement of counsel for the association in reply that, when one has to consider whether or not delivery under a contract of this kind, or of any kind, is given within a reasonable time, one must calculate the reasonable time by regard to all the circumstances of all the parties to that contract, and, furthermore, that in the circumstances of this case it could not be said that a reasonable time had elapsed if the manufacturer of the motor car can say, and does say, without any breach of contract, that he will not deliver except on conditions which the customer is unwilling to accept. In the course of his judgment SOMERVELL, L.J., referred to the form of agreement between Ford Motor Co., Ltd., and dealers who enter into arrangements for the supply of motor cars with them, and we were told that other manufacturers of motor cars have the same kind of agreement. In view of the terms of that agreement, it seems to me that, if a customer has in the *inter-regnum* given an order for a Ford motor car to the plaintiffs and brings an action against the plaintiffs for damages for breach of contract, the plaintiffs may well have a defence by reason of the fact that they are only able to get a Ford motor car delivered to them on the terms of their agreement with Ford Motor Co., Ltd., and it is open to the Ford company to say: "We will not deliver to you unless you comply with these terms or conditions, and we will not deliver to you unless your customer says he will enter into a covenant." There may be other considerations of which I know nothing, but that leads me to think that it is not shown in this case that the plaintiffs' position is so awkward as we were led to think at first it would be, if they did not succeed in getting an injunction. Furthermore, as far as I see, the injunction which is asked for now would not really help the plaintiffs. They would, indeed, be no better off if the manufacturer still refused to supply them with a car, so that the injunction, if granted, is the kind of remedy which would not be of help to them. That, I think, is another reason why the court should not grant it. The position at the moment is confused. As to what it would be if the court thought it right to grant an injunction, either in the terms originally

asked or in the terms as now amended, I confess I have some doubt. I am inclined to think that in the motor trade generally it would make confusion worse confounded. I do not think that it would help the plaintiffs or be any solution to the difficulties generally. For those reasons, I think that this appeal ought to be dismissed.

JENKINS, L.J.: I agree and have very little to add. The plaintiffs are asking the court to interfere with the domestic procedure of an association of which they themselves are members, and to whose rules they have subscribed. It, therefore, behoves them to show, and to show with reasonable clearness, that what is proposed to be done by the defendant association will inflict some actionable wrong on the plaintiffs, notwithstanding that it is done in accordance with the express provisions of those rules. A

Counsel for the plaintiffs put the proposition of law on which he relied in two ways. First, he said that the plaintiffs became members of the association before 1946, and, no doubt, then agreed to be bound by the rules of the association for the time being in force. But, he said, their agreement so to be bound must be held subject to an implied term that the plaintiffs were not, by any retrospective alteration of the rules, to be compelled to commit breaches of contracts lawfully entered into by them before such alteration and involving no infringement of the rules as they stood at the time when such contracts were entered into. On that submission he founded the contention that, by putting the plaintiffs on the stop list, the defendant association would be committing a breach of the implied term. Secondly, he said that, if it was within the power of the association under the rules to compel the plaintiffs to commit a breach of contract in circumstances such as these, then the rules to that extent were void as being contrary to public policy. B

Of those two submissions it seems to me that the first is the stronger, and I confess that I personally am attracted by it, although it is unnecessary for the purposes of this case to express any decided opinion. I thus, to some extent, part company with the learned judge, because he decided the case on the footing that the plaintiffs could not comply with the present rule without committing breaches of the contracts entered into before the new rule was passed, but, even so, felt it impossible to interfere. I am, as at present advised, disposed to think that, if it was clearly shown that breaches of antecedent contracts would inevitably be involved in complying with the rules as they now stand, then the proper course for the court to take might well be to grant an injunction. However, on the evidence before us I entirely agree with **SOMERVELL, L.J.**, and **SINGLETON, L.J.**, that the plaintiffs have failed to show that it is not possible for them to comply with the rules of the association as they now stand without committing breaches of the contracts in question. My Lords have stated fully the reasons for that conclusion, as to which I only wish to add this. Clause 2 of the terms and conditions of sale in the plaintiffs' form of order provides: C

"The seller will use his best endeavours to secure delivery of the goods on the date agreed, but he shall not be liable for any damages, or claim of any kind, which may arise in case of delay." D

It has been said that, as no delivery date is mentioned, that clause means no more than that delivery shall be in a reasonable time. With diffidence, I venture to suggest that this view of cl. 2 overlooks the fact that this was a contract for the sale of goods not yet in existence, and to be made by a third party over whom the vendor had no control. Reading cl. 2 with that in mind, I think there is force in the words: "The seller will use his best endeavours to secure delivery of the goods," even though no date for delivery is fixed. I think the effect of it is that the seller is to use his best endeavours to procure delivery of the goods by the manufacturers in a reasonable time, but is not to be liable for any delay. Construing the clause in that way, it seems to me to be reasonably plain, when one comes to look at the plaintiffs' agreement with Ford Motor Co., Ltd., that the plaintiffs, without any breach of contract, could refuse to deliver to a given E

purchaser any vehicle supplied by the Ford company on conditions requiring (in effect) that the particular car in question must be delivered to some other purchaser, perhaps a purchaser who, in fact, placed his order at a later date than the first-mentioned purchaser. In that state of affairs there never would have been a vehicle available to fulfil the particular order, and the disappointed purchaser could not, in my view, contend with success that any breach of contract had been committed by the plaintiffs in failing to appropriate the car in question to his order, for that car would never have been delivered except on terms, in effect, that it was not to be sold to the disappointed purchaser. Accordingly, I agree that on the facts in evidence in this case the plaintiffs have failed to make out their claim, and, therefore, that the appeal fails and should be dismissed.

Appeal dismissed. By consent, no order as to costs.

Solicitors: *Ludlow, Head & Walter* (for the plaintiffs); *Osmond, Bard & Westbrook* (for the defendants).

[*Reported by F. GUTTMAN, Esq., Barrister-at-Law.*]

MONKLAND v. JACK BARCLAY, LTD.

[KING'S BENCH DIVISION (Humphreys, J.), June 28, 29, 30, 1950.]

Sale of Goods—Non-delivery—Conditions in regard to sale by dealer imposed by manufacturer after date of contract between dealer and customer—Customer required to enter into covenant against re-sale—Refusal by customer to enter into covenant—Dealer's failure to deliver car—Liability of dealer.

In May, 1946, the plaintiff entered into an agreement with the defendants, motor car dealers, for the purchase of a new Bentley motor car, for which he paid a deposit. It was a term of the agreement that: "The sellers will use their best endeavours to secure delivery of the goods on the estimated delivery dates from time to time furnished, but they do not guarantee time of delivery, nor shall they be liable for any damages or claim of any kind in respect of delay in delivery." On Aug. 15, 1946, the British Motor Trade Association made a rule that on the sale of a new motor car its members should obtain a covenant by the retail purchaser against re-sale within a period of six (later, amended to twelve) months. On Mar. 28, 1947, the manufacturers of Bentley motor cars wrote to the defendants saying that they had decided to adopt the association's scheme and that the supply of a new Bentley car would be conditional on the retail purchaser executing a covenant against re-sale. The plaintiff refused to execute the covenant on the ground that it was not part of his original agreement, and, as a result, the defendants failed to supply him with a car. In an action by the plaintiff for damages for breach of contract, the defendants contended (a) that, having regard to the circumstances, a reasonable time for delivery had not elapsed, and (b) that it would be against public policy to supply the plaintiff with a car without obtaining the covenant from him.

Cases referred to:

- (1) *Bowman v. Secular Society, Ltd.*, [1917] A.C. 406; 86 L.J.Ch. 568; 117 L.T. 161; 9 Digest 81, 310.
- (2) *Mogul S.S. Co. v. McGregor, Gow & Co.*, [1892] A.C. 25; 61 L.J.Q.B. 295; 66 L.T. 1; 56 J.P. 101; 12 Digest 234, 1938.
- (3) *Hyams v. Stuart King*, [1908] 2 K.B. 696; 77 L.J.K.B. 794; 99 L.T. 424; 12 Digest 193, 1527.
- (4) *Beresford v. Royal Insurance Co., Ltd.*, [1938] 2 All E.R. 602; [1938] A.C. 586; 107 L.J.K.B. 464; 158 L.T. 459; Digest Supp.

E. Ryder Richardson for the plaintiff.

Pritt, K.C., and *Aldous* for the defendants.

HUMPHREYS, J., found that a reasonable time for delivery had elapsed and the defendants were in a position to deliver the car, had they wished to do so, long before May 12, 1948, when the writ in the action was issued. He held that, as the agreement between the plaintiff and the defendants had been entered into before the covenant scheme was in existence, the question whether it was contrary to public policy for the defendants to sell the car to the plaintiff without obtaining a covenant from him against re-sale did not arise, and, therefore, the defendants were liable to the plaintiff in damages for breach of contract.

Solicitors: *Booth & Blackwell* (for the plaintiff); *Osmond, Bard & Westbrook* (for the defendants).

F.A.A.

Re HONE (a bankrupt). Ex parte THE TRUSTEE v. KENSINGTON BOROUGH COUNCIL.

[CHANCERY DIVISION (Harman, J.), July 24, 1950.]

Bankruptcy—Effect on transaction by bankrupt—Payment by cheque before bankruptcy—Collection of money by payee's bank after bankruptcy—Bankrupt granted secured overdraft by bank—Bankruptcy Act, 1914 (c. 59), s. 45, s. 47 (1).

On Oct. 4, 1949, H. was served with a demand note for rates in respect of the six months from Oct. 1, 1949, to Mar. 31, 1950. On Nov. 3, 1949, H. signed a cheque for the appropriate amount payable to the rating authority, which received it on the same day and gave a receipt for the money. On Nov. 4, 1949, at 11 a.m. the cheque was paid into the authority's bank. During the afternoon of Nov. 4, H. filed her petition in bankruptcy, and at or about 3 p.m. a receiving order was made against her and she was adjudicated bankrupt. The cheque in question was honoured by H.'s bank on Nov. 8, 1949. H.'s account with her bank was at all material times overdrawn pursuant to an arrangement made with the bank by H. under which the bank held security for advances made by it. The trustee in bankruptcy moved for an order to the rating authority to pay the amount received by it to him for division among H.'s creditors.

HELD: (i) the rating authority was not paid until the money was collected on Nov. 8, 1949, and, therefore, payment did not "take place before the date of the receiving order" within the Bankruptcy Act, 1914, s. 45, and so was not protected by that section.

Hadley (Felix) & Co. v. Hadley ([1898] 2 Ch. 680) and *Marreco v. Richardson* ([1908] 2 K.B. 584), distinguished.

(ii) as the payment by the bank constituted a loan by the bank to H., the money paid belonged to H. and not to the bank.

(iii) although the money was lent to the bankrupt by the bank at the time the cheque was met it could not be said that the amount so lent was an asset acquired by H. after the adjudication within s. 47 (1) of the Act of 1914 because the advance depended on H.'s credit, which existed before the bankruptcy, and the security given by her before that time, and so the transaction was not protected by s. 47 (1).

[AS TO TRANSACTIONS UNAFFECTED BY RELATION BACK OF TRUSTEE'S TITLE, see HALSBURY, Hailsham Edn., Vol. 2, pp. 376-378, para. 508; and FOR CASES, see DIGEST, Vol. 5, pp. 638-646, Nos. 5739-5797.]

Cases referred to:

(1) *Hadley (Felix) & Co. v. Hadley*, [1898] 2 Ch. 680; 67 L.J.Ch. 694; 79 L.T. 299; 12 Digest 469, 3820.

(2) *Marreco v. Richardson*, [1908] 2 K.B. 584; 77 L.J.K.B. 859; 99 L.T. 486; 32 Digest 383, 659.

(3) *Pearce v. Davis*, (1834), 1 Mood. & R. 365; 174 E.R. 125; 12 Digest 464, 3773.

MOTION by the trustee in bankruptcy for a declaration that a sum of £55 5s. received by the Kensington Borough Council on or about Nov. 8, 1949, from the bankrupt formed part of the property of the bankrupt divisible among her creditors and vested in the trustee of the bankrupt; and also for an order that the borough council do pay the trustee the said sum of £55 5s.

Claude H. Duveen for the trustee in bankruptcy.

Dennis Lloyd (Muir Hunter with him) for the Kensington Borough Council.

HARMAN, J.: The debtor, a Mrs. Hone, was the rated occupier of certain property in London, and on Oct. 4, 1949, she was served by post with a demand note in the ordinary form by Kensington Borough Council in respect of the six months' rate from Oct. 1, 1949, to Mar. 31, 1950. The amount demanded

was £55 5s. On Nov. 3 she wrote a cheque payable to the borough council for that sum. The demand note stated:

"Cheques, money orders and postal orders should be made payable to Kensington Borough Council and crossed 'Westminster Bank' and should not be made payable to any individual officer. Post-dated cheques cannot be accepted. Cash should not be sent by post unless registered . . ."

- A So one of the ways in which the borough council invited the ratepayers to satisfy the rate demand was by sending a cheque. This cheque was received by the borough treasurer on Nov. 3, and he gave a receipt for it in these words: "Paid, J. Deacon, Borough Treasurer, Nov. 3, 1949, £55 5s. 0d." The cheque was paid into the borough council's bank at 11 a.m. on Nov. 4, to the credit of the general rate fund. After 3 p.m. on the same day the bankrupt filed her petition in bankruptcy, there being no previous act of bankruptcy. She was made bankrupt at once, a receiving order was issued against her, and she was adjudicated on the same day. It appears that the bankrupt had some arrangement with her bankers, the National Provincial Bank at Colchester, whereby she was enabled to overdraw her account. What the arrangement was I do not know, but I shall
- C assume that the bankers entered into it for valuable consideration, *viz.*, some security lodged with them, and that she had a right to draw against that security. In the ordinary course of the business of the clearing house, the cheque was not collected until Nov. 8, when it was honoured by the bank and the proceeds were credited to the Kensington Borough Council. The trustee in bankruptcy now moves the court for a declaration that this £55 5s. 0d. formed part of the property
- D of the bankrupt divisible among her creditors and vested in her trustee, and an order on the borough council to pay him that sum.

- Prima facie*, if this were a straightforward case of a person with money in the bank and money going out of that banking account after the date of the receiving order, that would be part of her assets paid to somebody else in defiance of the trustee's rights and he would be entitled to recover it, but it is said here that
- E there are three reasons why that result does not follow. First, it is said that, within the meaning of the Bankruptcy Act, 1914, s. 45, this payment was made on Nov. 3, when the cheque was received by the borough council, and not on Nov. 8, when the money was collected. Section 45, so far as relevant, provides:

- " . . . nothing in this Act shall invalidate, in the case of a bankruptcy—
- F (a) Any payment by the bankrupt to any of his creditors . . . Provided that . . . the payment . . . takes place before the date of the receiving order . . . "

- To say that a payment takes place is to use a vile phrase, but I must make the best of it. Did this payment "take place" before the date of the receiving order? On the face of it, it clearly did not. It took place on Nov. 8, when, for the first time, the Kensington Borough Council got the money into its coffers. It was not
- G paid before that date. The fact that it has now become the custom of the council to give a receipt for a cheque without qualification showing that only a cheque has been received cannot make any difference to that, but counsel for the borough council drew my attention to two cases which he said showed that, under the general law, payment by cheque of a debt or obligation is made when the cheque is handed to the payee and not on the date when the money is collected, and,
- H therefore, "payment" within the meaning of the Bankruptcy Act, 1914, s. 45, takes place when a cheque is received and not on the later date.

In *Hadley (Felix) & Co. v. Hadley* (1) the defendant sold to the plaintiff company, among other things, "all book and other debts due to the vendor" in connection with his business at such and such a date, and it was held—and I think inevitably held—that cheques which he had received on that date were not debts due to the vendor in connection with the business, because he, having received the cheques, on the true construction of that agreement had received

payment of the money, but BYRNE, J., does make this observation ([1898] 2 Ch. 682):

"I think the true view of this agreement is that where debts were paid conditionally or unconditionally, then such debts were not meant to pass to the purchasers. In this case I think what took place amounted to a conditional payment of the debt; the condition being that the cheque or bill should be duly met or honoured at the proper date. If that be the true view, then I think the position is exactly as if an agreement had been expressly made that the bill or cheque should operate as payment . . ."

That, of course, is confined strictly to the construction of that agreement, and, if I may say so with great respect, it was inevitable that the conclusion should be reached that the position was the same as if there had been an express agreement that any bills or cheques in the vendor's hands at the relevant date should be considered to be debts paid and not moneys due. Therefore, it does not seem to me that that decision helps me at all.

Marreco v. Richardson (2), which is said to be of more general purport, turned on a question under the Statute of Limitations. In that case there was a handing over of a cheque in part payment, and the question arose whether the promise to pay the balance to be implied by the part payment by the cheque was made on the date when the cheque was handed over or on the date when it was cashed. It seems to me clear that the promise to pay was made on the earlier date and it was from that date that the Statute of Limitations must run and not from the later date when the post-dated cheque was honoured, but FARWELL, L.J., made some observations which may be said to be near this case. He says ([1908] 2 K.B. 592):

"There is no doubt the cheque was given in part payment of the debt, and if it was so given in due time, that is, within six years of the commencement of this action, the case is taken out of the statute; if not, the debt is statute-barred."

Then he quotes a case before PATTESON, J., *Pearce v. Davis* (3), and adds (*ibid.*, 593):

"... the payment is made at the time when the cheque is given, and I infer from the judgment of PATTESON, J., that the giving of a cheque would support a plea of payment."

He refers with approval to BYRNE, J.'s decision in *Hadley v. Hadley* (1), and says (*ibid.*):

"... I should myself prefer to say that the giving of a cheque for a debt is payment conditional on the cheque being met, that is, subject to a condition subsequent, and if the cheque is met it is an actual payment *ab initio* and not a conditional one."

On that it is argued that in the present case the cheque was met and, therefore, there was an actual payment *ab initio*, namely, before the bankruptcy.

I cannot take that view as between the trustee in bankruptcy and the bankrupt. It may be that, as between debtor and creditor, in certain circumstances that might be so. In both *Hadley (Felix) & Co. v. Hadley* (1) and *Marreco v. Richardson* (2), the *ratio* of the decision was that the promise to pay was what counted, but I cannot think that in the present case the borough council did receive payment when the piece of paper passed to it. It got the money when it was the richer by £55. It is quite true the council could not have sued for the money, having accepted the cheque, until the cheque was dishonoured. Nevertheless, it was not till the council collected it that it was paid. At that time the receiving order had been made, and, therefore, s. 45, I think, does not apply, because there was no payment before the date of the receiving order.

Next there is taken a point which is formidable. This debtor was overdrawn,

and, therefore, it is said, the money with which the debt was paid was, not her money, not her asset, but the bank's money. In my judgment, that is not right. A payment by a bank under an arrangement by which the customer has an overdraft is a lending by the bank to the customer of the money. The customer pays the money, not the bank. Otherwise, in certain circumstances which might arise, the bank might be able to sue for the money, which they clearly could not do. They have only paid the money as agent for the customer just as if her account was in fund. Therefore, the money paid was, in my judgment, the bankrupt's money.

Thirdly, however, it is said that this is a transaction by the bankrupt with a person dealing with her *bona fide* and for value in respect of property acquired by the bankrupt after the adjudication within s. 47 (1) of the Bankruptcy Act, 1914. It is said that the bank never had this £55 5s. 0d. in the bankrupt's account until after the adjudication, because the bank did not lend it to the bankrupt until Nov. 8. The answer to that is that there was an asset of the bankrupt's, namely, the state of her credit in her account with the bank, which existed before the bankruptcy, and the security given to the bank before the bankruptcy, and, by appropriating this money to their arrangement with the bankrupt, the bank merely decreased another asset, namely, the value of the security charged by the bankrupt with which, in other circumstances, his creditors might have been paid.

I hold, therefore, that neither s. 45 nor s. 47 (1) applies, and that what seemed to be the *prima facie* view of the case turns out in the end to be the right one, *viz.*, that this was a payment by the bankrupt after the date of the receiving order and that the trustee is entitled to say that an asset of the bankrupt was paid away without his authority so that he is entitled to recover it. I, therefore, order the borough council to pay the trustee the sum of £55 5s. 0d. with costs.

Order accordingly.

Solicitors: *Isadore Goldman & Son* (for the trustee); *Pontifex, Pitt & Co.*, agents for *Town Clerk*, Kensington (for the borough council).

[*Reported by R. D. H. OSBORNE, Esq., Barrister-at-Law.*]

Affirmed. C.A. [1951] 1 All E.R. 682.

JOYCE v. BOOTS CASH CHEMISTS (SOUTHERN), LTD.

[KING'S BENCH DIVISION (Slade, J.), July 11, 12, 13, 1950.]

Factory—Chemist's shop—Staff comprising manager, dispenser, assistants and porter—Porter alone employed in manual labour—Factories Act, 1937 (c. 67), s. 151 (1).

The plaintiff was employed by the defendants, who were multiple shop chemists, as a porter in one of their branch shops, the staff of which comprised, in addition to the plaintiff, the manager, a dispenser, and three shop assistants. The ground-floor of the premises consisted of a chemist's shop with a dispensary which was separated from the rest of the shop by a partition. A flight of stairs led up to the first floor consisting of the stockroom and another room. The plaintiff's duties included loading and unloading vans, carrying goods and bottles up and down the stairs, cleaning floors and windows, and weighing out soda, soap powder and other similar commodities in convenient quantities for sale to customers. While carrying a box of bottles from the stockroom along the passageway leading to the stairs the plaintiff tripped over a piece of linoleum on the top stair and fell and sustained injuries. In an action for damages against the defendants for breach of statutory duty under the Factories Act, 1937.

HELD: the shop was not a factory within the meaning of the Factories Act, 1937, s. 151 (1) as (a) the manager, the dispenser, and the shop assistants were not persons "employed in manual labour" within the meaning of s. 151 (1) of the Act of 1937 (*Bound v. Lawrence* ([1892] 1 Q.B. 226), *applied*), and (b) while the porter was employed in manual labour "in a process"—a phrase which was used in s. 151 (1) of the Act of 1937 as equivalent to "in an activity" (definition of "process" in *Ward v. Coltness Iron Co., Ltd.*, 1944 S.C. 318, *adopted*)—for or incidental to the purposes specified in s. 151 (1) (a) and (c), his manual labour was incidental only to the purposes for which the shop was used.

[FOR THE FACTORIES ACT, 1937, s. 151 (1), see HALSBURY'S STATUTES, Second Edn., Vol. 9, p. 1113.]

Cases referred to:

- (1) *Ward v. Coltness Iron Co., Ltd.*, 1944 S.C. 318; 2nd Digest Supp.
- (2) *Bound v. Lawrence*, [1892] 1 Q.B. 226; 61 L.J.M.C. 21; 65 L.T. 844; 56 J.P. 118; 24 Digest 936, 247.
- (3) *Morgan v. London General Omnibus Co.*, (1884), 13 Q.B.D. 832; 53 L.J.Q.B. 352; 51 L.T. 213; 48 J.P. 503; 24 Digest 935, 242.
- (4) *Hoare v. Green (Robert), Ltd.*, [1907] 2 K.B. 315; 76 L.J.K.B. 730; 96 L.T. 724; 71 J.P. 341; 24 Digest 903, 39.

ACTION for damages for breach of statutory duty and for negligence.

The plaintiff was employed as a porter by the defendants, who were multiple shop chemists, at their branch at 275, High Road, Leytonstone. The ground floor of the premises consisted of an ordinary chemist's shop, with a dispensary in one corner separated from the rest of the ground floor by a partition. A flight of stairs led up to a half landing where there was a tea-room for the female staff. Three stairs led from the landing to the first floor, comprising a stockroom and tea-room for the male staff. There was no handrail on either side of the three stairs and each of the three stairs was covered by a rectangular piece of linoleum. The dispensary was used for dispensing medicines and for making ointments and pills. The stockroom held bottles of preparations for use in the dispensary, which had to be cleaned from time to time and which were then taken from the stockroom to the dispensary. Certain commodities in common use, such as soda, were weighed and put into containers of various weights for retail sale. The cleaning and carrying of the bottles to and from the dispensary, the measuring out of the soda, and the packing of it into containers formed part of the regular duties of the plaintiff. The plaintiff's duties also included the loading and unloading of packing cases from vans, unpacking goods and carrying them up and down the stairs, and the cleaning of floors and windows. The staff of the shop consisted of the manager, who was a member of the Pharmaceutical Society, a dispenser, three female shop assistants, and the plaintiff.

On Dec. 4, 1948, the plaintiff, while walking along the passageway carrying a case of bottles, caught the toe of his left foot in the linoleum on the top stair of the flight of three stairs. He tried to save himself by letting go of the box and clutching at the wall, but his hand slid along the wall and he fell down the three stairs with the case and suffered injuries. The damages sustained by the plaintiff as a result of the accident were assessed by SLADE, J., at £764 16s. The plaintiff contended that the shop was a factory within the meaning of the Factories Act, 1937, s. 151 (1), and that the accident was caused by a breach of the defendants' statutory duties under s. 25 (1) and (2), and s. 26 (1), of the Act, or, alternatively, by their common law negligence as his employers. The defendants denied that the premises were a factory within the meaning of s. 151 (1) of the Act of 1937, or, if the premises were a factory, that they had been guilty of any of the breaches of statutory duty alleged, or of negligence.

J. G. K. Sheldon for the plaintiff.

R. M. H. Everett for the defendants.

SLADE, J., stated the facts and continued: The plaintiff bases his case on two distinct grounds: first, on breach of statutory duty, *i.e.*, contravention of the provisions of s. 25 (1) and (2) and s. 26 (1) of the Factories Act, 1937, and secondly, on negligence by the defendants at common law. Having regard to the provisions of s. 25 (2), it is necessary for me to decide whether or not these premises are in law a factory.

In the first place, it is clear that the Factories Act, 1937, applies only to premises which are a factory as defined by that Act: see s. 149. The definition of a factory is contained in s. 151, and for the purposes of the Act of 1937, that definition bears no relation to the dictionary or colloquial definitions of a factory. By s. 151 (1), any premises are a factory for the purposes of the Act in which . . . persons are employed in manual labour in any process for or incidental to any of the purposes specified in paras. (a), (b) and (c) of the subsection. Therefore, to constitute premises a factory, they have to fall within both limbs of the definition in s. 151 (1), *i.e.*, there must be (i) persons employed in manual labour in some process, and (ii) that process must be for or incidental to one or more of the purposes specified in paras. (a), (b) and (c).

I will deal with the second limb first. Paragraph (a) refers to "the making of any article or of part of any article," and (c) to "the adapting for sale of any article." It is contended on behalf of the plaintiff that the making of pills and ointment and the dispensing of doctors' prescriptions (which are admitted activities of the defendant's shop) constitute the making of an article and/or the adapting for sale of an article. I will assume, without deciding the point, that that contention is right and that, therefore, there are carried on at this shop premises processes for or incidental to the purposes mentioned in paras. (a) or (c), or both of them. Making that assumption in favour of the plaintiff, these premises become factory premises within the definition if, but only if, persons are employed in them in manual labour in any process for or incidental to either of the purposes which I have assumed to exist. Under the Interpretation Act, 1889, s. 1 (1), not only does the singular include the plural, but the plural includes the singular, and, therefore, the word "persons" would include "person".

As to the word "process" in the first part of s. 151 (1), in *Ward v. Coltness Iron Co., Ltd.* (1) LORD MONCRIEFF, dealing with s. 151 (1) of this Act, said that he read the words "in any process" as used in the section as equivalent to "in any activity". He said (1944 S.C. 324):

"I do not think these words mean 'process' in a technical sense, seeing that 'processing' in such a sense is covered by the later words of the definition which deal with the 'making, altering or repairing of articles'."

I respectfully adopt that meaning of the word "process", and, in any event, it is safer in the present case for me to assume that "process" includes "any activity". With regard to the words "in manual labour", normally there were six persons employed at this shop. First, there was the manager, who is a member of the Pharmaceutical Society. I decide that he was not engaged in manual labour. Then there were the three shop assistants. I think that *Bound v. Lawrence* (2) shows that a shop assistant is not engaged in manual labour. That was a decision under the Employers and Workmen Act, 1875. The definition of a person engaged in "manual labour" in the Act of 1875 has also been applied to cases arising under the Truck Acts. I appreciate that there are differences in the wording of the Employers and Workmen Act, 1875, s. 10, and s. 151 of the Act of 1937. Section 10 of the Act of 1875 enumerates certain trades and ends with the words "or otherwise engaged in manual labour", and I appreciate that those words might have to be construed with

what has gone before. *Bound v. Lawrence* (2) is a binding authority on me only in respect of the language of the statute on which it was decided, but I derive considerable assistance from that case. I find, so far as it is a question of fact, as a fact, and so far as it is a question of law, as a matter of law, that none of the three shop assistants was engaged in manual labour. I find that the plaintiff was engaged in manual labour and, therefore, the only remaining person is the dispenser.

The only evidence about him is that he dispenses medicines from doctors' prescriptions and that he makes pills and ointments. It is in considering him that I desire to refer to passages in the judgments of LORD ESHER, M.R., and FRY, L.J., in *Bound v. Lawrence* (2). LORD ESHER said the question which arose in the case before him as stated by the magistrates was whether the appellant could be said to be engaged in manual labour within the meaning of the Employers and Workmen Act, 1875. He continued ([1892] 1 Q.B. 228):

"It seems to me that the decision in *Morgan v. London General Omnibus Co.* (3) assists us to this extent, that it shews that we must not look at what the appellant may do incidentally in the course of his employment, but must see what is his real and substantial work. Now, I take it that if we examine this case it appears that the appellant was employed as a grocer's assistant in a shop, and his business was to take orders from the customers and to carry them out. In doing this he may have to shew goods, and if the customers take away the goods he has to make up the parcels. In doing this he has to use his hands, and the question is whether that makes him a manual labourer. There can be no manual labour without user of the hands; but it does not at all follow that every user of the hands is manual labour, so as to make the person who does it a manual labourer."

After dealing with what he said was the substantial employment of the shop assistants in that case, the learned Master of the Rolls said (*ibid.*, 229):

"If the mere user of the hands in matters incidental to a man's employment is to constitute him a manual labourer, it would extend the Act to every shop-assistant in every shop, great or small, which cannot have been the intention of the legislature."

FRY, L.J., said (*ibid.*):

"It is to be observed that it is difficult to imagine any work done by man so purely intellectual as to require no kind of work with the hands; and the converse is equally true, that there can hardly be work with the hands that requires no intellectual effort. If, then, the words 'manual labour' are to have the full significance which could be put on them, they would be extended to every kind of employment. That cannot be the true meaning of the statute, but some more confined interpretation must be arrived at. I agree that this must be done by looking to the nature of the substantial employment, and not to matters that are incidental and accessory. The determination of what is substantial and what accessory may be a question of difficulty; but, in my view of this case, the appellant was not engaged in manual labour."

Applying that criterion (which I do apply notwithstanding the difference in phraseology between the two statutes) to the dispenser in the present case, I find as a fact that, in view of the skill which he employs in dispensing, the knowledge which he must have to enable him to carry out the instructions contained in the prescriptions, the care he has to exercise in seeing that the prescription is accurately dispensed, and so on, the intellectual part of the work is the substantial or dominant part and the use of the hands is purely subsidiary, or, to use the word in *Bound v. Lawrence* (2), "accessory." I

find, therefore, that the dispenser in this shop was not employed in manual labour.

A The upshot of these findings is that of the six persons normally employed in the shop one, namely, the plaintiff, was employed in manual labour and five were not. Again applying the Interpretation Act, 1889, and saying that "persons" includes "person" and bearing in mind that "process" means nothing more than "activity" and that the words are "for or incidental to any of the purposes," notwithstanding what I have said it would appear at first sight as though this shop fell within the definition, because it could be said that it is premises in which one person is employed in manual labour in some activity incidental to one of the purposes specified in (a), (b) and (c) of s. 151 (1) of the Act of 1937—"incidental" because at the very time of the accident what was B the plaintiff doing but carrying down a two-foot box of bottles to the dispensary to enable them to be filled by the dispenser, and, if making prescriptions or ointments is an activity, as indeed I have assumed, what could be more incidental to that than to provide the dispenser with a bottle without which he would be unable to dispense the prescription?

C I now have to consider whether there are any decisions, or any persuasive authorities—even if they do not bind me—which suggest that some restriction must be placed on the apparently all-embracing width of this definition. In that connection counsel for the defendants has referred me to *Hoare v. Green (Robert), Ltd.* (4), and, in particular, to a passage from the judgment of LORD ALVERSTONE, C.J. The facts are not important, but it was a Case stated by a metropolitan magistrate who had found that the respondents carried on the business of retail florists and that they employed a number of young women and girls whose duty consisted partly in serving the customers in the shop and partly in making up flowers into wreaths, crosses and bouquets and arranging floral decorations, for which purposes frames of wood or wire were sometimes used, in a room behind the shop. That case fell to be decided on the meaning D of the term "workshop" in s. 128 of the Factory and Workshop Act, 1901. The definition of "workshop" in s. 149 of that Act is in almost identical terms with the definition of "factory" in s. 151 of the Act of 1937. LORD ALVERSTONE, C.J., in the course of his judgment, found that the activities of the shop in that case (as I have found in the present case) fell within the purview of the words in the Act of 1901 corresponding to paras. (a), (b) and (c) of s. 151 (1) of the Act of 1937. LORD ALVERSTONE, C.J., continued ([1907] 2 K.B. 320):

F "I have had more difficulty in coming to a conclusion on the question as to whether this room is a place where manual labour was exercised by way of trade. It is, I think, clear that there must be some limit placed on the scope of these words, and I think that the question as to the limit is best answered by saying that, if the substantial purpose for which the place is used is the employment of persons in manual labour, then the Act applies. G On the other hand, if the place is only incidentally used for the purpose of manual labour—if, for example, the place is a shop and the manual labour is merely incidental to the general business of the shop—then different considerations would arise."

H That test I propose to apply in the present case. It seems to me to be almost fantastic to suggest that, merely because the plaintiff is employed as a porter at this ordinary chemist's shop, the shop becomes a factory, but would cease to be a factory the moment the plaintiff left. Counsel for the plaintiff suggested that, if the plaintiff left, it would be necessary to employ some other person to carry out the duties of a porter. That may or may not be so. I would expect some limitation to be placed on the apparently all-embracing width of the language of s. 151 (1), and I find that limitation expressed in the passage from the judgment of LORD ALVERSTONE, C.J., in the case to which I have just referred. Emphasising the distinction, as I think LORD ALVERSTONE, C.J.,

was emphasising it, between "persons", on the one hand, and "place", on the other, and taking the criterion which he posed, I ask myself: Are these shop premises premises which are only incidentally used for the purpose of manual labour or is that the substantial purpose for which they are used? I have no hesitation in answering that question by saying that manual labour, confined, as I find it to be, to the plaintiff as being the only member of the staff of six who is engaged in it, is a purpose incidental only to the substantial purpose for which the premises were used. In the result, therefore, I find that the shop premises were not a factory within the meaning of the Factory Act, 1937, s. 151 (1).

[HIS LORDSHIP reviewed the evidence; held that, if, contrary to his decision, it was found that the premises were a factory within the meaning of the Factories Act, 1937, there was no breach of statutory duty under s. 25 (1) or s. 26 (1) of the Act, and, though there was a breach of statutory duty in the failure to provide a hand-rail under the provisions of s. 25 (2) the plaintiff had not discharged the onus, if it was on him, of showing that the presence of a hand-rail would have prevented the fall or minimised the results of it; and found that there was no negligence on the part of the defendants in relation to the premises.]

Judgment for the defendants with costs.

Solicitors: *Shaen, Roscoe & Co.* (for the plaintiff); *Seaton Taylor & Co.* (for the defendants).

[*Reported by F. A. AMIES, Esq., Barrister-at-Law.*]

WILLEY v. PEACE.

[KING'S BENCH DIVISION (Lord Goddard, C.J., Byrne and Finnemore, JJ.), July 25, 1950.]

Arrest—Search—Metropolis—Police officer's powers—Suspicion of possession of stolen property—"Having or conveying" property in street—Search during voluntary visit to police station—Metropolitan Police Act, 1839 (c. 47), s. 66.

A police constable observed the appellant acting in a street within the metropolitan police district in a manner which was calculated to arouse suspicion and asked him what he was doing. In reply the appellant used obscene language and said he would go to the police station and complain of the constable's conduct. The two men walked to the station where the officer told the station sergeant what had occurred. The respondent, a detective constable, who was present and heard this account, observed that the appellant's pockets were bulging and that the appellant was trying to conceal it. The respondent asked the appellant what was in his pockets, but the appellant refused to say or to offer any explanation and the respondent then proceeded to search him. During the search the appellant resisted violently and assaulted the respondent. No stolen property was found, but the appellant was charged with assaulting the respondent in the execution of his duty and convicted.

HELD: a constable's power under the Metropolitan Police Act, 1839, s. 66, to "stop, search and detain . . . any person who may be reasonably suspected of having or conveying in any manner anything stolen or unlawfully obtained" was not confined to dealing with persons who were "having or conveying" something in the street; the appellant was conveying something in the course of a journey and the transit was not broken because he voluntarily entered the police station to lay a complaint; the respondent reasonably suspected that what was conveyed by the respondent had been

stolen or unlawfully obtained; and, therefore, the respondent had been rightly convicted.

[AS TO THE POWERS OF ARREST OF POLICE OFFICERS, see HALSBURY, Hailsham Edn., Vol. 9, pp. 87-96, paras. 116-121; and FOR CASES, see DIGEST, Vol. 14, pp. 178-186, Nos. 1555-1660, Digest Supp. and 2nd Digest Supp.]

Cases referred to:

- (1) *R. v. Fisher*, (1875), 32 L.T. 22; 39 J.P. 612; 14 Digest 186, 1655.
- (2) *Hadley v. Perks*, (1866), L.R. 1 Q.B. 444; 35 L.J.M.C. 177; 14 L.T. 325; 30 J.P. 485; 14 Digest 178, 1561.
- (3) *Christie v. Leachinsky*, [1947] 1 All E.R. 567; [1947] A.C. 573; [1947] L.J.R. 757; 176 L.T. 443; 111 J.P. 224; Digest Supp.

B CASE STATED by Middlesex Quarter Sessions.

At a court of summary jurisdiction sitting at Enfield on Jan. 23, 1950, the appellant was convicted of having on Jan. 18, 1950, at Chase Side, Southgate, assaulted the respondent, a detective constable of the Metropolitan Police Force, in the execution of his duty, contrary to s. 12 of the Prevention of Crimes Act, 1871, and was fined £5 and ordered to pay five guineas costs.

- C The appellant appealed to quarter sessions where it was contended on his behalf that the respondent was not acting in the execution of his duty within the meaning of s. 12 of the Prevention of Crimes Act, 1871, at the time of the assault, because he was engaged in searching the appellant by force and detaining him by force when he was not under arrest. It was also contended that there was no right at common law to search by force a person who was not under arrest and
- D that the respondent had no power to stop, search, and detain the appellant under s. 66 of the Metropolitan Police Act, 1839, because the appellant was in a police station and was not conveying anything in a street at the time when the respondent formed the suspicion that the appellant was in possession of stolen property. The respondent contended that in the circumstances he had a duty to exercise the power of search granted by s. 66 of the Act of 1839. Quarter sessions
- E accepted the contentions of the respondent and dismissed the appeal.

Sir John Cameron for the appellant.

Thesiger, K.C., and *J. C. Phipps* for the respondent.

LORD GODDARD, C.J.: In my opinion this case is very clear, and the appeal committee of Middlesex Quarter Sessions were right.

- F Shortly the facts were these. A police officer observed the appellant acting in the street in a manner which was calculated to arouse the suspicion of any police officer. The officer walked up to the appellant and asked him what he was doing, and so forth, and all the officer received in reply was obscene abuse. The appellant then said he was going to the police station to report the officer, and the officer walked with him to the station. The officer at that time only suspected the
- G appellant of being a person loitering with intent to commit a felony. Not knowing of any recent theft or housebreaking, he did not suspect him of being in possession of property unlawfully obtained or stolen. At the police station the respondent, a detective constable, heard the account which the police officer gave. He knew that the appellant had just come in from the street, he noticed that the appellant's pockets were bulging, and he saw the appellant doing things which
- H he regarded as an endeavour to conceal something. The respondent, therefore, asked him what he had in his pocket. The appellant would not say, and thereupon the respondent said: "Very well, I shall search you," and, as the appellant resisted, he was detained—there is no question about that—by the police while he was searched. He was not found to have any stolen property in his possession.

The question is whether anything unlawful was done? The matter seems to depend entirely on the construction of s. 66 of the Metropolitan Police Act, 1839, which provides:

"... and every such constable may also stop, search and detain any vessel, boat, cart, or carriage in or upon which there shall be reason to suspect that anything stolen or unlawfully obtained may be found, and also any person who may be reasonably suspected of having or conveying in any manner anything stolen or unlawfully obtained."

Therefore, a police officer who suspects on reasonable grounds that a person is carrying something stolen or unlawfully obtained may, first of all, stop him, then search him, and then, if necessary, detain him. It is argued that that can only apply when the person is "having or conveying"—which are said to have the same meaning, and I think they have—something in the street. That is putting far too fine a point on it, as was shown in *R. v. Fisher* (1). That case followed *Hadley v. Perks* (2), in which BLACKBURN, J., in giving the judgment of the court, frequently used the expression "in the street," but what the learned judge was doing in that case, I think, was contrasting the powers of search where a person is conveying something with the powers where the goods are not being conveyed, but are in a house, warehouse, or other premises, in which case a search warrant must be obtained. A person does not cease to be conveying or having something in his possession if he has it when he walks along the street and then goes into a police station with the thing still in his possession and is going to walk out of the police station if the police let him go.

In my opinion, in the present case, as soon as the appellant entered the police station and the respondent formed a reasonable suspicion—and there is no question he had a reasonable suspicion—the respondent had power to search him. There was no necessity for him to say, in view of what took place here: "I reasonably suspect you of having stolen goods," because, if that point had arisen, I think the case would come within the exception which VISCOUNT SIMON mentioned in *Christie v. Leachinsky* (3), where he said ([1947] 1 All E.R. 573):

"The requirement that the person arrested should be informed of the reason why he is seized naturally does not exist if the circumstances are such that he must know the general nature of the alleged offence for which he is detained."

In that case the House was considering an arrest at common law and what was necessary at common law. The procedure under s. 66 is appropriate whether a crime has been committed or not and whether or not the police are actually going to arrest a person in the sense of taking him before a magistrate. They may take him before a magistrate if they find property on him which has been stolen or unlawfully obtained, and this section gives them power to stop, search and detain. It need not necessarily be in a street because a vessel or boat is not to be found in a street. This power is given where a person is carrying something, that is to say, is in the course of a journey. In the present case, the appellant was in the course of a journey. He went into the police station to make a complaint about a police constable, but that did not break the transit. He had still got the property on him. He had got it while he was in the street and in the police station. In my opinion, there was ample power to search him given by this section. The appellant knew perfectly well why he was being searched—there can be no question about that—and I think the police here acted strictly in accordance with s. 66. Therefore, the appeal committee and the justices at Enfield came to a perfectly right decision and this appeal fails.

BYRNE, J.: I entirely agree.

FINNEMORE, J.: I also agree.

Solicitors: *Hamilton-Hill & Evershed* (for the appellant); *The Solicitor, Metropolitan Police* (for the respondent).

[Reported by F. A. AMIES, Esq., Barrister-at-Law.]

LARNER v. FAWCETT.

[COURT OF APPEAL (Somervell, Singleton and Jenkins, L.J.J.), July 25, 1950.]

Lien—Enforcement—Sale—Jurisdiction of court to order sale where no right to sell at common law or in equity—R.S.C., Ord. 50, r. 2.

On Jan. 19, 1949, F. agreed with D. that D. should take F.'s filly on lease for a certain period on the basis that any money won in racing her should be equally shared and that D. should pay all expenses and have the right to purchase her at any time. D. agreed with L. that L. should train the filly. In October, 1949, F. learned that L. had the filly, and L. informed him that he had started an action against D. in respect of her upkeep. F. wrote to L. stating the facts and asking him to "hold the filly on behalf of" F. who would "be responsible for any expenses in connection therewith." On Nov. 9, 1949, F. wrote to L. that "I shall have to withdraw or modify" the request to L. to hold the filly on his behalf. L. obtained judgment against D. and on June 30, 1950, began an action against F. claiming, *inter alia*, a declaration that he was entitled to a lien on the filly in respect of its upkeep and an order that the filly should be sold, and on the same day L. filed a notice of motion asking for an order of sale under R.S.C., Ord. 50, r. 2.

HELD: rule 2 was not confined to cases in which the applicant had, apart from the rule, a right of sale at law or in equity, but conferred power on the court in the present case to order the sale of the filly, and, on the facts, it was proper to make the order claimed.

Bartholomew v. Freeman (1878) (3 C.P.D. 316) and *dictum* of SIR WILLIAM PAGE WOOD, V.-C., in *Thames Iron Works Co. v. Patent Derrick Co.* (1860) (1 John. & H. 97), *applied*.

[AS TO RIGHT OF SALE UNDER A LIEN, see HALSBURY, Hailsham Edn., Vol. 20, pp. 553, 580, 581, paras. 696, 734; and FOR CASES, see DIGEST, Vol. 32, pp. 224, 225, Nos. 87-98.]

Cases referred to:

- (1) *Bartholomew v. Freeman*, (1878), 3 C.P.D. 316; 38 L.T. 814; Digest, Practice, 660, 2801.
- (2) *Thames Iron Works Co. v. Patent Derrick Co.*, (1860), 1 John. & H. 93; 29 L.J.Ch. 714; 2 L.T. 208; 70 E.R. 676; 32 Digest 224, 90.
- (3) *Dangar, Grant & Co. v. Gospel Oak Iron Co.*, (1890), 6 T.L.R. 260; 1 Digest 531, 1884.

APPEAL by the respondent from an order of DANCKWERTS, J., dated July 14, 1950, that a filly in the possession of the applicant should be sold unless the respondent paid £150 into court within ten days.

The applicant issued a writ against the respondent claiming (a) a declaration that he was entitled to a lien to secure payment to him in respect of the keep and/or training and/or veterinary expenses of a filly, belonging to the respondent, from February, 1949, to November, 1949, or until such later date as the court might determine; (b) an order for the sale of the filly; and (c) payment out of the proceeds of the sale of the amount due to the applicant in respect of the matters referred to under heading (a). The applicant gave notice of motion for an order for the sale of the filly, on which DANCKWERTS, J., made the order above stated. The facts appear in the judgment of SOMERVELL, L.J.

Threlfall for the respondent.

Astell Burt for the applicant.

SOMERVELL, L.J.: This is an appeal from an order made by DANCKWERTS, J., that a grey filly named *Veloce*, now in the possession of the applicant in the motion, should be sold

"unless the defendant on or before July 24, 1950, lodge in court to the credit of this action the sum of £150 as directed in the lodgment schedule hereto."

The filly was, and has remained, the property of the respondent to the motion. On or about Jan. 19, 1949, the respondent made an agreement with a Mr. Davis according to which Mr. Davis was to take Veloce on lease

"on the terms of half winnings to both parties, Mr. Davis to pay all expenses to train and insure against accident, Mr. Davis having the right to purchase at any time."

Mr. Davis, having got the filly into his possession, made an agreement with the applicant to look after and train her. Although there is no reference to this in the agreement between the respondent and Mr. Davis, we were told that it was in the contemplation of the respondent and Mr. Davis that the filly was suitable for training only for flat racing, though she might be used later as a brood mare. The applicant did not hold a licence to train horses for flat racing. From January to October, 1949, the respondent was unable to find out where the filly was, but he found that she was in the possession of the applicant on or about Oct. 24, 1949. He wrote to him a letter which we have not got, but we have a copy of the reply from the applicant's solicitors who say:

"We do not know if Mr. Davis has told you, but we have issued a writ against him on Mr. Lerner's behalf claiming the sum of £125 for keep of the filly. This action was dealt with in the High Court in London on the 24th instant when Mr. Davis was given leave to defend, provided only that he paid the sum of £90 into court by the 31st instant."

Mr. Davis did not pay the money into court, and judgment was entered against him for £125. A judgment summons was taken out against him and it was ordered that he should pay £1 a month, and he only paid the sum of £2. The letter goes on:

"Mr. Davis has treated our client very shabbily indeed. Our client has never hear of you prior to these present proceedings and was always under the impression that the filly belonged to Davis. Naturally, our client has a lien on the filly and is not prepared to part with her until his account and the costs of the proceedings have been paid."

The reply to that letter from the respondent's solicitor, dated Nov. 1, 1949, is of some importance and is in these terms:

"It is news to him [the respondent] that your client had had to sue Mr. Davis for the keep of the filly and he is somewhat astounded. The animal was leased to Mr. Davis on Jan. 19, 1949, and I send you herewith a copy of the memorandum relating thereto, which is in the handwriting of Mr. Davis. I have, of course, had to advise my client that your client, in the circumstances, has a particular lien on the animal, but I shall be glad if, when you obtain judgment, you will try to execute it otherwise than applying for an order for sale of the filly. Surely Mr. Davis has something upon which to levy. Thereafter it would be a great kindness if your client would hold the filly on behalf of my client who would, of course, be responsible for any expenses in connection therewith."

A question arose whether "thereafter" meant after he had obtained judgment, or after the period in respect of which the judgment for recovery of the charges was incurred, or whether it meant "after you have recovered the money from Mr. Davis" which might be never and it looks as if it is going to be never. I think the common-sense construction of this letter is that "thereafter" means after judgment or after the period covered by the judgment, so I read that letter as a clear expression by the respondent of his desire that the applicant should continue to keep the horse. It is said that that letter was written before

the respondent realised that the applicant could not train for flat racing. It may be so, but it is a little odd, if the respondent attached so much importance to the training of the filly, that there is no reference to that in the letter.

On Nov. 9, the respondent's solicitor wrote this somewhat cryptic letter:

A "In view of the fact that I have given you notice as to whom the filly belongs, I anticipate that you will serve me with notice of any application for an order for the sale thereof, so as to enable my client to be present at the hearing. In the light of certain facts which have emerged since I wrote to you on the 1st instant, I shall have to withdraw or modify the fourth and fifth paragraphs of my letter of the 1st instant."

B The fifth paragraph was the paragraph in which he asked the applicant to continue looking after the horse, and this last sentence of the letter may have been designed to try to make the best of two worlds.

C There was further correspondence, but none of the letters after that date was relied on. The applicant pressed the respondent. In May, 1950, the applicant began an action in the King's Bench Division claiming from Nov. 1, 1949, to May 1, 1950, sums due, as was alleged, under a contract. Leave was given to defend, but the action was discontinued. The present proceedings were started on June 30, 1950. The applicant claimed a declaration

D "(a) That he is entitled to a lien . . . to secure payment to him in respect of the keep and/or training and/or veterinary expenses . . . from February, 1949, to November, 1949, or until such later date as the court may determine. (b) An order for the sale of the said filly. (c) Payment out of the proceeds of the sale of the amount then due to the plaintiff in respect of the matters referred to in (a) hereof."

On the same day a notice of motion was filed asking for an order that the filly should be sold. That is the order with which we are concerned.

E On that motion, DANCKWERTS, J., was asked to make an order under R.S.C., Ord. 50, r. 2, which provides:

F "It shall be lawful for the court or a judge, on the application of any party, to make any order for the sale, by any person or persons named in such order, and in such manner, and on such terms as the court or judge may think desirable, of any goods, wares, or merchandise which may be of a perishable nature or likely to injure from keeping, or which for any other just and sufficient reason it may be desirable to have sold at once."

G The points taken in this court are three. First, it was submitted as a matter of law that a common law lien such as is claimed by the applicant in this case confers no right of sale. I would accept that. It was then said that Ord. 50, r. 2, cannot be construed as conferring a right of sale on a party who at law, or in equity, or law and equity combined, as they are, has no right of sale. That submission seems to me to fail in principle, because, if the party has a right of sale under his lien or under some other procedure, the rule would be unnecessary. Also the rule does not seem to me to be directed to that type of question. In construing it I think it is important to bear in mind that it refers primarily to goods of a perishable nature. In the course of the argument I gave an instance which seems to me as good as any other. One imagines goods which are claimed by A and B. They may be in the possession of a third party and there may be interpleader proceedings. One party or other would have the right of sale, and I can conceive he might sell at his own risk, but if there were interpleader proceedings that could not happen. The rule, it seems to me, is not based on a consideration of the right of sale of one party or another, but is directed to the injustice which might result if perishable goods perished and became of no value while the dispute between the parties as to their ownership was being decided at law.

Therefore, I think that the first point fails, because it seems to me to deprive this rule of any real application or meaning. It is also, I think, inconsistent with *Bartholomew v. Freeman* (1). That case also concerned a horse, and the head-note states (3 C.P.D. 316):

"The horse was bought and paid for by the plaintiff at Aldridge's repository, of which the defendants are proprietors, for thirty guineas, and was warranted to draw."

There were certain conditions of sale on breach of which the purchaser had a right to return the horse. The plaintiff returned it with a certificate that it was incapable of work. A veterinary surgeon was appointed who decided against the plaintiff, so it remained the plaintiff's horse but was in the possession of the defendants. There was a further dispute as to its capacity and the plaintiff started an action for breach of warranty. There was correspondence between the solicitors, and the defendants' solicitors wrote to the plaintiff's solicitors (*ibid.*, p. 317):

"Will your client consent to the horse in question being sold at Aldridge's, 'as in dispute' without warranty or reserve, and, of course, without prejudice to all parties? At present it is eating its head off without benefit to any one."

It is clear that the horse was in the possession of Messrs. Aldridge, who would have no right to sell it as it was the property of the plaintiff, but the court, consisting of GROVE, J., and LINDLEY, J., decided that it should be sold. It might be possible to distinguish that case on the facts, but it seems to me to dispose of the first point which was made for the respondent.

We were referred to various other cases, in particular to *Thames Iron Works Co. v. Patent Derrick Co.* (2), decided before the Supreme Court of Judicature Act, 1873. Counsel for the respondent said that that case shows (and I think he is right) that the mere fact that a person claiming a lien might be inconvenienced by having to retain the chattels while the right to the lien was being decided did not entitle him to go either to a court of common law or a court of equity and get an order for sale. Counsel then submitted that, that being so, Ord. 50, r. 2, ought not to be applied to order the sale of goods with regard to which a plaintiff could not either at law or equity obtain an order for sale. At one time in the course of his opening it was indicated that there might be a suggestion that Ord. 50, r. 2, was *ultra vires*, in that it was a procedural rule purporting to confer a new substantive right. A search was made, and it was discovered that this rule was in the schedule to the Supreme Court of Judicature Act, 1873, so that it has statutory force, but, even if it had not been so, that argument would not have commended itself to me. The rule has statutory force, and may well have been designed *inter alia* to enable the court in appropriate cases to order a sale of goods in respect of which a possessory lien was being claimed.

I do not propose to indicate or lay down any general principles, but I am satisfied that the rule confers on a judge power to order a sale in such a case as this, and, that being so, the only question which remains is whether in the circumstances of this case as they appear we ought to interfere with the order which DANCKWERTS, J., has made. It is not without importance that in *Thames Iron Works Co. v. Patent Derrick Co.* (2) SIR WILLIAM PAGE WOOD, V.-C., in the course of his judgment, says (1 John. & H. 97):

"As regards the lien which I am asked to enforce by sale, there is no question that it is in its nature a mere passive lien. It is not founded upon any stipulation in the contract, but arises simply from the usage of trade. It has been settled by numerous authorities that such a lien does not, in general, authorise a sale. It was argued that to create a mere right of retainer, involving considerable expenditure, and rendering the subject of

the lien utterly useless to both parties, would be absurd; and, to a certain extent, there is authority to show that this is not the law. The case referred to, of a horse having eaten its full value, is one instance of a right of sale being held to flow from a lien."

A There is evidence that this filly is worth about £150. The charges which were due from Mr. Davis and the charges which have accrued since must, I should think, exceed that sum. The respondent says that the horse would be worth more than that to him, but he has not taken advantage of that part of the judge's order which enabled the sale to be postponed if £150 was paid into court. I think, on the facts, that there is no reason why we should interfere with the learned judge's order.

B It is, perhaps, worth repeating what was pointed out in argument, that the respondent, in the letter which I have read, seems to have invited the applicant to continue to look after his horse. Whether that correspondence constituted a legal contract or not I do not consider at the moment, but the later letter did not, it seems to me, clearly withdraw that invitation. The respondent is in effect seeking to say: "I am ultimately going to claim this horse." He must admit, I think, that there is a perfectly reasonable issue whether a lien exists or not, but in the meantime he proposes to stand by and let the applicant feed the horse at his (the applicant's) expense which he maintains cannot be recovered by the applicant from him. That seems to me an unreasonable attitude. I should certainly regret it if there was no power in the rules to enable a court or a judge to deal with it. I think there is such a power under Ord. 50, r. 2. I have no reason for disagreeing with the exercise by the learned judge of the power conferred by that rule, and I think this appeal should be dismissed.

D SINGLETON, L.J.: I am of the same opinion. I should like to pay tribute to counsel for the respondent for the industry he has shown in tracing the history of lien and in bringing to our notice various authorities on that subject. He told the court, quite rightly, that lien in its primary sense is the right of one man to retain that which is in his possession belonging to another until certain demands of the person in possession are satisfied. He reminded us that the law does not, except in special circumstances, give any right to sell the thing retained, nor can a lien itself be assigned. In support of his proposition he cited the case to which my lord has already referred, *Thames Iron Works Co. v. Patent Derrick Co.* (2), and, in particular, to two passages in the judgment of SIR WILLIAM PAGE WOOD, V.-C. In the first of such passages SIR WILLIAM PAGE WOOD said (1 John. & H. 97): "It has been settled by numerous authorities that such a lien does not, in general, authorise a sale", and in the other he said (*ibid.*, 99): "I can find nothing to justify me in saying that the right to sell would arise at law on the ground of expense alone." It is clear indeed that the right to a lien does not give any right to sell the thing retained, speaking generally. For myself, I think that was probably one reason for the widening of the rule and for the introduction of Ord. 50, r. 2, which, apparently, was at one time

G Ord. 52, r. 2, for it is so referred to in *Bartholomew v. Freeman* (1). The rule provides:

H "It shall be lawful for the court or a judge, on the application of any party, to make any order for the sale, by any person or persons named in such order, and in such manner, and on such terms as the court or judge may think desirable, of any goods, wares, or merchandise which may be of a perishable nature or likely to injure from keeping, or which for any other just and sufficient reason it may be desirable to have sold at once."

In *Bartholomew v. Freeman* (1) the court was dealing with the case of a horse, and GROVE, J., in the course of his judgment, said (3 C.P.D. 318):

"The case comes sufficiently within the final clause of Ord. 52, r. 2. There seems 'just and sufficient reason' why it may be desirable to have

the animal sold at once. I certainly should not make such an order if the horse were a valuable one for which either party particularly cared. But here neither of them values it *per se* nor wishes to keep it."

LINDLEY, J., in the course of his judgment, said (*ibid.*):

"I also think the case is within the latter words of Ord. 52, r. 2. The defendants' object in having the horse sold is to save expense. It costs money to keep, and it is uncertain on whom the cost will ultimately fall. There is no cause for keeping the horse unsold."

The case was dealt with under the concluding words of the rule "or which for any other just and sufficient reason it may be desirable to have sold at once."

The circumstances of this case are somewhat unusual. The filly is now a three year old, and, so far as I gather, she has not yet been trained in the way in which the owner, the respondent, would like to have her trained. He has known where she was since October of last year, but he does not appear to have taken any active steps to get her back into his own possession, she having been placed with the applicant by someone who was going to arrange the training. Now a filly of that age obviously ought to be trained for flat racing, if she is ever to do any good in flat racing, but nothing apparently can be done because the parties do not know where they stand, or what their position is, and month after month the position has remained the same. The applicant who has the filly is spending considerable money in respect of her keep and that which he would describe as training. I suppose it may be some time before the action is tried, if ever it is tried. If the respondent had been anxious to have his filly back he could have commenced proceedings last October or November or at any time since. He has not done so. Thereupon the applicant commenced an action claiming a declaration that he is entitled to a lien. He added a claim for an order for the sale of the filly. Personally I think it was unnecessary that he should include that on his writ, for once the action was launched he could proceed by way of motion under the terms of Ord. 50, r. 2. That is what he did. He obtained leave to serve notice of motion with the writ, and the question came before DANCKWERTS, J., who made an order for the sale of the filly, having suggested terms on which the order would not be enforced, that is, if the respondent paid a certain amount of money into court to abide the result. That was not done, and the learned judge made the order because he thought there was just and sufficient reason for making it. I think there was. I think the purpose of this rule is to meet a case of this kind where the parties are at arms' length, and it is desirable that the matter should be brought to a head. The respondent can, if he likes, buy in the filly. The money will be paid into court to abide the result of the action. He really is no worse off.

I agree entirely with that which DENMAN, J., said in *Dangar, Grant & Co. v. Gospel Oak Iron Co.* (3) (6 T.L.R. 261) that:

"The rule ought to be construed with a very tender regard to the persons in whom the legal property is vested."

If the respondent, the owner of the filly, had shown any great desire to have the filly, I should have been less willing to apply the powers of that rule in this case, but, in view of his obvious reluctance to take any step to recover the filly, I think it would be deplorable if this court had not the power to do that which DANCKWERTS, J., ordered, and if, having the power, it did not exercise it. For these reasons, I agree that the appeal should be dismissed.

JENKINS, L.J.: I also agree.

Appeal dismissed with costs.

Solicitors: *Gibson & Weldon* (for the respondent); *Syrett & Sons*, agents for *Ivens, Thompson & Green*, Cheltenham (for the applicant).

[Reported by F. GUTTMAN, ESQ., Barrister-at-Law.]

Re A DEBTOR, No. 277 OF 1950. *Ex parte THE DEBTOR*
v. LIGUORI AND ANOTHER.

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Singleton and Jenkins, L.JJ.), July 18, 24, 1950.]

Bankruptcy—Notice—Validity—Judgment creditor resident abroad outside the scheduled territories—Notice requiring payment into court—Exchange Control Act, 1947 (c. 14), sched. IV, para. 3—Exchange Control (Bankruptcy Notices) Order, 1949 (S.I. 1949, No. 585), art. 1 (a), sched., pt. I—R.S.C., Ord. 42, r. 1 (2).

A creditor resident in Switzerland obtained judgment in England against a debtor, resident in this country, for £6,087. Treasury permission for the payment of the debt was not obtained as required by the Exchange Control Act, 1947, s. 5 (Switzerland not being one of "the scheduled territories" within the meaning of that Act), and the creditor served on the debtor a bankruptcy notice in the form prescribed by the Exchange Control (Bankruptcy Notices) Order, 1949, made by the President of the Board of Trade under the Act of 1947, requiring the debtor to pay the £6,087 into court within seven days "in accordance with the rules of court made pursuant to sched. IV to the Act" of 1947 or to secure or compound for that sum. The registrar held the notice to be valid and made a receiving order against the debtor, who appealed.

HELD: R.S.C., Ord. 42, r. 1 (2) (which directs that the debtor shall, in the circumstances therein mentioned, pay the amount of a judgment debt into court) did not go beyond the powers conferred on the rule-making authority by para. 3 (a) of sched. IV, to the Act of 1947, and, therefore, the premise on which the Order of 1949 rested, *viz.*, the validity of r. 1 (2), was correct, the President of the Board of Trade was entitled to make the Order, and the notice was valid.

[FOR THE EXCHANGE CONTROL ACT, 1947, sched. IV, para. 3, see HALSBURY'S STATUTES, Second Edn., Vol. 16, pp. 606, 607.]

APPEAL by the debtor against a receiving order made by Mr. Registrar PARTON on June 7, 1950.

The petitioning creditor had secured judgment against the debtor in respect of a debt, and thereafter he served a bankruptcy notice on the debtor in the form prescribed by the Exchange Control (Bankruptcy Notices) Order, 1949, which was made by the President of the Board of Trade under the Exchange Control Act, 1947, s. 33 (3) and sched. IV. The debtor contended that the notice was invalid, but the registrar rejected that contention. The facts appear in the judgment of SIR RAYMOND EVERSLED, M.R.

Muir Hunter for the debtor.

H. J. Phillimore for the petitioning creditor.

Aronson, K.C., and *H. J. Phillimore* for the Board of Trade.

SIR RAYMOND EVERSLED, M.R.: On Apr. 15, 1950, the petitioning creditor in the present proceedings obtained against the debtor final judgment in these courts for £6,087. The petitioning creditor was then resident in Switzerland, which is not one of the scheduled territories within the meaning of the Exchange Control Act, 1947. The result of his being so resident was, and is, that, by virtue of the Exchange Control Act, 1947, s. 5, it is unlawful for a person resident in this country, as is, and was, the debtor, to make any payment to or for the credit of the petitioning creditor save with the permission of the Treasury, and it is conceded in this case that no such permission has been given. The petitioning creditor, however, has sought to take advantage of further provisions of the Act of 1947 and certain rules and a statutory instrument which emanated from that Act—the Exchange Control (Bankruptcy Notices) Order, 1949—in order to make the debtor a bankrupt. There was served on the debtor on Apr. 19,

1950, a bankruptcy notice in a form which has its authority in the order of 1949. The form of that notice, so far as relevant, is:

"Take notice that whereas the petitioning creditor, a person residing outside the scheduled territories has obtained judgment against you for the sum of £6,087, and whereas permission of the Treasury for payment of the sum by you to him has not been obtained, you must within seven days after service of this notice on you, excluding the day of such service, pay into court in accordance with the rules of court made pursuant to sched. IV to the Act the said sum of £6,087, the amount of the said judgment whereon execution is not now stayed, or you must secure or compound for the same . . ."

The question raised in this appeal is whether that bankruptcy notice had any effect or validity. The learned registrar held that it had, and made a receiving order accordingly. Counsel for the debtor has, however, argued that bankruptcy is a matter affecting the liberty and status of the citizen and that it is the duty of the court to take care that the bankruptcy law should not be applied as regards any individual unless there is clear jurisdiction and authority for its application. The question—and it is one on which I have felt some little difficulty—really turns, on analysis, on the fact that in the bankruptcy notice which I have read there is reference to rules of court made pursuant to sched. IV. The particular rules which are invoked are R.S.C., Ord. 42, r. 1 (2) and (3)—rules which were made ostensibly in pursuance of the power conferred by the Exchange Control Act, 1947. The whole matter turns, I think, on whether r. 1 (2) is or is not *ultra vires*.

Bankruptcy notices under the Bankruptcy Act, 1914, are the subject of s. 2 of that Act:

"A bankruptcy notice under this Act shall be in the prescribed form, and shall require the debtor to pay the judgment debt or sum ordered to be paid in accordance with the terms of the judgment or order, or to secure or compound for it to the satisfaction of the creditor or the court . . ."

It is right to say at once that the prescribed form indicated in s. 2 comes into existence as a result of a procedure which admittedly has not been applied in this case, the bankruptcy notice with which we are concerned not being made in the prescribed form under the Act, but, if it was validly made at all, being made pursuant to a special power conferred on the President of the Board of Trade by the order of 1949. There is, therefore, no doubt that as regards the subject-matter of this appeal the more normal procedure in reference to bankruptcy matters has been departed from, but if Parliament has, on the proper construction of the Exchange Control Act, 1947, given the necessary authority and created liability to bankruptcy proceedings by means which differ from the more stereotyped method enshrined in the Bankruptcy Act, plainly it is not for this court to question their propriety.

I now turn to the Act of 1947. I have referred to s. 5 which prevents a debtor paying to, or for the credit of, a creditor outside the scheduled territories the judgment debt without Treasury permission. By s. 33 it is provided that there shall be an implied condition in any contract that where the requisite Treasury permission is necessary, then payment in accordance with the contract is not to take place save after the permission has been obtained. Section 33 (3) provides:

"The provisions of sched. IV to this Act shall have effect with respect to legal proceedings, arbitrations, bankruptcy proceedings, the administration of the estates of deceased persons, the winding-up of companies . . ."

Schedule IV is headed "Legal Proceedings, etc," and, having regard to the terms of s. 33 (3), Parliament was plainly intending to deal, among other things, with bankruptcy proceedings. Schedule IV, para. 1, provides, in effect, that where (as here) a judgment is recovered by a creditor outside one of the scheduled territories against a resident here, the judgment is to be treated as having an

implied term in it that the sum awarded or ordered to be paid shall not be so paid save with the permission of the Treasury. Paragraph 3, on which the whole argument has turned, provides, so far as relevant:

A "Without prejudice to the provisions of any enactments relating to the making of rules of court, rules of court—(a) enabling any person who is required by any judgment, order or award to pay any sum, if he apprehends that the payment of that sum is unlawful under this Act except with the permission of the Treasury, to pay that sum into court; and (b) declaring that payment of a sum into court by virtue of the preceding sub-paragraph, together with the delivery to the other party concerned of such evidence of the payment as may be prescribed by the rules, shall, to the extent of the payment, be a good discharge to the person making the payment; and (c) . . . regulating the process of execution which may issue . . . may be made, as respects the High Court, under s. 99 of the Supreme Court of Judicature (Consolidation) Act, 1925 . . . Provided that—(i) the form of any bankruptcy notice shall be such as may be prescribed by the Board of Trade . . ."

B I will come back to that, but I should like to make a brief reference to two other paragraphs. First, in para. 5 (1) Parliament states:

C "In any bankruptcy . . . (being a bankruptcy . . . carried on under the law of any part of the United Kingdom) a claim for a sum not payable without the permission of the Treasury shall, notwithstanding that the permission has not been given . . . be admitted to proof."

D Then para. 6:

E "A debt for the payment of which the permission of the Treasury is required under this Act shall, if in other respects it complies with the requirements of s. 4 (1) of the Bankruptcy Act, 1914, be allowed to be a good petitioning creditor's debt, notwithstanding the said requirement, if and to the extent that the debt can be satisfied either by a payment into court or by a payment to a blocked account."

F I have read those other paragraphs because they seem to point inevitably to the fact that Parliament is expressing clearly the intention that, in the case of a judgment such as we have here which cannot be paid because of the Exchange Control Act, 1947, failure to pay the sum into court after receiving the necessary notice is to constitute an act of bankruptcy. I think there can be no doubt whatever that it was the intention that the debtor should not be entitled to say: "I cannot pay because of the Exchange Control Act, 1947. I am not going to bother about asking the Treasury for permission. If I do, I shall not get it, and there is nothing you can do." I think it was intended to provide, first, that there should be an alternative means of discharge to the debtor, *viz.*, by payment into court, and, further, that the creditor should have the right to invoke bankruptcy procedure if the alternative means were not taken advantage of. I emphasise that, because it is the burden of the argument of counsel for the debtor that Parliament, whatever it may have intended, has expressed itself in terms which leave, as a matter of construction, no doubt that all that the rules were intended to do, and, therefore, all the rule-making authority had power to achieve, was to give to a person in the position of the present debtor a right, if he chose to make use of it, and, particularly, if he *bona fide* apprehended that he could not pay because of the Exchange Control Act, 1947, a privilege, without his being under any positive obligation to do anything; that since the rule, as will appear, went beyond that, it is *ultra vires*; and since, finally—and I agree with counsel on this point—the bankruptcy notice which was prescribed in the statutory instrument proceeded on the footing that the existing rule was valid, or, at least, that a valid rule had been made, it, therefore, in turn falls to the ground. That is the argument, and as, I think, counsel admitted, any bankruptcy notice which pro-

ceeded merely on the failure of the debtor to take advantage of a privilege, as distinct from a failure to do what he had been told he was bound to do, would not, according to bankruptcy procedure, be a good bankruptcy notice, with the rather startling result that, notwithstanding the strong indications to the contrary, having regard to the language which Parliament chose to adopt in sched. IV, no effective bankruptcy notice could possibly have either been prescribed or made use of in any such case as the present. The Exchange Control (Bankruptcy Notices) Order, 1949, bears date Mar. 28, 1949, and was made by the President of the Board of Trade. I hold that he was entitled to make it if the premise on which it rested, *viz.*, the validity of the new rule, R.S.C., Ord. 42, r. 1 (2), is assumed.

Is r. 1 (2) valid? It provides:

"Where any person is directed by any judgment, order, or award, to pay any money to or for the credit of any person who is resident outside the scheduled territories . . . he shall, unless the permission of the Treasury . . . has been given . . . pay the amount thereof into court."

Rule 1 (3) follows para. 3 (b) of sched. IV, in that it provides:

"Payment into court under the preceding paragraph of this rule shall, to the extent of the payment, be a good discharge . . ."

There is at first blush an obvious disparity between the language of para. 3 (a) of sched. IV to the Act and the language of Ord. 42, r. 1 (2), for the former refers to something enabling a person, if he apprehends a certain state of affairs, to pay money into court, whereas the latter in terms appears imperative and says that, whatever his apprehension may be, if the Act applies he shall pay the money into court. It was because of that difference in language that I felt for some time troubled whether it could be said that this rule really was within the rule-making authority conferred by sched. IV.

I observe that the opening words of para. 3 of sched. IV are: "Without prejudice to the provisions of any enactments relating to the making of rules of court," and there is a specific reference to the Supreme Court of Judicature (Consolidation) Act, 1925, s. 99. We are, as counsel for the petitioning solicitor pointed out with some force, dealing here with an order of the court, and Ord. 42 is headed "Execution," and is dealing with the consequences of an order made by the court to pay money. I think there is some force in the argument that, apart from particular authority conferred on the rule-making body by para. 3, there may be added power in the general language of s. 99 itself. I need not, however, pursue that further because I have come to the conclusion that r. 1 (2) was within the scope of the rule-making power by virtue of the Act of 1947. I think that the difficulty created by the distinction between "shall" in the rule and "enabling" in the schedule is resolved when one considers the context and object. I have already said that Ord. 42 deals with execution. It makes provision for what is to happen after an order has been made by the court to pay money, what steps have to be taken, and what is liable to happen to the person ordered to make the payment if he does not pay. As counsel for the Board of Trade pointed out, that context is quite different from that in which you may find the word "shall," *e.g.*, in an Act of Parliament which imposes a duty to do or not to do something—a frequent formula to-day is: "No person shall do" so-and-so—failure to comply with which involves the person in question in penalties. In Ord. 42, r. 1 (2), the word "shall" cannot be used to impose an obligation subject to a penalty of that kind. As I have said, it merely provides for what is to be done in the case of an order of the court directing a payment which cannot be performed according to its terms because of the Exchange Control Act, 1947.

There is no general provision enabling a debtor who has been ordered by a judgment of the court to pay A.B. a sum of money to comply with that judgment

by paying the money into court. The only way in which a debtor who has been ordered to pay A.B. £100 can fulfil that obligation is to find A.B. and pay him. He cannot do it in any other way without A.B.'s consent. That being so, I think the proper construction, going back now for the moment to sched. IV to the Act, to be given to the word "enabling" is to treat it as equivalent to "providing machinery whereby any person," etc. As I have said, in the absence of some rule, there is no such machinery, and it is to be observed that under para. 3 (a) no consequences follow. It is simply a paragraph authorising or directing the rule-making authority to provide the machinery. What happens afterwards, if the machinery is taken advantage of, is ascertained by looking at para. 3 (b), viz., that the person paying the money into court gets *pro tanto* a discharge. If that be the right view of para. 3, it seems to me that, on its true construction, r. 1 (2) does not go beyond the powers conferred on the rule-making authority, for it merely provides that in the cases mentioned a person ordered to pay a particular individual is to pay into court instead. That is the way in which, according to the rules, he will satisfy the judgment. If he does not do it, he will not suffer any penalty. He does not commit a criminal offence, but he will be a debtor who has not paid the debt ordered to be paid, and such other consequences as the rules or the Act of Parliament provide if he does not pay will ensue. The rule, therefore, is simply doing in other words what sched. IV says—providing machinery whereby in such a case discharge of the debt is to be achieved by payment into court.

There still remains the point that r. 1 (2) speaks of payment "to any person who is resident outside the scheduled territories as defined by the Act," whereas para. 3 (a) of sched. IV, speaks of "the debtor apprehending that the payment of the sum is unlawful." The word "apprehends" is commonly used as meaning "is afraid," though it does not necessarily have that meaning, but in all the circumstances I think there is no real substance in this point. As has been pointed out, where proceedings are started by a person resident outside the scheduled territories it must appear on the face of the writ that they are so started. A debtor sued in such circumstances, I think, is bound to apprehend, that is, to learn or understand, that the prohibition is applicable. I do not, therefore, think that change of language is sufficient to invalidate the construction which I think ought to be given to the rest of the paragraph, or to qualify the conclusion I have reached that r. 1 (2) is within the scope of the power conferred by para. 3 (a).

I agree with counsel for the debtor that this is a matter of principle in the sense that it turns mainly on the proper construction of these paragraphs, and is one on which we are not likely to get guidance from authority. I, therefore, will not take up time by making any reference to the few cases to which we have been referred. I conclude, for the reasons I have stated, that the argument against the validity of Ord. 42, r. 1 (2), fails, and, therefore, in my judgment, it follows that the premise on which the present statutory instrument rested is established. As I have said, on that assumption I see no grounds for suggesting that the form of notice which the statutory instrument prescribed was not well within the scope of the proviso at the end of para. 3 and conferred on the Board of Trade, acting by its President, the power so to prescribe. Everything else I think from that stage follows. The form used in this case followed the statutory instrument and nothing more remains to be said except that I agree with the view of the learned registrar, and that I think the appeal should be dismissed.

SINGLETON, L.J.: I agree.

JENKINS, L.J.: I also agree.

Appeal dismissed with costs. No order as to the costs of the Board of Trade.

Solicitors: *Michael Abrahams, Sons & Co.* (for the debtor); *L. A. Hart & Co.* (for the petitioning creditor); *Solicitor to the Board of Trade.*

[*Reported by F. GUTTMAN, Esq., Barrister-at-Law.*]

LEICESTER PERMANENT BUILDING SOCIETY v. SHEARLEY.

[CHANCERY DIVISION (Wynn-Parry, J.), July 26, 1950.]

Mortgage—Possession of mortgaged property—Mortgagor not in occupation—Person in occupation under agreement with mortgagor—Need to join occupier as defendant to claim for possession by mortgagees—R.S.C., Ord. 55, r. 5A.

Practice—Originating summons—Parties—Summons by mortgagees for possession—Mortgagor not in occupation—Person in occupation under agreement with mortgagor—Need to join occupier as defendant to claim for possession by mortgagees—R.S.C., Ord. 55, r. 5A.

By a legal charge, dated Oct. 9, 1946, and made between the L. Building Society, of the one part, and S., of the other part, £4,250 was secured on certain property belonging to S. including premises known as No. 25, E. Avenue. The statutory power of leasing was expressly excluded, except with the consent of the building society to whom S. attorned tenant. The money secured was repayable with interest by monthly instalments. Instalments fell into arrear and on Mar. 3, 1950, the building society issued an originating summons under R.S.C., Ord. 55, r. 5A, claiming possession of No. 25, E. Avenue, and citing only S. as defendant. In July, 1950, the building society became aware that, although no consent to any lease had been given, No. 25, E. Avenue, was occupied by Mr. and Mrs. G., who claimed that the premises had been let to them after the date of the legal charge, furnished at five guineas per week.

HELD: the building society should be ordered to give notice to Mr. and Mrs. G. that the society were applying for an order for possession, and that that order would be made unless within fourteen days an occupier of the premises applied to be added as a defendant.

Minet v. Johnson (1890) 63 L.T. 507, *applied*.

[AS TO EXERCISE OF MORTGAGEE'S RIGHT TO POSSESSION, see HALSBURY, Hailsham Edn., Vol. 23, pp. 360, 361, para. 537; and FOR CASES, see DIGEST, Vol. 35, pp. 406-409, Nos. 1474-1491.]

Cases referred to:

- (1) *Alliance Building Society v. Varma*, [1949] 2 All E.R. 261; [1949] Ch. 724; [1949] L.J.R. 1452; 2nd Digest Supp.
- (2) *Martins Bank, Ltd. v. Kavanagh*, [1948] 2 All E.R. 448; 2nd Digest Supp.
- (3) *Minet v. Johnson*, (1890), 63 L.T. 507; Digest, Practice, 391, 949.
- (4) *Dudley & District Benefit Building Society v. Emerson*, [1949] 2 All E.R. 252; [1949] Ch. 707; [1949] L.J.R. 1441; 2nd Digest Supp.

ADJOURNED SUMMONS issued by mortgagees, the Leicester Permanent Building Society, under R.S.C., Ord. 55, r. 5A, for possession of certain mortgaged premises.

After the summons had been issued, it came to the knowledge of the mortgagees that persons other than the mortgagor were in possession of the premises and that they claimed to be in possession by virtue of a tenancy, and the present question then arose, *viz.*, whether these persons should be made defendants. The facts appear in the judgment.

A. F. M. Berkeley for the mortgagees.

The mortgagor did not appear.

WYNN-PARRY, J.: This is an originating summons under R.S.C., Ord. 55, r. 5A, by which the mortgagees ask for an order against the mortgagor for possession of premises known as 25, Eastcombe Avenue, Greenwich, as part of the property comprised in a legal charge dated Oct. 9, 1946, and made between the mortgagor, of the one part, and the mortgagees, of the other part. That was a charge to secure £4,250, together with interest at 4½ per cent. per annum, on a number of properties including the property to which I have referred.

By the terms of the legal charge the statutory power of leasing was excluded

except with the express consent of the mortgagees. The mortgage provided for the payment of monthly instalments of £27 5s. 6d. and the mortgagor attorned tenant to the mortgagees. On Feb. 3, 1948, owing presumably to the mortgagor being in arrear, the mortgagees determined that tenancy, which expired on Feb. 7. On Jan. 20, 1949, the mortgagees obtained leave under the Courts (Emergency Powers) Act, 1939, to institute proceedings for possession. Payments of the instalments were resumed, but on Jan. 20, 1950, the mortgagor paid the last instalment which he has paid, leaving six instalments to be paid which are now in arrear, and on Mar. 3, 1950, the present originating summons was issued claiming possession of the Eastcombe Avenue property and citing the mortgagor as the sole defendant. In July, 1950, inquiry agents, making normal inquiries on behalf of the mortgagees, ascertained that the premises in question were, as they still are, in the occupation of a Captain and Mrs. Goddard, who claim that they were let to them on a furnished tenancy at the rate of five guineas per week. No permission was given by the mortgagees to the mortgagor to effect a letting, and the evidence shows that the alleged letting to Captain and Mrs. Goddard was effected after the date of the mortgage. The originating summons came before the master who directed that Captain and Mrs. Goddard should be made defendants, and it is in those circumstances that the matter has been adjourned before me that the question may be decided whether or not it is necessary in such a case as this that the mortgagee should in every case join any person who, he learns, is in occupation of the premises possession of which is sought.

There is a certain body of authority bearing on applications of this kind, but no case covers the case before me. It is established by the recent decision of the Court of Appeal in *Alliance Building Society v. Varma* (1) that Ord. 55, r. 5A, entitles the court

“... to make an order for delivery up of possession to the mortgagee against a person in occupation, even though that person is neither the mortgagor nor a person claiming to derive title under him in the sense of having a right to redemption.”

In that case the person involved was before the court.

It also appears from the judgment of ROXBURGH, J., in *Martins Bank, Ltd. v. Kavanagh* (2) that on such a proceeding as this the mortgagor must be a defendant, but the question has been left open whether the person in occupation should be joined as a defendant. The nearest case is *Minet v. Johnson* (3) in which the plaintiff issued a writ against one Johnson to recover possession of a house and signed judgment in default of appearance. The sheriff, in pursuance of a writ of possession, ejected from the premises one Hartley, who was in possession, and put in the plaintiff. Hartley had no knowledge of the action and did not claim to hold through Johnson. Hartley applied that the writ of summons and all subsequent proceedings in the action should be set aside for irregularity and that the plaintiff should restore possession of the house to him. WILLIAMS, J., at chambers, made an order setting aside the judgment and subsequent proceedings, and directing the plaintiff

“to go out of any possession obtained by reason of or under the judgment, such order to take effect only if the applicant [Hartley] within twelve days should elect to be added as defendant; applicant to be at liberty so to appear upon filing an affidavit that, at the time of the issue of the writ, he was in possession by himself or his tenants.”

The Divisional Court affirmed the order of WILLIAMS, J., and the matter was taken by the applicant to the Court of Appeal, where LORD ESHER, M.R., said (1890) 63 L.T. 507):

“In this case the plaintiff *bona fide* and without any abuse of the process of the court brought an action against Johnson to recover possession of

certain premises. There is nothing to show but that he had a *bona fide* belief that the defendant Johnson was the person in possession. The writ was served on Johnson only, and he allowed judgment to go by default, which was an admission that, as between himself and the plaintiff, he was in possession and the plaintiff was entitled to turn him out. Then, in pursuance of a writ of possession the sheriff turns out of possession the persons on the premises and delivers possession to the plaintiff. If Hartley were a tenant of Johnson's of course he must go out; therefore to support his complaint now he must say that he had some independent right of his own. What then is his remedy? There has been a miscarriage of justice, and Hartley has a right to be heard, and he must be let in to assert his case. If he had taken his point before judgment had been signed, he would have been treated as though he were a defendant in the action; if he has done so after judgment has gone by default, without his knowing anything of the former proceedings, he must then also be allowed to defend. But the judgment must not be set aside as between the plaintiff and Johnson; it can only be set aside so far as it concerns him. That is what has been ordered here, but it is said that that is not enough."

His Lordship held that it was the correct order in the circumstances. He says later (*ibid.*, p. 508):

"If the judgment was set aside simply, Johnson would be able to come in and defend if he liked; therefore the judgment must be set aside, and also the writ of possession, only so far as it affects Hartley. WILLIAMS, J., has imposed no terms on Hartley; his order merely says in effect that Hartley must come in in the same way as if he had come in before judgment had been signed. The order is right, and this appeal must be dismissed."

LINDLEY, L.J., said, in the course of his short judgment (*ibid.*):

"On principle a person in actual possession ought to be made a defendant; but where this has not been done Ord. 12, r. 25, seems to me to point out what is the proper course of procedure. The moment the person in possession has done as he is there directed he is treated as a defendant in the action."

BOWEN, L.J., said (*ibid.*):

"The mistake at the root of this application is, that the applicant has been deprived of some right."

It appears to me that, although that case does not directly cover this case, it provides me with guidance as regards the correct course to follow in this matter. The evidence, as I have observed, shows that Captain and Mrs. Goddard are in possession, and claim to be in possession under a furnished letting. It is difficult to imagine how they came to be in possession under that letting unless it was a letting purporting to have been made by the defendant, but that is not a matter on which, as it seems to me, at this stage the court can finally pronounce, and an opportunity ought to be given to Captain and Mrs. Goddard to take any point that they may consider is open to them with a view to resisting an order for possession against them. On the other hand, if there were to be laid down a hard and fast rule that in every case such as this the mortgagee ought to join as a defendant every person who in the course of the proceedings he learns is in possession, the result in many cases might well be very serious and an unnecessary embarrassment to the mortgagee—as, for instance, in the case of a large block of flats—and it appears to me that this summons, on the information which the mortgagees had at the time of its issue, was properly commenced by citing only the mortgagor. Now, however, that it has been learned that somebody is in occupation and claims to be in occupation under some form of letting it would be a miscarriage of justice not to give that person an opportunity to be heard. It further appears to me that it would be inconvenient in such a case to follow

the course which was followed in *Minet v. Johnson* (3), that is, to make the order, leaving Captain and Mrs. Goddard to make an application to set it aside. That was the only course that could be taken in *Minet v. Johnson* (3), having regard to the circumstance that the order for possession was made when it was not known that Hartley was in possession. Here it is known before judgment that Captain and Mrs. Goddard are in possession.

A It, therefore, appears to me that the practical course is to refer this summons back to the master with a direction that he should order the mortgagees to give notice to the persons in actual possession that the mortgagees are applying for an order for possession, and that that order will be made unless within fourteen days of the service of the notice any occupier applies to be added as a defendant to the proceedings.

B Order accordingly. Costs to be added to the plaintiffs' security.
Solicitors: *Field, Roscoe & Co.*, agents for *A. H. Pollard*, Leicester (for the plaintiffs).

[Reported by H. McL. MORRISON, Esq., Barrister-at-Law.]

C R. v. DUNSHEATH. *Ex parte* MEREDITH.

[KING'S BENCH DIVISION (Lord Goddard, C.J., Byrne and Finnemore, JJ.), July 27, 28, 1950.]

D *Mandamus*—Application for order directed to chairman of university convocation—Alleged refusal to perform duty imposed by university statutes—Matter for visitor of university—Refusal to re-employ teacher in school.

E Statute 6 of the University of London made and approved by His Majesty in Council under the authority of the University of London Act, 1926, s. 4 (1), provided that His Majesty in Council should be the visitor of the university. The statute imposed no limitation on his visitatorial powers.

F Fifty members of convocation of the university served a requisition on the chairman of convocation, in accordance with statute 62 of the statutes of the university, to summon an extraordinary meeting of convocation to discuss, *inter alia*, the refusal of a school connected with the university to re-employ one of its teachers. The chairman refused to call the meeting on the ground, among others, that the motion was not one which related to the university or one on which convocation could properly declare its opinion to the senate because it related to a matter within the discretion of the council of the school in question. On a motion by one of the fifty members for an order of *mandamus*,

G HELD: the question whether an officer of the university had refused to perform a duty placed on him by the statutes of the university was a domestic matter and, therefore, one essentially for the visitor, and the application for *mandamus* would be refused.

H [AS TO THE VISITOR, see HALSBURY, Hailsham Edn., Vol. 4, pp. 340-346, paras. 578-592; and FOR CASES, see DIGEST, Vol. 8, pp. 385-388, Nos. 2003 2070.]

Cases referred to:

- (1) *St. John's College, Cambridge v. Todington*, (1757), 1 Burr. 158; 97 E.R. 245; 8 Digest 385, 2003.
- (2) *Philips v. Bury*, (1694), Carth. 180, 319; Skin. 447; 90 E.R. 198; 8 Digest 385, 2014.
- (3) *A.-G. v. Talbot*, (1748), 1 Ves. Sen. 78; 3 Atk. 662; 27 E.R. 903; 8 Digest 387, 2054.

- (4) *A.-G. v. Smythies (or Smithies)*, (1836), 2 My. & Cr. 135; 6 L.J.Ch. 35; 40 E.R. 592; 8 Digest 386, 2030.
- (5) *R. v. Hertford College*, (1878), 3 Q.B.D. 693; 47 L.J.Q.B. 649; 39 L.T. 18; 42 J.P. 772; 8 Digest 367, 1718.
- (6) *Thomson v. University of London*, (1864), 33 L.J.Ch. 625; 10 L.T. 403; 8 Digest 385, 2012.

MOTION for *mandamus*.

Fifty members of convocation of the University of London served a requisition on the chairman for the summoning of a meeting of convocation to consider certain matters, but he refused to do so and an order of *mandamus* was now sought to compel him to summon the meeting in accordance with the statutes of the university. For the chairman it was contended that the matter was a domestic one within the jurisdiction of His Majesty in Council as visitor of the university, and, therefore, that *mandamus* did not lie. The facts appear in the judgment of LORD GODDARD, C.J.

Pritt, K.C., and *Ralph Millner* for the applicant for the order.

Diplock, K.C., and *Boileau* for the respondent (the chairman).

Cur. adv. vult.

July 28. LORD GODDARD, C.J., read this judgment of the court. Counsel for the applicant moved for an order of *mandamus* calling on the respondent, the chairman of the London University Convocation, to summon an extraordinary meeting of convocation following a request by not less than fifty members of convocation as provided by statute 62 of the statutes of the university. The requisition served on the chairman stated the matter which the members desired should be brought before the meeting, *viz.*, that a school connected with the university had refused to re-employ a person as a teacher of Slavonic languages. They also desired to raise certain questions with regard to political opinions influencing the appointment of teachers. The chairman refused to summon the meeting on the grounds, *inter alia*, that the motion was not one which "related to the university," nor was it one on which convocation could properly declare its opinion to the senate. It related, he submitted, to a matter within the discretion of the council of the particular school. Counsel for the respondent objected that this was not a matter in which the court should act by way of *mandamus*, but submitted that the appropriate authority to deal with the question was the visitor of the university.

By the University of London Act, 1926, it was provided by s. 1 (1): "There shall be a body of commissioners to be styled 'The University of London Commissioners' . . ." By s. 4 (1) it was provided:

"Subject to the provisions of this Act, the commissioners shall make statutes for the University of London (in this Act referred to as 'the University'), in general accordance with the recommendations contained in the report of the committee [appointed by the Board of Education], subject to any modifications which may appear to them to be expedient, and, so far as may be necessary for giving effect to any of the said recommendations, the commissioners may, subject as hereinafter provided, make statutes for any school of the university, or for any other college, school, or institution for the purpose of enabling it to become a school of the university."

By s. 5 (1) it was provided:

"No statute or part of a statute made under this Act shall have effect until it has been approved by His Majesty in Council, but every statute or part of a statute so approved shall, subject to the provisions of this Act, have effect notwithstanding anything in any Act of Parliament, charter, deed, or other instrument whatsoever."

It is common ground that the statutes had been duly approved by His Majesty in Council. By statute 6 of the statutes of the University, it is provided:

“His Majesty in Council shall be the visitor of the university”.

The only two statutes which deal with the powers of the visitor are statutes 109 and 115. Those confer some special powers and duties on the visitor, but there is nothing in the Act to show that there is any limitation imposed on the ordinary visitatorial powers of the visitor.

It is important to remember that *mandamus* is neither a writ of course nor a writ of right, but that it will be granted if the duty is in the nature of a public duty and specially affects the rights of an individual, provided there is no more appropriate remedy. This court has always refused to issue a *mandamus* if there is another remedy open to the party seeking it. This is one of the reasons, no doubt, why, where there is a visitor of a corporate body, the court will not interfere in a matter within the province of the visitor, and especially this is so in matters relating to educational bodies such as colleges. I see no difference for this purpose between a college and a university. Any question that arises of a domestic nature is essentially one for a domestic forum, and this is supported by all the authorities which deal with visitatorial powers and duties, and, although the question has generally arisen with regard to election to fellowships, I see no difference in principle between the question whether a particular person ought to be elected to a fellowship or whether a particular person is a fit and proper person to be appointed or retained as a teacher at a university or a school. Unless the question really does affect the suitability of the person in question to be a teacher at a college connected with the university, it would be difficult to see how the matter could be one which, in the words of statute 61 of the statutes, must be a matter relating to the university.

The authorities on the matter seem to be fairly consistent. In *St. John's College, Cambridge v. Toddington* (1), LORD MANSFIELD said (1 Burr. 200):

“The visitatorial power, if properly exercised, without expense or delay, is useful and convenient to colleges. However (be that as it may), we must take it, as it is now established by law: and it is now settled and established (since the case of *Philips v. Bury* (2) in the House of Lords) that the jurisdiction of the visitor is summary and without appeal from it.”

Philips v. Bury (2) decided that the visitor's decision was final, and it seems to me that it is a very desirable thing that in a matter of this sort there should be some means of obtaining a final decision. It should not have to be brought before courts with the possibility of an appeal first to the Court of Appeal, and then to the House of Lords, on a matter which, after all, is a domestic matter referring to the government and internal affairs of the University of London.

In *A.-G. v. Talbot* (3), LORD HARDWICKE decided that the powers of the visitor were such that the court would not interfere by injunction or otherwise in a court of equity. He said (3 Atk. 674):

“If the chancellor of this university then is visitor, the general powers of a visitor are well known; no court of law or equity can anticipate their judgment, or take away their jurisdiction, but their determinations are final and conclusive. And it is a more convenient method of determination of controversies of this nature, it is at home, *forum domesticum*, and final in the first instance, and they should be adjudged in a short way *secundum arbitrium boni viri*; it is true this power may be abused, but if it is exercised in a discreet manner, it is a much less expense than suits at law, or in equity; and in general, I believe, such appeals have been equitably determined”.

To the same effect is *A.-G. v. Smythies* (or *Smithies*) (4), and we were referred to *R. v. Hertford College* (5), the importance of the latter case being that it shows that the same principles apply where the corporation is governed and set up by an Act of Parliament as when it is set up by a charter. There are also several cases in the books in which *mandamus* has been sought by either students or barristers of the Inns of Court to admit them, but the court has always refused

to grant a *mandamus* to the benchers of the Inns, the method of questioning their decision now being well-established as an appeal to the judges, not as a court, but in their capacity as visitors of the Inns.

In *Thomson v. University of London* (6), the headnote states (33 L.J.Ch. 625):

"The University of London conferred upon the plaintiff a gold medal, as being the candidate who had obtained the highest number of marks in the examination of 1861 for the LL.D. degree. Two years afterwards, it was discovered by the senate of the university, that, according to the construction put by the senate on the regulations for the LL.D. examination, the examiners had miscarried in the mode which they had adopted in ascertaining the highest number of marks; and the senate thereupon determined to confer a second gold medal upon the candidate to whom according to their view the medal ought to have been awarded. The plaintiff filed his bill, alleging, in effect, that before becoming a candidate he made inquiry of the registrar of the university, and had been informed by him that the examination would be conducted upon the principle and the marks ascertained in the mode upon and in which they were in fact subsequently conducted and ascertained, and that he had become a candidate and paid his examination fee upon that footing, and praying that the university might be restrained from awarding such other medal:—*Held*, upon demurrer, that the court had no jurisdiction to entertain the suit, the matter being one solely within the jurisdiction of the visitor".

That shows, therefore, the extensive power of the visitor.

If a visitor refuses to act, a *mandamus* may go to the visitor calling on him to act, but that is an entirely different matter. Here the statutes actually have been approved by the visitor. Statutes 61 and 62 of the statutes must be read together. Statute 61 provides:

"The ordinary meetings of convocation shall take place on such days as convocation shall determine, provided that at least one ordinary meeting shall be held in each year. Convocation may discuss any matter relating to the university and declare its opinion thereon to the court or to the senate".

Statute 62, which is the clause under which this *mandamus* was moved, provides:

"The chairman of convocation may at any time at his discretion, and shall upon the requisition in writing of not less than fifty members of convocation stating the purpose for which the meeting is to be called, summon an extraordinary meeting of convocation and the notice summoning such meeting shall specify the business to be considered".

It is obvious, therefore, taking those two statutes together, that the business to be considered must be a matter relating to the university.

The case, then, is that an officer of the university is alleged to have refused to perform a duty placed on him by the statutes of the university, and that seems to me to be essentially a matter for the visitor, because it is a domestic question. The officer objects to calling this meeting on the ground that the matter sought to be discussed is not a matter relating to the university. Whether it is such a matter is essentially a question for the visitor, who is also presumed to understand the statutes generally relating to the university, and will have knowledge of the status of these particular schools, which we have not gone into at any length, and which do not seem to be entirely clear. For these reasons, the court has come to the conclusion that this matter is a matter within the visitatorial jurisdiction of His Majesty in Council, and, therefore, this application for a *mandamus* is refused.

Application refused with costs.

Solicitors: *Gaster & Turner* (for the applicant); *Field, Roscoe & Co.* (for the respondent).

[Reported by F. A. AMIES, ESQ., Barrister-at-Law.]

CORKERY v. CARPENTER.

[KING'S BENCH DIVISION (Lord Goddard, C.J., Hilbery and Byrne, JJ.), July 21, 1950.]

Highway—Drunk in charge of “carriage”—Inclusion in “carriage” of bicycle—Licensing Act, 1872 (c. 94), s. 12.

A The appellant, while pushing his pedal bicycle along a road, was drunk and incapable of having proper control over the bicycle. He was arrested without warrant and charged with “being drunk in charge of a bicycle on a highway, contrary to s. 12 of the Licensing Act, 1872,” which provides that “every person . . . who is drunk while in charge on any highway or other public place of any carriage . . . may be apprehended”, and shall be liable to a penalty.

B HELD: the word “carriage” in s. 12 was wide enough to include a bicycle, and, therefore, the appellant was guilty of an offence under the section.

Taylor v. Goodwin (1879) (4 Q.B.D. 228), and *Cannan v. Abingdon (Earl)* ([1900] 2 Q.B. 66), *applied*.

C [AS TO THE OFFENCE OF BEING DRUNK OR DISORDERLY IN CHARGE OF A CARRIAGE, see HALSBURY, Hailsham Edn., Vol. 19, pp. 160, 161, para. 389; and FOR CASES, see DIGEST, Vol. 26, p. 348, Nos. 754-757.

FOR THE LICENSING ACT, 1872, s. 12, see HALSBURY'S STATUTES, Second Edn., Vol. 13, p. 158.]

D Cases referred to:

(1) *Taylor v. Goodwin*, (1879), 4 Q.B.D. 228; 48 L.J.M.C. 104; 40 L.T. 458; 43 J.P. 653; 26 Digest 438, 1553.

(2) *Cannan v. Abingdon (Earl)*, [1900] 2 Q.B. 66; 69 L.J.Q.B. 517; 82 L.T. 382; 64 J.P. 504; 26 Digest 348, 755.

(3) *Williams v. Ellis*, (1880), 5 Q.B.D. 175; 49 L.J.M.C. 47; 42 L.T. 249; 44 J.P. 394; 26 Digest 348, 754.

E (4) *Simpson v. Teignmouth & Shaldon Bridge Co.*, [1903] 1 K.B. 405; 72 L.J.K.B. 204; 88 L.T. 117; 67 J.P. 65; 26 Digest 348, 756.

CASE STATED by Devon Quarter Sessions.

F On Jan. 19, 1950, at a court of summary jurisdiction sitting at Ilfracombe, the appellant was convicted, *inter alia*, of being drunk while in charge of a bicycle on a highway, contrary to s. 12 of the Licensing Act, 1872, and was sentenced to one month's imprisonment. The appellant appealed to quarter sessions contending that since a bicycle was not a “carriage” within the meaning of s. 12 of the Act of 1872 his arrest without warrant was unlawful, and that, as he had been brought before the justices solely by virtue of such unlawful arrest, no information having been laid against him, he was never properly before the court, and G the proceedings against him resulting in his conviction and sentence were a nullity. Quarter sessions were of opinion that a bicycle was a “carriage” within the meaning of s. 12 of the Act of 1872, and that the proceedings against the appellant were, therefore, regular. Accordingly, they dismissed the appeal and confirmed the conviction and sentence. The appellant appealed.

H *D. M. Scott* for the appellant.

Wilmsers for the respondent.

LORD GODDARD, C.J.: This is a Case stated by justices for the county of Devon before whom the appellant was charged with “being drunk in charge of a bicycle on a highway at Ilfracombe on Jan. 18, 1950, contrary to s. 12 of the Licensing Act, 1872.” He was arrested by a police constable, and, with the assistance of another constable, was taken to the police station where he was put in a cell which he proceeded to damage. For the offence under s. 12 he was

sentenced to one month's imprisonment, and for damaging the cell to three months. He has appealed by way of Case Stated and argues that he was not liable to be arrested without warrant because the offence for which he was arrested was that of being drunk in the highway in charge of a bicycle, a bicycle is not a carriage within the meaning of s. 12, and, therefore, he had not committed an offence against that section.

The point, though it seems trivial, is of some importance since some doubt has been expressed by text-book writers whether a bicycle is a "carriage" within the meaning of s. 12. That section was passed for the protection of the public and the preservation of public order. It provides *inter alia*:

"... Every person who in any highway or other public place, whether a building or not, is guilty while drunk of riotous or disorderly behaviour, or who is drunk while in charge on any highway or other public place of any carriage, horse, cattle, or steam engine, or who is drunk when in possession of any loaded firearms, may be apprehended, and shall be liable to a penalty not exceeding forty shillings, or in the discretion of the court to imprisonment with or without hard labour for any term not exceeding one month..."

In my opinion, it is clear that the word "carriage" is wide enough to include a bicycle for this purpose. It does not follow that in every Act of Parliament a bicycle is a "carriage." That may depend on the words of the Act in question. The question has most commonly arisen with regard to toll-bridges, because the proprietor of the toll-bridge has to show that the vehicle from which he seeks a toll is covered by the words of the Act of Parliament which allows him to impose a toll. In the present case, bearing in mind that the object of the Act of 1872, is the protection of the public and the preservation of public order, I think a "carriage" can include any sort of vehicle—certainly a vehicle which is capable of carrying a person, and, it may be, one capable of carrying goods. Indeed, in my opinion, this case is decided, so far as this court is concerned, by *Taylor v. Goodwin* (1). That was a case, it is true, under the Highway Act, 1835, but for this purpose there cannot be any distinction, it seems to me, between a section in a highway Act which is passed for the protection of the public and a section in a licensing Act which is passed for the same purpose, both of them dealing with the conduct of persons on the highway and the preservation of public order. In *Taylor v. Goodwin* (1) the headnote reads (4 Q.B.D. 228):

"A person, riding a bicycle on a highway at such a pace as to be dangerous to the passers by, may be convicted of furiously driving a carriage..."

The relevant words of s. 78 of the Act of 1835, under which the appellant was charged in that case provided:

"... if any person riding any horse or beast, or driving any sort of carriage, shall ride or drive the same furiously so as to endanger the life or limb of any passenger..."

he shall be guilty of an offence. It is true that the words there are "any sort of carriage," but that does not carry the matter any further. A bicycle is a "carriage" because it carries, and, therefore, it comes within the word "carriage." MELLOR, J., in giving judgment in that case, said (4 Q.B.D. 229):

"The expressions used are as wide as possible. It may be that bicycles were unknown at the time when the Act [was] passed, but the legislature clearly desired to prohibit the use of any sort of carriage in a manner dangerous to the life or limb of any passenger."

Applying that case, nothing can be more dangerous than a drunken man with a bicycle on a highway. He is dangerous whether he is riding the bicycle or pushing it. If he is pushing it, he has not proper control and can push it into persons or cause vehicles to swerve, quite apart from the danger to himself.

In *Cannan v. Abingdon (Earl)* (2), in which the question was whether or not a

bicycle could be subjected to a toll in going over the bridge belonging to Lord Abingdon on the road between Oxford and Cheltenham, BIGHAM, J., said ([1900] 2 Q.B. 71):

A "The bicycle or tricycle is a thing which carries. It may carry a man, as a horse does, or a carriage does; it may carry luggage or goods as we know that tradesmen's tricycles do. It is, therefore, in my opinion, a carriage, and, being a carriage, it is made by the terms of the Act of Parliament liable to pay the toll."

In that case the words of a special Act, 7 Geo. 3, c. lxiii, by which the owner of the bridge was authorised to collect tolls, were:

B "For every coach . . . or other carriage whatsoever with four wheels the sum of fourpence and with less than four wheels the sum of twopence."

That was an Act allowing a toll to be imposed on a carriage other than those which had been enumerated by name, and it was held that a bicycle was a "carriage."

In *Williams v. Ellis* (3) the words of a local Turnpike Act, 3 Wm. 4, c. lv, which imposed the tolls, were:

C "For every horse, mule, or other beast drawing any coach, sociable, chariot, berlin, landau, vis-a-vis, barouche, phaeton, curricie . . . For every carriage of whatever description, and for whatever purpose, which should be drawn or impelled, or set or kept in motion by steam or any other power or agency . . ."

D The words "or any other power" had to be construed *ejusdem generis* with "kept in motion by steam or any other power," and, therefore, the court held that a bicycle was not caught by those particular words. To the same effect was the later case of *Simpson v. Teignmouth & Shaldon Bridge Co.* (4) where s. 18 of 5 Geo. 4, c. cxiv, after enumerating these various coaches, provided ". . . and for every other carriage hung on springs . . ." The court came to the conclusion that a bicycle did not come within any of the words in that section.

E In spite of the argument of counsel for the appellant, however, I am clearly of opinion that the words of s. 12 of the Licensing Act, 1872, are wide enough to include a bicycle under the expression "carriage," whether it is a tradesman's bicycle or tricycle or the ordinary private bicycle, which was the case here. That being so, the appellant was lawfully arrested, and, therefore, he was in lawful custody at the police station.

F HILBERY, J.: I agree.

BYRNE, J.: I agree.

Appeal dismissed.

Solicitors: *Arnold Carter & Co.*, agents for *Crosse & Crosse*, Exeter (for the appellant); *Coode, Kingdon, Cotton & Ward*, agents for *Crosse, Wyatt & Co.*, South Molton (for the respondent).

[*Reported by F. GUTTMAN, Esq., Barrister-at-Law.*]

DOUGLAS v. DOUGLAS.

[COURT OF APPEAL (Bucknill, Somervell and Denning, L.JJ.), July 13, 14, 25, 1950.]

Divorce—Connivance—Suspicion of adulterous association—Watching and eaves-dropping—Opportunity created for adultery—No intention to promote or encourage adultery—Motive only to obtain evidence.

The husband petitioned for dissolution of his marriage on the ground of his wife's adultery. Suspecting an adulterous association with the co-respondent he asked her about it, but she denied that the co-respondent had any hold over her. Not satisfied with this answer the husband arranged a speaking apparatus and spyhole so that he could hear conversation between his wife and the co-respondent when they were alone together in the kitchen so that he might ascertain what happened between them. What he saw and heard confirmed his suspicions, and he engaged inquiry agents and made an excuse to absent himself from the house so that the agents could watch. The agents saw the wife committing adultery during the husband's absence. There was no evidence to show that the husband had done anything to bring about the illicit association between his wife and the co-respondent, nor that he desired it.

HELD: (i) once a husband suspects that an adulterous association between his wife and another man has started he is not guilty of connivance simply because he watches for proof of adultery, or even creates an opportunity for it, for he is not consenting to the inception of adultery but is seeking for proof of its repetition. To obtain the proof he may even acquiesce in the continuance of the adultery, but that is not connivance, for in connivance it is essential that there should be a corrupt intention.

(ii) on the evidence the husband did not intend to encourage or promote an adulterous association by absenting himself on a false excuse, but was merely seeking proof of what already he rightly believed to exist, and, therefore, he was entitled to a decree.

Churchman v. Churchman ([1945] 2 All E.R. 190), *applied*.

Manning v. Manning, Fellows v. Fellows ([1950] 1 All E.R. 602), *distinguished*.

[AS TO CONNIVANCE, see HALSBURY, Hailsham Edn., Vol. 10, pp. 674-676, paras. 995-999; and FOR CASES, see DIGEST, Vol. 27, pp. 326-332, Nos. 3052-3122, and Digest Supp.]

Cases referred to:

- (1) *Manning v. Manning, Fellows v. Fellows*, [1950] 1 All E.R. 602.
- (2) *Churchman v. Churchman*, [1945] 2 All E.R. 190; [1945] P. 44; 114 L.J.P. 17; 173 L.T. 108; 2nd Digest Supp.
- (3) *Mudge v. Mudge*, [1950] 1 All E.R. 607.
- (4) *Forster v. Forster*, (1790), 1 Hag. Con. 144; 161 E.R. 504; 27 Digest 355, 3403.
- (5) *Rogers v. Rogers*, (1830), 3 Hag. Ecc. 57; 162 E.R. 1079; 27 Digest 327, 3061.
- (6) *Gipps v. Gipps and Hume*, (1864), 11 H.L. Cas. 1; 33 L.J.P.M. & A. 161; 10 L.T. 735; 11 E.R. 1230; 27 Digest 327, 3064.
- (7) *Hoar v. Hoar*, (1801), 3 Hag. Ecc. 137; 162 E.R. 1108; 27 Digest 327, 3056.
- (8) *Timmings v. Timmings*, (1792), 3 Hag. Ecc. 76; 162 E.R. 1086; 27 Digest 339, 3195.
- (9) *Phillips v. Phillips*, (1844), 1 Rob. Ecc. 144; 2 L.T.O.S. 336; 3 L.T.O.S. 141; 163 E.R. 993.
- (10) *Harrison v. Harrison*, (unreported).

(11) *Emanuel v. Emanuel*, [1945] 2 All E.R. 494; [1946] P. 115; 114 L.J.P. 60; 173 L.T. 118; 2nd Digest Supp.

APPEAL by a husband from the judgment of His Honour JUDGE WHITMEE, sitting as commissioner in divorce, dated Mar. 30, 1950, dismissing the husband's petition for divorce presented on the ground of the wife's adultery. The commissioner found adultery proved—and that finding was not contested in the Court of Appeal—but he came to the conclusion that the husband had connived at the wife's adultery. The facts appear in the judgment of SOMERVELL, L.J.

Nield, K.C., and *Hines* for the appellant.

Havers, K.C., and *C. J. A. Doughty* for the respondent and co-respondent.

Curr. adv. vult.

July 25. The following judgments were read.

SOMERVELL, L.J.: This is a husband's petition for divorce on the ground of his wife's adultery with the co-respondent. After a first hearing the commissioner adjourned the case as the cross-examination for the wife, in his view, raised issues of connivance and condonation which ought to be pleaded. The pleadings were, therefore, amended. At the adjourned hearing the commissioner found that adultery had been committed and this finding was not challenged before us, though it was in issue at the trial. He felt, however, that he was bound, reluctantly as he said, to come to the conclusion that the husband had connived at that adultery. The plea of condonation was abandoned. He felt that on the facts the case was covered by a decision of this court in *Manning v. Manning*, *Fellows v. Fellows* (1), to which I will refer later.

Before setting out the facts I will state the principles of law as laid down by this court in the recent case of *Churchman v. Churchman* (2). The main issue in that appeal was whether the wording of s. 4 of the Matrimonial Causes Act, 1937, had altered the law by placing on the petitioner an increased burden of proving that he had not been guilty of connivance. It was suggested that the wording of the new Act had created a presumption of connivance. In the considered judgment of the court delivered by LORD MERRIMAN, P., this was expressly negatived. Connivance must be strictly proved and the presumption of law has always been, and remains, against connivance. The issue involved a consideration of earlier authorities and there are statements of the law which are relevant to the present issue. Thus LORD MERRIMAN, P., said ([1945] 2 All E.R. 194):

" . . . it is of the essence of connivance that it precedes the event and generally speaking, the material event is the inception of the adultery, and not its repetition, although the facts may be such that connivance at the continuance of an adulterous association shows that the husband must be taken to have connived at it from the first."

The judgment later refers to the difficulty created by attempts to lay down general principles of wider application than were necessary for deciding the particular case, and then this passage follows (*ibid.*, p. 195):

" In our opinion it is of the utmost importance to bear in mind that the issue is whether on the facts of the particular case the husband was or was not guilty of the corrupt intention of promoting or encouraging either the initiation or the continuance of the wife's adultery . . ."

There was some discussion before us as to the word "corrupt." It may be difficult to envisage an intention to encourage adultery which is not "corrupt." It certainly emphasises what is also stated to be "all important", namely, the husband's "state of mind."

I would like to add a word on the necessity of connivance being strictly

proved. It is stated in *RAYDEN ON DIVORCE*, 5th ed., p. 131, that at the end of the case the court must be satisfied that there has been no connivance, but it need only be satisfied on a balance of probabilities and not beyond reasonable doubt. This seems to put a somewhat greater burden on the husband than is placed on him by *Churchman v. Churchman* (2). It implies, I think, that, if the balance of probabilities was in favour of connivance, that would be sufficient for the court to find connivance, but *Churchman v. Churchman* (2) assimilates connivance to matrimonial offences of which strict proof is required. It affects an important issue in the present appeal. In considering the issue of connivance, the inception of the adulterous association may be of great importance. If the balance of probabilities leads to the conclusion that the adultery began at or about a certain date, that date ought, I think, to be taken in considering the issue of connivance, although adultery at that time might not be sufficiently proved for the purpose of granting a decree.

I will turn to the facts. The parties were married in June, 1936. At all material dates the husband was the licensee of the Queen's Head Hotel, Nayland, in which he and his wife worked, he mostly in the bar and she in the kitchen. The commissioner in substance accepted the husband's evidence, which, he thought, was given with commendable frankness. In 1944 the co-respondent, Mr. Webb, who is a married man, for reasons which are not material began taking his meals at the Queen's Head. He became a friend of both husband and wife, and used to help from time to time in odd jobs. No suspicion of any kind arose as to the relationship of the wife and Mr. Webb for four years. In August, 1948, the husband noticed, he thought, a slight change in his wife's attitude. She seemed to side with the co-respondent against him. He spoke to her two or three times. She assured him that the co-respondent had no hold over her, and told him not to be silly. At the end of November or beginning of December he heard his wife say to the co-respondent: "Don't be a bloody fool, do you want to break my home up?" The husband spoke to his wife and she again assured him that the co-respondent had no hold over her. He remained suspicious. He was, he says, determined to find out the truth. He adjusted the speaking apparatus from bar to kitchen so that he could hear what was said in the kitchen. He also removed a bolt so that he could see into the kitchen. Accepting, as the commissioner did, the husband as an honest witness, there is no doubt in my mind that he would have been greatly satisfied if his observations had shown his suspicions to be without foundation. There is no suggestion that he had ceased to care for his wife. They had a daughter aged 11, and the wife helped in running the Queen's Head. He was greatly distressed as proofs of her clandestine association with the co-respondent led him to the conclusion that his married life was at an end. When adultery was finally proved, he said: "My world had gone to pieces," and he was in a most distressed state. Just before Christmas, 1948, he heard his wife and the co-respondent having high words. The co-respondent said that she was "only one of his wives." She said: "I am degraded. I have sunk as low as I can and you cannot deny it." Just after Christmas the husband heard his wife tell the co-respondent that she was late in her periods. The husband said that this proved to him beyond doubt that his marriage was finished. In so far as it is necessary on the issue of connivance I would hold that an adulterous association existed at this date between the wife and the co-respondent. The husband was asked why he did not forbid the co-respondent to come to the house. His answer was that if he had sent him away they would have met elsewhere. He was determined to get the evidence of what he believed was going on. He said that, if he had charged them before he had full evidence, he would have been ridiculed with cruel words. The husband continued to share a bed with his wife up to Feb. 12. About a week before Christmas he took his wife to the doctor and she said the doctor advised that there should be no sexual intercourse until she was better and that was over a month. The questions and

answers are not quite clear, but I think the right inference is that there were no sexual relations after that date. It was on that occasion that his wife called him by the co-respondent's christian name, and he later heard an intimate conversation between his wife and the co-respondent on the subject of underclothes. He heard other intimate conversations from time to time which he did not wish to mention. He was upset and the commissioner intervened, so he was not pressed for details. On Jan. 31 he saw his wife sitting in an armchair and the co-respondent sitting on a chair by her side with his hand up her clothes. On the next day he heard the co-respondent promising her money and a fur coat. At about this date he instructed solicitors and through them inquiry agents.

The acts primarily relied on as constituting connivance arose on Feb. 11, but counsel for the wife also relied on events up to this date. The application of the law as laid down in *Churchman v. Churchman* (2) to particular facts may well raise difficult problems. In the present case, as it seems to me, the husband was not intending to encourage or promote an adulterous association but was seeking proof of what from Christmas he rightly believed to exist. In every case in which a husband who believes his wife is committing adultery has her watched, it can be said that, if he warned her she was going to be watched, no act of adultery would have taken place on that occasion. It would be absurd to suggest that this in itself amounted to connivance: see *Mudge v. Mudge* (3). The inquiry agents had been at the Queen's Head since about the end of January, though it is not clear if they had been there continuously. It was suggested by them that the husband should find some excuse to absent himself. This was done. The excuse was untrue. The agents watched and one of them saw the wife and the co-respondent having sexual intercourse. This evidence was accepted by the commissioner. The petition alleged adultery on Feb. 11, and on divers dates unknown to the husband prior thereto. The commissioner felt unable to find any adultery before Feb. 11. If there had been no issue of connivance, it may be that the strict proof required of adultery would not have been satisfied prior to Feb. 11. In considering connivance, however, regard must be paid to the husband's state of mind and it may lead to a conclusion as to the inception of the adultery on, at the best for the respondent, a balance of probabilities. On this basis the procedure adopted on Feb. 11 was, as I hold, a considerable time after the inception of the adulterous intercourse and cannot be relied on as connivance at what is "generally speaking the material event," namely, the inception. If it is suggested that it is connivance at its continuance, then does it show that the husband must be taken to have connived at it from the first? Everything, it seems to me, points in the opposite direction. I am satisfied the husband regarded this association as a disaster. He cannot be taken to have intended to encourage and promote it. His intention was to get evidence of what he believed existed, an association which meant that "his world had gone to pieces."

The commissioner gave a careful and clear judgment. With respect, I think he went wrong in considering the issue of connivance on the basis that no adultery had been committed before February 11. He was not satisfied beyond reasonable doubt that the "inception" was not earlier. He said: "It is equally probable that Feb. 11 was the first occasion." I think myself that the balance of probabilities was greatly in favour of adultery before Feb. 11. Then the commissioner felt himself bound by *Manning v. Manning, Fellows v. Fellows* (1) reluctantly to hold that the husband was guilty of connivance. In that appeal two petitions were involved, one by Mr. Manning on the ground of the adultery of his wife with Mr. Fellows. The other by Mrs. Fellows on the ground of the adultery of her husband with Mrs. Manning. There are, undoubtedly, points of similarity. There was a microphone used. Normal married life, including in that case intercourse, was continued after suspicions had been aroused and while steps were being taken to detect the adultery. The

adultery, in that case the only adultery, relied on in the petition was on an occasion when Mr. Manning told his wife he would be away for the night. He then went to the garage to listen at the microphone and as a result of what he heard returned and found the parties in the act of adultery.

It is, I think, dangerous, particularly in this area where the state of mind of the husband is all important, to argue from the facts of one case in deciding another. In *Manning v. Manning*, *Fellows v. Fellows* (1), the trial judge clearly found that the two petitioners were acting in concert. He also found this ([1950] 1 All E.R. 604):

"I find as a fact that she [Mrs. Manning] did, as she says, request her husband to be allowed to drop the friendship with the Fellows. The fact that this request was refused confirms me in concluding that from a time certainly as early as August Mr. Manning and Mrs. Fellows, so far from attempting to stop the association between their spouses, not only acquiesced in its continuance, but did all they could to foster and encourage it, while at the same time taking pains to conceal from their spouses what they already knew and suspected."

HODSON, J., in the Court of Appeal, regarded the interview between Mr. and Mrs. Manning as affecting Mr. Manning only. I think the trial judge regarded it as a step in a joint plan. There seems to me to have been evidence in that case on which the judge could well find that from the outset the two persons hoped that the association would become adulterous, and, so far from regarding that as the end of the world in which they had hoped to live, were anxious that it should happen. The procedure adopted on the final occasion was a step in the carrying out of this intention formed some time earlier. Mrs. Manning asked her husband to protect her from a man who was, she felt, getting a hold over her. The present wife, when taxed, told her husband not to be silly as the co-respondent had no hold over her. I do not think *Manning v. Manning*, *Fellows v. Fellows* (1) is an authority which compels me to find connivance in this case. It does not appear from the report that *Churchman v. Churchman* (2) was cited. Although, I think, there was clearly evidence in that case on which the judge could find connivance, there is a passage in the judgment of BUCKNILL, L.J., ([1950] 1 All E.R. 602), which, taken out of its context, might be read as inconsistent with what was laid down in *Churchman v. Churchman* (2). I refer to the passage in which BUCKNILL, L.J. ([1950] 1 All E.R. 603), referred to the fact that Mr. Manning was acting on his solicitor's advice and to his desire to find out whether his wife was unfaithful as irrelevant and immaterial. They may well have been so in that case and generally, but if the petitioner's state of mind is important I can imagine circumstances in which they might be relevant. The commissioner in the present case would, I think, have regarded the fact that the husband was acting on his solicitor's advice as material but for the passage to which I have referred. In the next sentence BUCKNILL, L.J., said the question was whether the petitioner encouraged and promoted the adultery which took place on Oct. 2. It is clear from the rest of the judgment of BUCKNILL, L.J., that that question had to be answered not merely by considering the fact that on that occasion the husband said he was going to be away for the night, but in the light of the whole previous history. These are difficult cases and I agree with what was said in *Churchman v. Churchman* (2) as to the danger of laying down general rules, but for the reasons I have given I do not think the husband here was guilty of connivance. The appeal, therefore, should be allowed.

DENNING, L.J.: The question in this case is whether a husband, who suspects his wife of adultery, is entitled to keep watch on her or to lay a trap for her. The answer depends on whether his conduct amounts to connivance. The principle on which connivance is founded is *volenti non fit injuria*. That was laid down by LORD STOWELL in *Forster v. Forster* (4) (1 Hag. Con. 146),

and by SIR JOHN NICHOLL in *Rogers v. Rogers* (5) (3 Hag. Ecc. 58), and has never been doubted since. Now volenti is very different from scienti. It is not the knowledge of what may occur which bars a husband from complaining. It is his consent to it. A husband cannot complain of his wife's adultery if he has theretofore, by his words or conduct, consented to it taking place, but the consent, to be a bar, must be a consent to the inception of the adultery.

A LORD CHELMSFORD in *Gipps v. Gipps and Hume* (6), said (11 H.L. Cas. 28):

"It must be borne in mind that the offence of adultery is complete in a single instance of guilty connection with a married woman. It is the first act which constitutes the crime, and though the adulterous intercourse between the parties should continue for years, there is not a fresh adultery upon every repetition of the guilty acts, although all and each of them may furnish proof of the adultery itself."

In that passage LORD CHELMSFORD recognises the fact—for fact it is—that the first act of adultery marks a turning point in the relationship of the guilty pair. It means that they have swept aside all scruples and committed themselves beyond recall. Thereafter repetition becomes easy and, I fear, likely.

C The material event, therefore, as this court pointed out in *Churchman v. Churchman* (2) is the inception of the adultery and not its repetition. It follows that the consent of the husband which is to bar his claim must be a consent to the adultery before it starts.

When this is realised it becomes plain that, once a husband suspects that an adulterous intrigue has already started, he is not guilty of connivance simply because he watches for proof of it. He is not then consenting to the inception of adultery, but only seeking for proof of its repetition. In order to obtain the proof, he may even acquiesce in its continuance, but that is not connivance. In every case where a husband or his agents keeps watch on his wife, to see if she is keeping an illicit assignment, he can be said to acquiesce in her adultery, because he has only to warn her beforehand that she will be watched and she will abstain from keeping the appointment. Such acquiescence has never been held to be connivance. The reason is because in connivance it is essential that there should be a corrupt intention on his part. This was pointed out by

E LORD STOWELL in *Hoar v. Hoar* (7) and has been repeatedly affirmed since. Now, a man who sets watch on his wife, whom he suspects of adultery, cannot be said to have a corrupt intention. He is seeking to discover the offence, not to promote it or encourage it. Some people may think it discreditable of him to spy on her, but on balance it is more to the good of the community that he should be at liberty to find out her guilt by keeping watch than that she should escape with impunity. That was the rule of the civil law as appears from a passage from SANCHEZ DE MATRIMONIO (1654) (Lib. X, disp. 12, no. 52), which I will translate into English:

G "A man who suspects his wife of adultery is allowed to keep watch on her with suitable witnesses, so that he may give proof of her adultery: for that is not conniving at her sin, but discovering her guilt so that he can get his remedy. It is one thing to request, counsel or command evil to be done, that is not allowed. But is it quite another thing to permit, or not to interfere with the doing of evil. That is sometimes allowed as being the greater good."

H That passage was quoted with approval by LORD STOWELL in *Timmings v. Timmings* (8) (3 Hag. Ecc. 82), and by DR. LUSHINGTON in *Phillips v. Phillips* (9) (1844) 1 Rob. Ecc. 159), and I do not doubt that it is as valid in our law as it was in the civil law. In *Mudge v. Mudge* (3), where the parties were separated, HODSON, J., held that the husband who kept watch was not guilty of connivance, and in *Harrison v. Harrison* (10), recently before this court, where husband and

wife were still sleeping in the same bed, no one suggested that his watching of her clandestine meetings amounted to connivance and we granted a decree.

This case goes one step further than watching, because the husband deliberately left the house so as to let the guilty pair believe they were alone, and then had them watched. By so doing he not merely acquiesced in the adultery. He created an opportunity for it. Does this added element make him guilty of connivance where mere watching would not? I think not. This court is not concerned with the ethics of the matter. The question is: Which is the greater evil—to allow the adultery to continue undetected and unproved, or to allow the husband to get his proof by creating an opportunity for it? My answer is that, if a husband honestly believes that adultery has already taken place, it is very necessary that his suspicions should either be confirmed or disproved. Merely asking his wife about it may not suffice. The circumstances may be such that the husband cannot be expected to accept the bare denial of the guilty pair. They often deny the truth. It is better that he should be able to get their adultery proved or disproved, even by creating an opportunity for it, rather than that the suspicion of it should continue to ruin his peace of mind and his home. It is altogether different if he throws them together before he believes that adultery has taken place. If he sees an association ripening into close friendship and then promotes and encourages it to turn into adultery, he is guilty of connivance. He then has a corrupt intention because he is not seeking to prove an existing offence, but is trying to provoke a new one. He is then truly an *agent provocateur*. So, also, if he, being already guilty himself, wants a divorce for his own reasons, and then throws his suspected wife into temptation so as to get proof for his own ends. That is also a corrupt intention, but when an innocent husband is only seeking to discover proof of an adulterous intrigue which he believes is already going on, the creation of an opportunity for it is not of itself connivance. In support of this view, perhaps, I may quote further from *SANCHEZ DE MATRIMONIO* (Lib. X, disp. 12, no. 52):

“Gamekeepers who absent themselves in order that poachers may come freely and take game are to be punished: but if they do so in order that the poachers may return and be caught, they should be excused. So also a husband cannot complain of adultery which his wife commits with his knowledge and approval; but that is not so when his dissimulation is not by way of consent but in order to gain proof of her adultery.”

If it be objected that this view involves an inquiry into the husband's belief, that is, into his state of mind, I say that is just as it should be. It is clear that in this case, if the commissioner had been satisfied that the wife had committed adultery before the fatal night, the husband would not be guilty of connivance, because he could not then be said to have consented to the inception of it. His guilt or innocence cannot depend, however, on the view which a court may ultimately take of the evidence before it, which may be different from that which the husband had before him. It must depend on the husband's state of mind at the time. That has always been laid down right from *Phillips v. Phillips* (9) to *Churchman v. Churchman* (2). And when considering his state of mind, it must be remembered that he is presumed to be innocent of connivance. He may reasonably believe that his wife is indulging in an adulterous intrigue on evidence which would be quite insufficient to establish it in a court of law. When there are reasonable grounds for his belief, his conduct in testing his belief is not evidence of connivance, because he must, in fairness, be given the credit of believing it and of seeking only for the necessary proof. If there are no reasonable grounds for his belief, a suspicion of connivance arises, because it may be inferred that he did not in fact believe it. If he then promotes and encourages an act of adultery, by throwing the pair together, he may be called on to explain it because at the end of the case the court

must be satisfied, on the balance of probabilities, that there was no connivance, *Emanuel v. Emanuel* (11).

A The case of *Manning v. Manning*, *Fellows v. Fellows* (1) is distinguishable. As HODSON, J., pointed out, that case, as pleaded and fought, concerned one act of adultery only, and that act was clearly promoted and encouraged by the petitioners. The court was not asked to consider whether the adultery had started earlier, or whether the petitioners honestly believed that it had, or what the effect in law would be of such a belief. So the points which we have been considering did not arise. The decision itself is not open to question because the connivance at the continuance of the adulterous association was so provocative that the petitioners must be taken to have connived at it from the first, an exceptional state of affairs which was envisaged in *Churchman v. Churchman* (2).

B Applying those principles in this case, the conduct of the husband may be divided into two parts. (i) After his suspicions were aroused, he watched and eavesdropped. That did not amount to connivance. He then heard and saw things which gave him reasonable grounds for believing that they were indulging in an adulterous intrigue. He lacked the proof necessary to establish it in a court of law, but nevertheless he had reasonable grounds for believing it. C He should, therefore, be given the credit of believing it and of seeking only for the necessary proof. (ii) In the course of his search, he created an opportunity for adultery, by purposely leaving the pair together alone. That does not in the circumstances give rise even to a suspicion of connivance. The appeal should, therefore, be allowed.

D **BUCKNILL, L.J.:** I agree that the appeal should be allowed and wish to add a few words on one point only. In the course of my judgment in *Manning v. Manning*, *Fellows v. Fellows* (1), I said in effect that the point that Mr. Manning was acting on the advice of his solicitors was irrelevant. I did not intend this statement to mean that such action was irrelevant to the question as to the state of Mr. Manning's mind on the subject of his wife's possible or E probable adultery with the co-respondent. I intended to say that if Mr. Manning deliberately encouraged and promoted his wife's adultery the fact that he did so on the advice of his solicitors did not, in my opinion, protect him against the charge of connivance. I also said in my judgment that the question whether the husband's only desire was to find out whether the wife was unfaithful was immaterial, and that the question was whether he had F encouraged and promoted the adultery proved to have taken place on the particular occasion charged. I did not intend my words to mean that I thought that the state of mind of the spouse charged with connivance is in all cases irrelevant. At the same time when one is considering the question of connivance in this case, the relevance of the state of the husband's mind on Feb. 11 when he deliberately went away from his house in order to leave the wife G and the co-respondent alone there, raises in my mind a question of some doubt and difficulty. Primarily I think that the court should consider the husband's conduct objectively, i.e., should consider what its natural and probable result would be with regard to encouraging and promoting the wife's adultery, rather than consider his intention. At the same time I cannot say that his intention was irrelevant to the question of connivance.

H The questions in this difficult case seem to me to be: (a) Was the adultery which was proved to have been committed on Feb. 11 the natural and probable result of the husband's conduct in leaving his wife and the co-respondent alone on that date? (b) Did the husband desire his said conduct to promote his wife's adultery? (c) Did his said conduct in fact encourage and promote adultery? As regards (a) I do not think it is proved that the adultery was the natural and probable consequence of the husband's absence. As regards (b) I think the evidence shows that he did not so desire it. As regards (c) I

think the husband's conduct made the adultery more easy and therefore more likely. To this extent I must hold that his absence promoted the adultery. For these reasons in the particular circumstances of this case I do not think the husband connived at the wife's adultery on Feb. 11, the only date on which adultery is proved to have occurred.

Appeal allowed with £500 damages against co-respondent, no costs to wife in Court of Appeal or below. Co-respondent to pay husband's costs of both hearings. A

Solicitors: *Ellison & Co.* (for the appellant); *Edward Page & Co.*, Colchester (for the respondent).

[Reported by C. N. BEATTIE, ESQ., Barrister-at-Law.]

R. v. LOWER MUNSLOW JUSTICES. *Ex parte* PUDGE.

[KING'S BENCH DIVISION (Lord Goddard, C.J., Byrne and Finnemore, JJ.), July 25, 26, 1950.] C

Justices—Bias—Application for possession of cottage—Clerk to justices having acted for vendor of cottage on sale to applicant several years previously—Advice to justices on evidence—Comment after decision of justices—Conclusion of justices that no case to answer—Decision announced during respondent's examination, and before cross-examination. D

The applicant, the owner of a farm, claimed possession of a cottage under the Small Tenements Recovery Act, 1838. A week's notice had been given, and the issue was whether the tenancy in question was a weekly or a yearly one. The applicant called evidence to prove his case, and the tenant was giving evidence when the justices announced that the application would be dismissed as they thought the tenancy was a yearly tenancy. An application was made for an order of *certiorari* to quash this decision on the ground that the clerk to the justices had acted for the vendor when the estate on which was the cottage in question was sold to the applicant in 1946, that because of his personal knowledge of the subject-matter of the application for possession he was not fit to act as clerk during the adjudication, and that he gave or appeared to give information to the justices during the hearing. In an affidavit the chairman of the bench said that "the clerk said nothing during the hearing to the magistrates except that, in face of the receipts and the respondent's evidence, it did not appear to be a weekly tenancy. Immediately after I had given the decision of the court the clerk . . . said . . . that he acted for the vendor on the sale of the farm to the applicant and happened to know that at that time the respondent was a yearly tenant." It was further contended that the action of the justices in announcing their decision before the tenant had been cross-examined amounted to a denial of justice or a failure to demonstrate that justice was being done.

HELD: (i) the facts that the clerk to the justices had acted in his capacity as a solicitor for a previous owner of the property who was not a party to the litigation before the court and that he had personal knowledge of the matters before the court did not debar him from sitting as a clerk, and it was proper for him to advise the justices on the evidence which had been given. There was no impropriety in his saying, after the decision had been announced, that he knew the tenancy was a yearly tenancy at the time he acted for the vendor years before. H

(ii) the justices were entitled at any time after the applicant had closed his case to give a decision against him, just as they could have done immediately at the end of his case, and in all the circumstances there was no bias or denial of natural justice.

[AS TO THE INTEREST OF JUSTICES' CLERK AND THE BIAS OF JUSTICES, see HALSBURY, Hailsham Edn., Vol. 21, pp. 541, 542, paras. 957, 958; and FOR A CASES, see DIGEST, Vol. 33, pp. 292-301, Nos. 83-157, and Digest Supp.]

APPLICATION for an order of *certiorari* to bring before the court and quash a decision of justices for the Lower Munslow petty sessional division of Shropshire dismissing the applicant's summons for possession of a cottage under the Small Tenements Recovery Act, 1838. The facts appear in the judgment of LORD GODDARD, C.J.

B *C. N. Shawcross, K.C.*, and *Conway Clifford* for the applicant.
Ronald Davies for the tenant.
C. S. S. Burt for the justices.

LORD GODDARD, C.J. : Counsel for the applicant has moved for a writ of *certiorari*, addressed to the justices of Shropshire sitting in the division of Lower Munslow, to bring up and quash an order made by them dismissing an application which the applicant made for possession of a cottage in the occupation of a Mrs. Bowen. Leave was obtained on an affidavit stating matters which, had they been true, would have constituted very grave misconduct on the part of the clerk to the justices. The statement was this:

D "The grounds of the application are as follows:—(1) The clerk of the said court [Mr. Malan] was (unknown to the said applicant) so related to the matters upon which the said adjudication or purported adjudication depended and had such personal knowledge of the same, that he was not fit to act as clerk, but nevertheless did so act and thereby caused, or created a suspicion that he caused, an improper interference with the course of justice. (2) During the course of the hearing preceding the said adjudication or purported adjudication the said clerk from his personal knowledge of the said matters, gave, or appeared to give, to the magistrates composing the said court information concerning the same, in such wise as to be partially audible and partially inaudible to persons then present. (3) The said court acted, or appeared to act, upon the information so given, or appearing to be so given, as aforesaid."

F So what is said is: "Here is a clerk who has been interested in this matter and he has been surreptitiously giving evidence in the case, in the sense that he has been informing the justices of matters within his own personal knowledge." Of course, if such a thing were done, it would be a matter of the gravest moment. It would certainly be a ground for *certiorari*, and it might be a ground for G putting forward strong recommendations to the bench that they had better get rid of their clerk.

But what are the facts we now know? The only possible connection which the clerk to the justices had with this matter was that in 1946 his firm were concerned as the solicitors for the vendors of the estate on which this cottage happened to be situate, on the sale of it to the applicant. During the negotiations requisitions on title were put in and answered, and it is not without some significance that the answer that was given to a requisition with regard to the tenancy of the cottage now in question was that it was held on a yearly tenancy. No objection to Mr. Malan sitting was taken by the applicant at the time, but it is now brought against him, in support of the charge that is made against him of being so connected with this matter that he was not fit to act as clerk, that he answered that requisition. It seems to me that, if we were to hold such a thing as that, it would be extending the doctrine of "bias" to the most H

unreasonable extent. The only connection which this clerk to the justices, in his capacity as a solicitor, had had with the matter was that he had acted, not for any party to this litigation, but for a previous owner. Is it to be said that because a gentleman who is not only a practising solicitor but also holds the office of clerk to the justices acts for client A in some transaction which A may have with B, he is thereafter for all time prohibited from sitting as clerk to the justices in a case in which any question arises with regard to the subject-matter of the property he sold? I cannot believe that it would be right to hold any such thing, nor would it be right to say that because a clerk to justices may have some personal knowledge of matters which come before his bench he is thereby debarred from sitting as clerk. Everybody who has experience of these matters and has gone circuit knows that clerks to justices in the country are usually leading solicitors in the district. The clerk probably knows a great deal about everybody's affairs in the neighbourhood. He certainly knows a good deal about the defendants who appear before the justices occasionally—those we may call their “regular customers”—and it would be an astonishing doctrine to lay down, that because a justices' clerk knows something about the matter before the court and his knowledge has been acquired owing to a transaction he has had with some previous person connected with the subject-matter of the litigation he is thereby debarred from acting as clerk. Of course, if he communicates his knowledge to the justices and tells them facts which would mean that he was giving evidence behind the backs of the parties and not being subjected to cross-examination, he would be acting most improperly.

The chairman of the justices has made an affidavit in which he says:

“The clerk of the court said nothing during the hearing to the magistrates, except that, in face of the receipts and the respondent's evidence, it did not appear to be a weekly tenancy.”

That was a perfectly proper thing for the justices' clerk to say because the justices were entitled to rely on the advice of their clerk on such matters, and he was rightly advising them on the evidence that was given. Then the chairman says:

“Immediately after I had given the decision of the court, the clerk said to the magistrates that he acted for the vendor on the sale of the farm to the applicant, and happened to know that at that time the respondent was a yearly tenant.”

Is it contrary to natural justice, does it give an appearance that justice has not been done, that, when justices have given their decision and thereby are *functus officio*, their clerk says: “I think you are quite right in this case, because I happen to know that this was a yearly tenancy and not a weekly tenancy”? He had given no advice to the justices during the case, except on the evidence produced, and the fact that he made a casual remark at the end of the case neither showed bias, nor did it indicate that justice had not manifestly been done. The clerk to the justices has made an affidavit in the same terms, and the court accepts his affidavit and that of the chairman. No affidavit has been filed reiterating the charge that was made in the affidavit for leave, and we are satisfied that we have to decide this case on the basis that there is no suggestion whatever to be made against the conduct of the clerk during the hearing of the case. We are unable to say that, because the clerk in 1946 acted for the vendors of the estate on which this cottage was situate, that prevents him from acting as clerk in a case where proceedings are taken under the Small Tenements Recovery Act, 1838, by the new landlord for the ejectment of the tenant of the cottage. If the clerk had acted for Mrs. Bowen, the tenant, at any time, that would have been an entirely different matter, but that is not the fact, and, therefore, there is no ground for saying there was any impropriety or bias on the part of the clerk.

A The applicant further complains that the justices stopped the hearing of his application for possession while the tenant was giving evidence and before she was cross-examined and before the applicant's solicitor had an opportunity to address the justices. The chairman says that they stopped the case because, in view of the receipts for rent which had been put in (indicating at what intervals rent had been paid) they were unanimously of the opinion that it was not a weekly tenancy. Perhaps it would have been better if the justices had done this before the tenant had gone into the witness box, but how can it be said that what occurred amounted to a denial of natural justice?

I am of opinion that we should not grant *certiorari* in this case, and that the application should be dismissed.

B **BYRNE, J. :** The court is asked to say that the behaviour of the justices and their clerk amounted to a denial of justice or a failure to demonstrate that justice had been done. It is to be observed that, although originally there was a very grave charge made against the clerk, that charge has now been abandoned, and it is alleged that he took part in this failure to demonstrate that justice was being done by sharing in an adjudication in which he had at some time had some kind of interest. It is, therefore, important to see what
C interest it could possibly be said he had ever had in the matter. It turns out that he had acted for the vendors on the sale to the applicant of the farm on which this cottage was. It would be very difficult to think of any more remote connection with the matter than that. When the justices had arrived at their decision, the clerk informed the chairman that he had so acted, and that is also alleged as a ground on which we should say that justice was not done.
D I fail to see that that in any way is indicative of any denial of justice or indicative of a failure to demonstrate that justice was being done, because it was an observation made by the clerk to the chairman of the bench after the justices had given their decision. Thus, so far as the clerk is concerned, it appears to me that there is nothing in this matter at all.

E With regard to the justices, it is said that they should not have stopped the case after the tenant had given evidence-in-chief, but that they should have permitted the applicant's solicitor to cross-examine her and to make submissions to them. It is said that there again there was a failure to demonstrate that justice was being done. Is it right for justices, if at the close of the case for the applicant they think there is a case to answer, but, on reflection while the defendant is giving evidence, they come to the conclusion that they were wrong,
F to stop the case then, or are they obliged to wait till the defendant is cross-examined and addresses or submissions have been made to them? In my opinion, they are not called on to pursue that latter course. If they come to the conclusion that they have made a mistake in thinking there was a case to answer, there is no reason why they should permit the defendant to be subjected to cross-examination. On the affidavit of the chairman, it appears that that
G is precisely what happened here. I agree with my Lord that this application for *certiorari* fails.

FINNEMORE, J. : I also agree. Originally, very serious allegations were made against the clerk. It was alleged that in the course of the case he imparted to the justices knowledge of his own which vitally affected the case. He was alleged to have told them that he himself knew that the tenancy was
H a yearly tenancy when it was being alleged by the applicant that it was a weekly one and a week's notice only had been given. If he had done that, it is unnecessary to say that it would have been highly improper. In his affidavit the clerk says he did not tell the bench that. The chairman of the justices also says that he did not make any such communication to them and that allegation was not persisted in before this court. It is still said, however, that what is called natural justice was denied to the applicant and that justice did not manifestly appear to be done, because some three years before the clerk

had acted on behalf of the vendors when this property was sold to the applicant. In the course of that sale naturally he knew something about this tenancy, and the court has seen in the documents in answer to requisitions on title the statement that this was a yearly tenancy. The clerk had no concern whatever with the matter after the sale had been completed. He never at any time had anything whatever to do with Mrs. Bowen, the tenant, nor, once the sale had been completed, had he anything whatever to do with the applicant. It is true that after the case had been decided, he told the justices that in fact he did know from his previous experience that this tenancy was a yearly one, as the justices had found on the evidence of the documents which were placed before them. I agree that that is a very long way from supporting a charge of bias or one of lack of natural justice or lack of appearance of justice, and, in my opinion, such a state of facts could not be held to disentitle a clerk from acting. The other matter alleged is that the justices, having heard the applicant, then heard the tenant, who gave evidence, and before she had completed her evidence and been cross-examined, the chairman said: "We dismiss this application. The court thinks the tenancy was not a weekly one but a yearly one." That was plainly a decision they could have made at the end of the case for the applicant. On the documents we have seen, though we are not concerned with the merits, it appears obvious that there was at least ground for the justices saying: "This weekly tenancy has not been proved; therefore, the application fails." If the applicant was dissatisfied with that decision in law, he would have been able, as my Lord has said, to ask for a Case to be stated. He did not do that. His advocate said: "This is a very extraordinary decision." When asked why, he said: "I have had no opportunity of cross-examining the said tenant concerning her said tenancy or any other matter, and I have not been invited or permitted to address the said court concerning the same." He does not seem to have persisted very much in that. He does not appear to have said he wanted to address the court, and it may well be that, had he done so, the result would have been the same. Speaking for myself, I think it is often wiser for the court to invite, or to allow, the party against whom the decision is being given to address the court, if he so wishes, but there is no bounden duty to do so that I can see. They had heard the opening, in which the applicant had set out the whole of his case. They had heard the evidence. That evidence, quite plainly, from what the chairman says, had not only failed to satisfy them that this was a weekly tenancy, but they were satisfied it was not. Therefore it followed that the notice given was an insufficient notice, and the application was bound to be refused. I, therefore, agree that there has been no denial of natural justice, as it is called, and no reason at all why the writ of *certiorari* should issue.

Application refused.

Solicitors: *Williamson, Hill & Co.*, agents for *Russell, Orme and Dykes*, Ledbury (for the applicant); *Kenneth Brown, Baker, Baker*, agents for *G. H. Morgan & Sons*, Ludlow (for the tenant); *Capron & Crosse*, agents for *Clark & Co.*, Ludlow (for the justices).

[Reported by F. GUTTMAN, ESQ., Barrister-at-Law.]

HOLLOWAY v. MOBBERLEY & PERRY, LTD.

[COURT OF APPEAL (Bucknill, Somervell and Denning, L.J.J.), July 19, 28, 1950.]

Workmen's Compensation—Industrial disease—Certificate of disablement given after July 5, 1948—Workman not insured against disease—National Insurance (Industrial Injuries) Act, 1946 (c. 62), s. 89 (1), proviso (a).

A A workman was employed for thirty years up to Oct. 11, 1946, as a hewer of coal. From that date until May, 1949, he was employed in the woodworking industry in respect of which employment he was insured as from the appointed day (July 5, 1948) under the National Insurance (Industrial Injuries) Act, 1946. On Aug. 29, 1949, a medical board certified him as totally incapacitated as from May 17, 1949, by pneumoconiosis which was due to his employment as a hewer. By s. 55 (1) of the Act of 1946, compensation for industrial disease developed on or after the appointed day is payable only if the disease is due to the nature of the employment in respect of which the workman is insured under the Act. By s. 89 (1) it is provided that workmen's compensation shall not be payable in respect of any employment on or after the appointed day, provided that "(a) the said enactments shall continue to apply to cases to which they would have applied if this Act had not been passed, being cases where a right to compensation arises or has arisen in respect of employment before the appointed day, except where in the case of [*inter alia* pneumoconiosis] the right does not arise before the appointed day and the workman, before it does arise, has been insured under this Act against that disease or injury." On the question whether the workman was entitled to workmen's compensation,

D HELD: although the right to compensation arose after the appointed day, the workman was not insured under the Act of 1946 against the disease from which he was suffering, and, therefore, he was not deprived of his right to claim workmen's compensation by the exception to the proviso to s. 89 (1) of that Act.

E *Harris v. Rotol, Ltd.* ([1950] 1 All E.R. 867), explained.

[FOR THE NATIONAL INSURANCE (INDUSTRIAL INJURIES) ACT, 1946, s. 89 (1), see HALSBURY'S STATUTES, Second Edn., Vol. 16, p. 893.]

Cases referred to:

- F (1) *Hales v. Bolton Leathers, Ltd.*, [1950] 1 All E.R. 149; [1950] 1 K.B. 493.
(2) *Harris v. Rotol, Ltd.*, [1950] 1 All E.R. 867.

APPEAL by a workman from an order of His Honour JUDGE LANGMAN, made at Stourbridge County Court, and dated May 18, 1950, dismissing a claim under the Workmen's Compensation Acts.

G For the workman it was contended that, although the certificate of disablement was given after the appointed day under the National Insurance (Industrial Injuries) Act, 1946, so that the right to compensation could be said to arise after that date, nevertheless, he was not insured under that Act against the disease in question, and, therefore, his claim was not excluded by s. 89 (1) (a) of the Act. The facts appear in the judgment of SOMERVELL, L.J.

Paull, K.C., and *A. E. James (M. Gore with him)* for the workman.

Beney, K.C., and *E. G. H. Beresford* for the employers.

H *J. P. Ashworth*, as *amicus curiæ* (representing the Minister of National Insurance).

Cur. adv. vult.

July 28. The following judgments were read.

SOMERVELL, L.J. (read by DENNING, L.J.): This is an appeal by a workman claiming compensation under the Coal Mining Industry (Pneumoconiosis) Compensation Scheme, 1943, made under s. 47 (1) of the Workmen's

Compensation Act, 1925, as extended by later Workmen's Compensation Acts. It is unnecessary to refer to s. 47 which gives, or the later Acts which extend, the power to make the scheme in question. The scheme applies to all workmen employed on or after July 1, 1943, in any operation underground in any coal-mine. The present workman was so employed. He was employed as a hewer for thirty years prior to Oct. 11, 1946. He was not after that date employed in any coal mine, but he was employed in the woodworking industry from October, 1946, to May, 1949. Since then he has done no work. On Aug. 29, 1949, a medical board certified him, or, as the employers would say, purported to certify him, in accordance with the Pneumoconiosis Scheme as totally incapacitated by pneumoconiosis from May 17, 1949. Although I shall refer later to some of the provisions of the scheme it is not disputed that, if the Workmen's Compensation Acts—including, of course, the schemes made under them—continued to apply to him, he is entitled to succeed. The National Insurance (Industrial Injuries) Act, 1946, as from the appointed day, July 5, 1948, repealed the Workmen's Compensation Acts and substituted a new scheme for dealing with industrial injuries, the provisions of which are to be found in that Act. It provided, however, in s. 89 that the Workmen's Compensation Acts should continue to apply in certain cases, and the question is whether the workman's case is one to which they continue to apply. The learned county court judge decided that it was not, and from that decision the workman appeals.

The scheme follows the general lines on which industrial diseases were dealt with under the old code. It provides (para. 4) for certification by a medical board whether death or total or partial disablement is due to the industrial diseases covered by the scheme. Where the disease is due to employment in the industry, the workman or his dependents are entitled to claim compensation as if the disease were a personal injury by accident as provided by the Acts. By para. 5, if, as here, the workman has been employed in the industry for five years or more, the disease is deemed to be due to the employment unless the employer proves the contrary. By para. 6 the date of the injury is deemed to be the date on or from which the man is certified to be disabled. By para. 8 the compensation is recoverable from the employer who last employed the workman in the industry. Other employers, if any, who have employed the workman in the industry during the five years preceding the date of the injury are, subject to qualifications which do not matter, liable to make contributions to the last employer from whom the compensation was recoverable. I have set out these provisions because they assist in understanding the form of the provisions which have to be applied.

Section 89 (1) of the Act of 1946, on which this appeal turns, is as follows:

"Workmen's compensation shall not be payable in respect of any employment on or after the appointed day, and accordingly the enactments set out in sched. IX to this Act are hereby repealed as from that day to the extent mentioned in the third column of that schedule: Provided that—
(a) the said enactments shall continue to apply to cases to which they would have applied if this Act had not been passed, being cases where a right to compensation arises or has arisen in respect of employment before the appointed day, except where, in the case of a disease or injury prescribed for the purposes of Part IV of this Act, the right does not arise before the appointed day and the workman, before it does arise, has been insured under this Act against that disease or injury . . ."

Dealing first with the words before the proviso is reached, the workman was, on the appointed day, and up to May 15, 1949, employed in the woodworking industry. If he had sustained a personal injury in that industry after the appointed day the Workmen's Compensation Acts would have had no application. Under s. 1, of the Act of 1946, he could have claimed his benefits under that Act. I will now turn to the proviso. This proviso came before this court

A in *Hales v. Bolton Leathers, Ltd.* (1). The exact point argued there does not affect the present case. We held that the words down to the exception continue to apply the Workmen's Compensation Acts to cases where the right to compensation arises after the appointed day if it is in respect of employment before the appointed day. That case, like this, turned on the exception. It is not disputed that pneumoconiosis is a disease or injury prescribed for the purposes of Part IV of the Act. The exception provides that the Workmen's Compensation Acts shall not continue to apply even though the right to compensation is in respect of employment before the appointed day if two conditions are fulfilled, (i) the right does not arise before, that is, arises on or after the appointed day, and (ii) the workman has been insured under the Act of 1946 against that disease or injury.

B In the present case it seems to me plain that the workman's right to compensation arose in respect of employment before the appointed day. The employment to which the disease was due ceased in October, 1946. For reasons which we elaborated in *Hales'* case (1), "arises" means "arises at any time," so, unless taken out by the exception, the appeal must succeed. The first condition of the exception is fulfilled as the workman's right to compensation arose after the appointed day whether one takes the date of the certificate or the disablement. To see whether the second condition is fulfilled one has to turn to s. 55 (1) of the Act of 1946 which reads as follows:

D "Subject to the provisions of this Part of this Act, a person who is under this Act insured against personal injury caused by accident arising out of and in the course of his employment shall be insured also against any prescribed disease and against any prescribed personal injury not so caused, being a disease or injury due to the nature of that employment and developed on or after the appointed day."

E As I have said, the workman was insured in respect of his employment in the woodworking industry, but as his pneumoconiosis was not due to the nature of that employment he was not insured against pneumoconiosis under the Act of 1946. The second condition is not fulfilled, and under the opening words of the proviso to s. 89 (1) the Workmen's Compensation Acts continue to apply. This broadly was the argument as presented by counsel for the workman, and it seems to me plainly right unless we are constrained by authority to hold otherwise. If one asks oneself why it was necessary to have an exception, it was, I think, because an industrial disease is "in respect of employment" over a long period and complications would have arisen in the application of the opening words, for example, to a miner employed as such after the appointed day who developed pneumoconiosis, say, a year after that date.

F The authority relied on by the employers is a decision of this court, *Harris v. Rotol, Ltd.* (2). In that case the workman was certified on Aug. 17, 1949, under s. 43 of the Workmen's Compensation Act, 1925, as disabled by dermatitis as from Feb. 6, 1948—before the appointed day. It would seem clear that the right arose in respect of employment before the appointed day. The employers took a preliminary objection based on the repeal of the Workmen's Compensation Acts by the opening words of s. 89 (1). The employers sought to argue, in the first place, that the case was outside the opening words of the proviso. This seems to me clearly contrary to what was said in *Hales'* case (1). There was, however, scope for argument, and this seems to me to have been the only point argued, whether the first condition of the exception was fulfilled. In other words, as there is power to give a retrospective certificate of disablement, does the right to compensation arise when the certificate is signed or as from the certified date of disablement? The court held that, as s. 43 made the certificate a condition precedent, no right arose till it was given. The right to compensation, therefore, did not arise before the appointed day. It is a binding decision on this point, and if the workman in that case had been insured

under the Act of 1946 against dermatitis, it would have defeated his claim, and the surgeon would have been *functus officio*. I can find no discussion on the question whether the workman was insured under the Act of 1946 against dermatitis. It may have been admitted or tacitly assumed that he was. It was, I think, unsatisfactory that the employers were allowed to take a preliminary objection, as, in deciding whether s. 89 (1) continues the application of the Workmen's Compensation Acts, the history of the workman and his employment on and after the appointed day is relevant. I cannot regard the case as deciding anything beyond the point which emerges in the judgment. For these reasons I think the appeal succeeds.

DENNING, L.J. : I agree so entirely with the judgment of SOMERVELL, L.J., that I would not add a word but for the difficulties presented by *Harris v. Rotol, Ltd.* (2). That case came before the court in a most unusual way. The claim was for compensation for incapacity which started in December, 1948. The employers took a preliminary objection. They said that the "workman's right to claim compensation did not arise before July 5, 1948", and "therefore" the employers are not liable to pay compensation under the Workmen's Compensation Acts. That preliminary objection was upheld without any evidence being heard. So far as can be told from the record the incapacity in December, 1948, was a recurrence due to the nature of his employment from July 5, 1948, to December, 1948, against which he was insured by the State. The case was, therefore, on the face of it covered by *Hales v. Bolton Leathers, Ltd.* (1), that is, the workman was entitled to industrial insurance from the State, not to workmen's compensation from the employers. I do not think *Harris v. Rotol, Ltd.* (2) should be regarded as deciding any more than appears from the record. The only point that it decided was that the right to compensation under s. 43 of the Act of 1925 only arises when the certifying surgeon gives his certificate and not before. If, therefore, as was assumed, the workman was before December, 1948, insured by the State against the disease, the case came within the exception to s. 89 (1) (a).

The judgment of this court in *Harris v. Rotol, Ltd.* (2) does not recite the facts at all, no doubt because they were not proved. It is, however, instructive to consider the hypothetical set of facts which were stated to the court. On Feb. 6, 1948, the workman, who had theretofore been working with oil, had an attack of dermatitis. He did not, however, stop work. He had his hands bandaged and was put on light, dry work at slightly less wages than before. Later on he was appointed an inspector and was engaged on work which did not bring him into contact with oil. In December, 1948, he had a recurrence of dermatitis and was totally incapacitated. On Aug. 17, 1949, the certifying surgeon certified that he was suffering from dermatitis and that the date of his disablement was Feb. 6, 1948. If those facts had been proved two questions might have arisen for decision which were not, in fact, decided: First: Was the workman entitled to workmen's compensation from his employers for the period of partial incapacity which started on Feb. 6, 1948? The answer, I think, was plainly "Yes." Although the right to it did not arise until Aug. 17, 1949, when the certifying surgeon gave his certificate, nevertheless, the right arose "in respect of employment" before July 5, 1948. The case came, therefore, within the opening words of s. 89 (1) (a) of the Act of 1946. It did not come within the exception because, although the right did not arise before July 5, 1948, nevertheless, the workman was not insured against the disease, that is, the incapacity due to the disease, under the Act of 1946. Secondly: Was the recurrence in December, 1948, due to the nature of his employment from July 5, 1948, to December, 1948, or only to his employment before July 5, 1948? If it was, in fact, due to his work with oil prior to February, 1948, and his subsequent work had nothing to do with it, then the very point would have arisen which we have to decide to-day. The answer again is plain. Although

the right did not arise until the certifying surgeon gave his certificate in August, 1949, nevertheless the right arose "in respect of employment" before July 5, 1948. The case would come within the opening words of s. 89 (1) (a). It would not come within the exception because, although the right did not arise before July 5, 1948, nevertheless the workman was not insured against the disease, that is, the incapacity due to the disease, under the Act of 1946.

- A The answers which I have given clearly carry out the intention of the Act of 1946 which was, as stated in s. 89 itself, that workmen's compensation should not be payable in respect of employment after July 5, 1948, but should continue to be payable in respect of employment before it. The date when the right arose does not matter so much as the employment in respect of which it arose. The employer must pay compensation for accidents and diseases due to employment before July 5, 1948. The State must pay industrial assurance for accidents and diseases due to employment after July 5, 1948. No rights of the workman are taken away by the Act of 1946. The certifying surgeons are not *functus officio*. They remain entitled to act after July 5, 1948, in respect of diseases due to employment before July 5, 1948. It is only when the workman has become insured against the incapacity due to the disease under the National Insurance (Industrial Injuries) Act, 1946, that he loses his right to claim workmen's compensation from his employer and the certifying surgeons become *functus officio*. In one way or the other the man is entitled throughout, and the only question which arises in the transition period is: Who is to pay, the employer or the State? He cannot get both workmen's compensation and industrial assurance, as we decided in *Hales v. Bolton Leathers, Ltd.* (1), but he does not lose both, as we decide to-day. In my opinion, therefore, the appeal should be allowed.
- D

BUCKNILL, L.J. : I also agree that the appeal should be allowed.

Appeal allowed with costs here and below.

Solicitors: *Stafford Clark & Co.*, agents for *Hooper & Fairbairn*, Dudley (for the workman); *Rugg (E. P.) & Co.*, agents for *Buller, Jeffries & Kenshole*, Birmingham (for the employers); *Solicitor, Minister of National Insurance* (for Minister of National Insurance).

[*Reported by C. N. BEATTIE, ESQ., Barrister-at-Law.*]

F

Affirmed. C.A. [1951] 1 All E.R. 982.

EARL FITZWILLIAM'S WENTWORTH ESTATES CO. v. MINISTER OF TOWN AND COUNTRY PLANNING AND ANOTHER.

G [KING'S BENCH DIVISION (Birkett, J.), July 11, 12, 31, 1950.]

Compulsory Purchase—Building land—Compulsory purchase by Central Land Board—Power of board to acquire land for disposal for permitted development—Planning permission granted by local authority to prospective lessee—Owner unwilling to sell at existing use value—Town and Country Planning Act, 1947 (c. 51), s. 43 (1).

H

The owners of a plot of land offered it to R., who wished to build a house on it, on a three hundred years' lease, at an annual rent of £20 10s., inclusive of the assignment of the benefit of the owners' claim for compensation for loss of development rights under the Town and Country Planning Act, 1947, R. to pay the development charge under the Act. Permission to build the house was granted to R. by the local authority. On a request by R. that a compulsory purchase order should be made for his benefit, because the owners did not propose to lease the land at the existing use value, the

Central Land Board wrote to the owners asking them whether they would be prepared to adopt one of three methods of disposing of the land. The methods, which the board considered fair to buyers who wanted a house immediately, were: (i) to sell the land at existing use value, the buyer paying development charge; (ii) the seller to pay the development charge, and then to sell the land at a fair price, including the development charge; or (iii) the seller to pay the development charge, erect the house and then sell the house and land at a fair price, including the development charge. The owners refused to adopt any of these methods. The existing use value of the land was £35, but the owners would only agree to sell it at £462 (its probable value if it were developed), without paying development charge. The board resolved that, as they were unable to acquire the land by agreement on reasonable terms, an order be made to acquire the land compulsorily. An order to that effect was made, under s. 43 of the Act of 1947, on June 22, 1949, and was confirmed by the Minister of Town and County Planning on Dec. 3, 1949. On an application to the court by the owners for an order that the compulsory purchase order and the Minister's confirmation order be quashed, the owners contended (*inter alia*) that the order was made to punish them for their refusal to adopt one of the three methods suggested by the board, but the learned judge found that the evidence did not justify him in drawing that inference.

HELD: (i) if the board had exercised their compulsory powers under s. 43 (1) and s. 43 (2) of the Act of 1947 with the sole purpose of enforcing their policy that land should not be sold save at existing use prices, the compulsory purchase order would have been invalid, but it was reasonable to suppose that the decision of the board was determined by many other considerations.

(ii) the power given to the board by the second part of s. 43 (1), *viz.*, to "acquire any land for the purpose of disposing of it for development for which permission has been granted under Part III of this Act on terms, inclusive of any development charge payable under those provisions in respect of that development," was not limited by the earlier words of the sub-section, and so was not confined to cases bearing directly and solely on the ascertainment of development values under s. 61 or the assessment of development charges under s. 70, but was wide enough to allow the board to make the compulsory purchase order in the circumstances of the present case, and, therefore, the order was valid.

[FOR THE TOWN AND COUNTRY PLANNING ACT, 1947, see HALSBURY'S STATUTES, Vol. 40, p. 727.]

Cases referred to:

- (1) *Galloway v. London Corpn.*, (1866), L.R. 1 H.L. 34; 35 L.J.Ch. 477; 14 L.T. 865; 30 J.P. 580; 11 Digest 117, 109.
- (2) *Sydney Municipal Council v. Campbell*, [1925] A.C. 338; 133 L.T. 63; *sub nom.*, *Sydney Municipal Council v. Hughes Motor Service, Ltd.*, 94 L.J.P.C. 65; Digest Supp.
- (3) *Glanricarde (Marquess) v. Congested Districts Board for Ireland*, (1914), 79 J.P. 481; 11 Digest 118, 116.
- (4) *Point of Ayr Collieries, Ltd. v. Lloyd-George*, [1943] 2 All E.R. 546; 2nd Digest Supp.

MOTION for an order that a compulsory purchase order, made by the Central Land Board on June 22, 1949, and a confirmation order, made by the Minister of Town and Country Planning on Dec. 3, 1949, be quashed.

The applicants were the owners of large estates in Sheffield which they had been developing for some years by leasing plots of land on building leases for a term of three hundred years. In August, 1948, they informed the prospective

lessee of one of the plots of the terms on which they would grant a lease to him. The prospective lessee, who had obtained permission from the local authority to build a house on the land, wrote to the Central Land Board complaining that the applicants did not propose to lease the land at present use value, and asking if the board would make a compulsory purchase order for his benefit. The board drew the applicants' attention to three methods of disposing of land which they considered fair to buyers and asked the applicants if they were prepared to accept one of these methods. The applicants replied that they were not, and on June 22, 1949, the board made a compulsory purchase order in respect of the land. On Dec. 3, 1949, the order was confirmed by the Minister of Town and Country Planning. The applicants contended that the order was not within the powers conferred on the board by the Town and Country Planning Act, 1947, s. 43 (1) and s. 43 (2), because its object was to make the applicants conform to the board's policy that land should not be sold at a price greater than its existing use value, and it was made as a reprisal for the applicants' refusal to conform to the methods of sale suggested to them. They also contended that the power conferred by the second part of s. 43 (1), *viz.*, the power to acquire land for the purpose of disposing of it for development for which permission had been granted under the Act, was limited by the power conferred by the first part of the sub-section, and, therefore, it was a power exercisable only in connection with the performance by the board of their functions under the Act (*viz.*, the ascertainment of development values and the determination of development charges), and was not a separate and independent power. The respondents, the Minister of Town and Country Planning and the board, contended that the powers of the board had been properly exercised, that the power under the second part of s. 43 (1) was a separate and independent power enabling the board to do what they had done, and that, both respondents having acted in good faith, their decisions could not be impugned or inquired into. The respondents further contended that in the circumstances of the case the board were entitled to exercise their power of compulsory purchase, even if one of the considerations in their mind was to enforce their view as to the sale of the land at existing use value, and that, if the power in the second part of s. 43 (1) was not a separate and independent power, the order was not outside the functions of the board, one of which might reasonably be to see that land was not sold at a price greater than its existing use value in the circumstances of the case. The facts appear in the judgment.

H. A. Hill for the applicants.

The Attorney-General (Sir Hartley Shawcross, K.C.) and *J. P. Ashworth* for the respondents.

Cur. adv. vult.

July 31. **BIRKETT, J.**, read this judgment. This is a motion by the applicants, Earl Fitzwilliam's Wentworth Estates Co., for an order that a compulsory purchase order, made by the Central Land Board on June 22, 1949, and a confirmation order, made by the Minister of Town and Country Planning on Dec. 3, 1949, be quashed on the grounds set out in the notice of motion.

The Acts of Parliament with which we are principally concerned are the Acquisition of Land (Authorisation Procedure) Act, 1946, and the Town and Country Planning Act, 1947. The Act of 1947 imposes, no doubt, considerable burdens on landowners and it has been the subject of acute controversy. The steps taken by landowners to ease or to shift the burdens, or to alter the views of the Central Land Board on what they may regard as a proper way in which the provisions of the Act should be carried out, are not matters on which I am called on to express any opinion on the merits. I am concerned only—and I desire to emphasise this—with the precise case before me and the special facts applicable to that case, and to determine whether the Central Land Board had the power to make the compulsory purchase order in this case under the provisions of the

Act of 1947 without regard to merits on the one side or the other, and to determine whether the Central Land Board have exercised their powers properly.

The Act of 1946 dealt with procedure relating to the making and the confirmation of compulsory purchase orders. Schedule I, Part IV, para. 15, reads:

"(1) If any person aggrieved by a compulsory purchase order desires to question the validity thereof, or of any provision contained therein on the ground that the authorisation of a compulsory purchase thereby granted is not empowered to be granted under this Act or any such enactment as is mentioned in s. 1 (1) of this Act . . . he may, within six weeks from the date on which notice of the confirmation or making of the order or of the giving of the certificate is first published in accordance with the provisions of this schedule in that behalf, make an application to the High Court, and on any such application the court (a) may by interim order suspend the operation of the compulsory purchase order or any provision contained therein, or of the certificate, either generally or in so far as it affects any property of the applicant, until the final determination of the proceedings; (b) if satisfied that the authorisation granted by the compulsory purchase order is not empowered to be granted as aforesaid, or that the interests of the applicant have been substantially prejudiced by any requirement of this schedule or of any regulation made thereunder not having been complied with, may quash the compulsory purchase order or any provision contained therein, or the certificate, either generally or in so far as it affects any property of the applicant."

It is, however, the Act of 1947 that is the all-important statute which introduces far-reaching changes in the law of town and country planning. The Town and Country Planning Act, 1932, and the Town and Country Planning (Interim Development) Act, 1943, are wholly repealed as from July 1, 1948, and the Town and Country Planning Act, 1944, is repealed save for the important sections of the Act which are preserved and amended in sched. XI to the Act of 1947. Planning the right use of land was a comparatively late development in social legislation, but successive Acts of Parliament have strengthened planning powers as growing experience has dictated. Immediately before the Act of 1947, speaking quite generally, the owner of land could not develop his land just as he liked. He was compelled to observe the planning restrictions in force, but, if the planning restrictions were relaxed or removed to permit development, the owner was under no liability to pay any charges for the removal or relaxation. The Act of 1947 made very great changes. It is a very comprehensive, a somewhat complicated and a rather difficult, statute, and as the years pass many important questions arising out of it will call for an answer.

The statute was first published in bill form on Jan. 7, 1947, and it received the Royal Assent on Aug. 6, 1947. It repealed existing planning schemes as from the appointed day, July 1, 1948. As a general rule, it required permission for all development. The most important change of all, perhaps, was what is sometimes called the acquisition of development rights by the State, and it is not unimportant to observe that in the description of the Town and Country Planning Act, 1947, these words occur, ". . . to secure the recovery for the benefit of the community of development charges in respect of certain new development . . ." For the carrying out of development for which planning permission is required, a development charge is payable to the Central Land Board. The local planning authority decide whether any particular form of development may be carried out and, subject to the powers of the Minister, it is the local planning authority who are concerned primarily with the policy of town and country planning. The Central Land Board, which from most points of view may be regarded as a new government department set up under the Act, would not appear generally to be concerned with policy of that kind so much as with fiscal matters. It collects the development charges and it administers the funds designed by the Act to

alleviate causes of hardship, the War Damage Fund and the fund of £300 million reserved for compensation for loss of development value [see s. 58 (2)]. The Act of 1947 provided that the right to receive a payment out of the £300 million fund was transmissible by assignment or by operation of law as personal property [see s. 64 (2)]. That compensation would appear to be payable once and for all, and is not dependent on the time when the land is developed, nor is it related to any particular kind of development. The compensation is limited to £300 million and it is uncertain whether claimants will receive the full amount of their claim. Some claimants will, no doubt, receive preferential treatment, but it is quite impossible to-day to say what the ordinary claimant will ultimately get. The development charge is certain, the compensation is uncertain, and one cannot be set against the other in the ordinary way.

The facts in the present case are these. The applicants are the owners of large estates in Ecclesfield, in the city of Sheffield. They and their predecessors in title have been developing these estates for over thirty years by leasing plots of land for three hundred years on building leases. In August, 1948, Mr. G. N. Rodgers, through his architect, Mr. Arthur Lusby, approached the applicants' surveyors for a lease of a plot of land on which to build a house. He was told that he could have a lease for three hundred years at an annual rent of £20 10s., inclusive of the assignment of the benefit of the applicants' claim on the £300 million fund in respect of this plot, and that he, Mr. Rodgers, would have to pay the development charge. On Aug. 16, 1948, Mr. Rodgers obtained permission under Part III of the Act of 1947 to build a house on the plot of land. On Oct. 7, 1948, Mr. Lusby, for Mr. Rodgers, wrote to the Central Land Board a letter in which this paragraph appears:

"As the land agent does not propose to lease this land to my client at present use value, will you please make a compulsory purchase order or lease for the benefit of my client. I presume that I shall be informed of your present use value and have the opportunity of agreeing to the price before the purchase or lease is completed."

That was followed by a letter, dated Nov. 1, 1948, from the secretary of the Central Land Board to the applicants' surveyors:

"The Central Land Board understand that you are acting for a client who wishes to dispose of land at Whirlow Lane, Sheffield. The board have been informed that the price which your client is asking for the land is £20 10s. per annum ground rent (inclusive of the assignment of the right to claim a payment in respect of the development value of the land out of the £300 million set aside under the provisions of the Act). This price appears to approximate to the level of prices obtained for similar land in the neighbourhood before the Act came into operation. I inclose a document which sets out three methods which, in the view of the board, should be adopted by landowners. The board will be glad to know, as soon as possible, whether your client is prepared to adopt one of these alternatives, and, if so, which."

The affidavit of Sir William Robert Fraser, the deputy chairman and secretary of the Central Land Board, states:

"The principal reason which prompted the Central Land Board to publish the . . . document [inclosed with the letter of Nov. 1] was that, notwithstanding that the Town and Country Planning Act, 1947, had come into full operation on July 1, 1948, the nature and effect of the provisions of Parts VI and VII of the Act did not appear sufficiently to be known to persons wishing to purchase land on which to erect a house for their own occupation, or even to some landowners offering plots for sale; with the result that plots of land were continuing to be bought and sold at prices which did not reflect the fact that the ownership of land no longer carried with it the right to develop

the land, and that a liability to pay a substantial development charge would arise if development in fact took place. It appeared, moreover, to the board that it would be of assistance to both vendors and purchasers in deciding what was the fair price to be paid for land that the amount of development charge payable in respect of an intended development should be ascertained on the application of the vendor and, if desired, be paid by him even though the development would not be carried out by the vendor but by a purchaser. As provisos (a) and (b) to s. 70 (1) of the Act empower the board to refuse to make this facility available, it seemed the more desirable to make it clear that the board would, in fact, make it available in suitable cases."

The circular to which the deputy chairman and secretary, Sir William Robert Fraser, referred is called "House 1," and reads:

"Advice on buying and selling a site for building a house. The Town and Country Planning Act, 1947, has entirely changed the basis of sales of land required for building a house. This pamphlet suggests methods for negotiation between a seller of land, on which the building of a house is intended in the near future, and a purchaser of land who wants to build a house. (It does not necessarily apply to sites where there have been buildings before, *e.g.*, war-damaged sites. In these cases advice can be obtained from any office of the Central Land Board). The Central Land Board wish to give advice to both buyers and sellers.

Advice to buyers. The following advice is offered to anyone who wants to buy (or take a lease of) a piece of land for a house: 1. Remember that building value now belongs to the State, and not to the seller. 2. Always ask first (and before the price is settled) whether the development charge is going to be paid to the Central Land Board by you or the seller. 3. Do not buy as part of the purchase price of the land the seller's claim on the £300 million fund. The right to a payment from the fund is not yet established and its amount cannot yet be known. The amount will in any case be related to the circumstances of the owner of the land on July 1, 1948, and not to those of any new buyer. A buyer of such a claim is, therefore, buying a risk at a 'certainty' price. 4. If the seller agrees to pay the development charge, ask him the amount which he has agreed with the Central Land Board. You can then safely pay building value for the land in the knowledge that you yourself will not be liable for any development charge, when the seller has paid it. 5. If you are to pay the development charge (and, unless the seller is willing to pay it, you will have to do so) you should never pay building value for the land. If you do, you will be charged the building value over again in your development charge. You should pay what is known as existing use value and no more. A rough guide to existing use value of land is its value to use it as it is actually being used (as, *e.g.*, agricultural, allotment, or garden land) with a prohibition against erecting any building on it except for agriculture.

Advice to sellers. Three courses, which will be fair to buyers who want a house immediately, are open to sellers of land: A. To sell the land at existing use value, leaving the buyer to pay the development charge (Method A). B. The seller to pay (or agree with the board to pay) the development charge; to disclose the amount of this charge to the buyer; and then to sell the land at a fair price, including the development charge, direct to the person who wishes to erect the house. This method, after discussion and agreement with the board, can be used either for sale to a named buyer, or by public or other advertisement, or by auction (Method B.) C. The seller to pay the development charge; erect the house himself; and then sell the house and land at a fair price, including the development charge (Method C).

Owners of land with building value on July 1, 1948, have been given a

right by the Act to make a claim before Mar. 31, 1949*, upon the fund of £300 million set aside to meet varying cases of hardship. No promise has been given that everyone will be paid the whole of the market value of his loss of building rights. Indeed, clear statements have been made to the contrary, and that some will receive the whole loss and that some will not. The decision will not be made (except in the cases of certain 'near-ripe' land) until 1952 or 1953, and then, by a scheme which will require affirmative approval by Parliament, payments will be made in 1953. A sale of land, therefore, at a price which includes building value is unfair to buyers for two reasons: (i) It passes on the claim to the purchaser at a definite amount, whereas the claim is as yet unestablished and the amount is unknown. (ii) It forces the purchaser to pay for building value twice over in two immediate payments (the purchase price and the development charge). This places an intolerable burden on persons who have been carefully selected for a building licence on their urgent need for a house. In normal cases, therefore, where an owner is not prepared to sell at a price related to Method A, B, or C, the Central Land Board will have to consider the various compulsory purchase powers in the Act. If sellers will sell, and purchasers will only buy, as advised in this pamphlet, land can be sold at a price which will not hinder or prevent houses being built."

On Nov. 5, 1948, the applicants' surveyors replied to the Central Land Board:

"In reply to your letter of Nov. 1, we wish to correct you in para. 1 [of the 'Advice to Buyers']. It is presumed that your informant wishes to acquire the land of our client. In regard to your final paragraph, we are instructed that our client is not disposed to adopt any of the alternatives set out in the document referred to."

On Nov. 15, 1948, the board wrote to the Sheffield City Council:

"The board have been approached by Mr. G. N. Rodgers, of 50, St. Michael's Road, Ecclesfield, in connection with land which he wishes to lease for the erection of a house in Whirlow Lane, Sheffield 11. The land forms part of Earl Fitzwilliam's Wentworth Estates, for whom Messrs. Shepherd, Fowler & Marshall, 15, St. James' Row, Sheffield 1, are acting as agents, and was originally offered to Mr. Rodgers at a ground rent of £20 10s. per annum. This rent appears to reflect more than the existing use value of the land, and Mr. Rodgers has asked the board to assist him by the exercise of their powers under s. 43 of the Act. While the board have not given any undertaking that they will acquire the land, they have written to the owner, who states that he is not prepared to adopt any of the three alternative methods of disposal recommended by the board in the inclosed leaflet . . . The board would be glad to know whether planning permission has been or would be granted for the erection of a dwelling-house [on the plot] referred to above, and whether, in the opinion of the council, it is expedient in the public interest that these sites should be made immediately available for housing development. The board would be grateful for an early reply."

On Dec. 4, 1948, the town clerk wrote to the Central Land Board:

"With reference to your letter of Nov. 15, the points raised therein have now been considered by the city council who have expressed the opinion that it is in the public interest that the sites to which you refer should be made immediately available for housing development. Sewerage and water facilities are available in respect of each site and each is within a proposed residential zone, and planning permissions have been granted. I enclose for

* Extended to June 30, 1949, by Claims for Depreciation of Land Values (Period for Making Claims) Regulations, 1948 (S.I. 1948, No. 2822).

your information copy of the letter which the city engineer has sent to me on the matter."

The letter from the city engineer said:

"Whirlow Lane. Planning permission was granted by the council in August, 1948, to the erection of a dwelling-house and garage in Whirlow Lane for Mr. G. N. Rodgers . . . I have ascertained that sewerage and water facilities are available, in which case, and in view of the acute shortage of houses, I am of the opinion that the sites should be made available for housing development."

Thereupon the Central Land Board, on Dec. 23, 1948, wrote to the applicants' surveyors:

"With reference to your letters of Nov. 5 and 30, 1948, the board note that your clients are not prepared to adopt any of the approved methods described in the pamphlet 'House 1.' As far as the board are aware, the land is not the subject of a certificate under s. 80 of the Town and Country Planning Act, 1947. The board have notice that planning permission for the erection of houses on the above sites has been granted and that licences will be granted to the would-be purchasers. It appears, therefore, that the approved development may be hindered, if not prevented, unless the land is made available. The board have therefore requested the district valuer, as a matter of urgency, to negotiate with you for the immediate purchase of the land on the basis provided in s. 51 of the Town and Country Planning Act, 1947. This basis the board considers to be the reasonable terms mentioned in s. 43 (2) of the Act."

On Dec. 30, 1948, heads of agreement were sent by the applicants' surveyors to Mr. Rodgers, the two material paragraphs being:

"Ground rent to be £20 10s. per annum payable half yearly on May 1 and Nov. 1 in each year . . . 10. The lessee to be responsible for any charges payable under or by virtue of the Town and Country Planning Act, 1947, and shall be entitled to receive any sums payable from the compensation fund under the said Act in respect of this land."

On Jan. 7, 1949, the district valuer wrote to the applicants' surveyors:

"With reference to my letter of Dec. 31, I shall be obliged if you will let me have, at your early convenience, the information for which I asked. I have now been requested by the Central Land Board to negotiate with you for the acquisition of an area of about 1,670 square yards of land at Whirlow Lane, Sheffield. I shall, therefore, be obliged if you will supply the information for which I have asked in respect of the land at Dobercroft Road in relation to this site also."

On Jan. 10, 1949, Mr. Arthur Lusby, for Mr. Rodgers, wrote to the Central Land Board:

"My client has received heads of proposed agreement for the lease of the land for his house from the land agents, Messrs. Shepherd, Fowler & Marshall. Notwithstanding your communication to them of Nov. 1, asking them whether they were prepared to adopt one of the three methods recommended in the circular headed 'Advice to sellers,' they still demand a ground rent of £20 10s. per annum, my client to pay development charge and receive any benefits from the compensation fund. I shall be pleased therefore to know if you are proceeding with the compulsory purchase of the land. This should be settled at an early date so that the responsible person can put in the S.I. claim [*i.e.*, on the £300 million fund]."

There was an interval while negotiations continued between the applicants and Mr. Rodgers and his agent, but on Mar. 3, 1949, the district valuer wrote again to the applicants' surveyors:

"With reference to my telephone conversation with you from which it was gathered that negotiations between yourselves and the would-be developer in this case are unlikely to result in a settlement, I shall be obliged if you will supply me at your earliest convenience with the information for which I asked in my letter of Jan. 7 in order that I may make my report in this case."

- A On Mar. 21, 1949, the applicants' surveyors wrote to the district valuer, giving the terms. One of the paragraphs in the letter was:

"We are prepared, therefore, to recommend sale at £462 subject to the purchaser erecting a house of not less size than 1,100 square feet internal area, exclusive of garage or outbuildings, to plans, etc., first approved by the vendors' agent."

- B The next stage was that there was a resolution by the board on May 13, 1949, which read:

"That it was desirable to acquire the land in Whirlow Lane, Sheffield (appendix 'A') for the purpose of disposing of it for development for which planning permission has been granted on terms inclusive of any development charge payable in respect of that development, and that, as the board were unable to acquire the said land by agreement on reasonable terms, an order be made to acquire the land compulsorily."

- C The order was made in these terms:

"Subject to the provisions of this order the board are, under s. 43 of the Town and Country Planning Act, 1947, hereby authorised to purchase compulsorily for the purpose of disposing of it . . ."

- D Then there followed the words of the resolution.

On July 20, 1949, an objection was made on behalf of the applicants, the grounds of objection being:

- E "1. That the order is *ultra vires*, in that it has been made to secure an object which it is not within the board's powers to achieve, namely, that the estates company shall bear the loss, if any, resulting from the vesting of the development rights in the State by virtue of the Town and Country Planning Act, 1947, and shall not be permitted to make it a condition of sale that the purchaser shall stand in their shoes. 2. That it is not expedient in the public interest that the board should acquire the land included in the order. 3. That the terms on which the estates company would be prepared to lease the land are reasonable. Our clients desire to have an opportunity of appearing before, and of being heard by, a person appointed by you for the purpose."

- F Accordingly, on Aug. 30, 1949, there was a hearing at Sheffield, presided over by Mr. Fitzgibbon, an inspector of the Ministry of Town and Country Planning, and on Dec. 3, 1949, the Minister of Town and Country Planning made the

- G confirming order:

"Whereas on June 22, 1949, the Central Land Board in pursuance of s. 43 of the Town and Country Planning Act, 1947, made an order in accordance with the provisions of sched. I to the Acquisition of Land (Authorisation Procedure) Act, 1946, for the compulsory acquisition of certain land described in the schedule thereto, and have submitted the said order to the Minister of Town and Country Planning (hereinafter called 'the Minister') for confirmation; and whereas the Minister is satisfied that it is expedient in the public interest that the board should acquire the said land and that the board are unable to acquire the land by agreement on reasonable terms; and whereas the Minister has taken into consideration the objection made to the said order; and whereas the Minister is satisfied that the said order should be confirmed. Now therefore the Minister in pursuance of all the powers

- H

enabling him in that behalf hereby confirms the said order in the form set out in the schedule hereto."

The Minister himself made an affidavit which was read in this case, as also did Sir William Robert Fraser.

On that state of facts counsel for the applicants submitted that the order had been made in this case because the applicants refused to accept the board's policy, as laid down in "House 1," viz., that land should not be sold at a price greater than its existing use value, and that the order was made to make the applicants conform to the board's policy and as a reprisal for their refusal to conform. He further submitted that it was not within the powers conferred by s. 43 of the Act of 1947 for the board to make a compulsory order for this purpose. He contended that there was no express provision in the Act so empowering the board, that if Parliament had intended that the board should have this power for such a purpose it would have said so, and that, if Parliament had intended that land should not be sold at a price greater than its existing use value, it could have made it an offence so to do, as it had made certain specific things offences in s. 26 (4), s. 28 (6), s. 29 (5), s. 32 (3) and s. 74 (3).

In support of those submissions, counsel for the applicants cited *Galloway v. London Corporation* (1). The opening words of the headnote are (L.R. 1 H.L. 34):

"Where persons have special powers conferred on them by Parliament for effecting a particular purpose they cannot be allowed to exercise those powers for any purpose of a collateral kind. Therefore, a company authorised (making due compensation) to take compulsorily the lands of any person for a definite object may be restrained by injunction from any attempt to take them for another object."

LORD CRANWORTH, L.C., said (L.R. 1 H.L. 43):

"The case of the appellant, Mr. Galloway, rested on a principle well recognised, and founded on the soundest principles of justice. The principle is this, that when persons [are] embarking in great undertakings, for the accomplishment of which those engaged in them have received authority from the legislature to take compulsorily the lands of others, making to the latter proper compensation, the persons so authorised cannot be allowed to exercise the powers conferred on them for any collateral object; that is, for any purposes except those for which the legislature has invested them with extraordinary powers."

Counsel for the applicants contended that the Town and Country Planning Act, 1947, has conferred certain compulsory purchase powers on the Central Land Board and it must be shown that, when the board exercised those powers, they did so for the purposes laid down by the Act, and not for any other collateral purpose. He also cited *Sydney Municipal Council v. Campbell* (2), the headnote to which reads ([1925] A.C. 338):

"The appellants had statutory power to acquire compulsorily land required for the purpose of making or extending streets, also land required for 'carrying out improvements in or remodelling any portion of the city.' In connection with the extension of a street, they resolved to acquire the respondents' land for the latter purpose. They had previously been restrained from acquiring the land for the extension, on the ground that it was not really required for that purpose, but that its purchase was desired because of its probable increase in value. No plan for improving or remodelling the area was considered or proposed, and evidence as to proceedings in the council showed that the appellants were endeavouring to give a new form to the transaction previously decided upon, rather than considering whether the respondents' land was required for improving or remodelling:—*Held*, that the evidence sustained the lower court's conclusion of fact that the

appellants were exercising their powers for a purpose differing from those specified by the statute, and that they had rightly been restrained from acquiring the respondents' land."

DUFF, J., delivering the judgment of the Judicial Committee, said ([1925] A.C. 343):

- A "The legal principles governing the execution of such powers as that conferred by s. 16 [of the Sydney Corporation Amendment Act], in so far as presently relevant, are not at all in controversy. A body such as the Municipal Council of Sydney, authorised to take land compulsorily for specified purposes, will not be permitted to exercise its powers for different purposes, and if it attempts to do so, the courts will interfere. As LORD
- B LOREBURN said, in *Marquess of Clanricarde v. Congested Districts Board for Ireland* (3): 'Whether it does so or not is a question of fact.' Where the proceedings of the council are attacked upon this ground, the party impeaching those proceedings must, of course, prove that the council, though professing to exercise its powers for the statutory purpose, is in fact employing them in furtherance of some ulterior object."
- C The contention of counsel for the applicants was that, in the case now before me, the Central Land Board had used their powers to enforce a policy which they themselves had conceived, *viz.*, of ensuring that land should not be sold at prices in excess of existing use values, and that such a course was not valid under the Act. He submitted, further, that to compel owners to lease or sell land on terms which the board considered fair and reasonable would be a serious
- D restriction on the common law right of the subject to contract freely and this common law right could be taken away only by express provisions, such as are contained, *e.g.*, in the Building Materials and Housing Act, 1945, the Rent Restrictions Acts and the Landlord and Tenant Act, 1927, and not by implication. He further submitted that Parliament, having by s. 51 of the Act of 1947 ensured that all land required for public purposes could be acquired at its existing
- E use value, had left to private individuals the right to make their own contracts unfettered. In the present case, from the affidavit of Sir William Robert Fraser it would appear that the existing use value of this land was £35 only, but, with permission to develop, it might be worth as much as £462, a difference of £427.
- F Counsel for the applicants submitted that it was no part of the function of the Central Land Board to secure the building of houses by local authorities or private persons, but that was the duty of the Minister of Health and local authorities under the Housing Acts, 1936 and 1949, and any action of the applicants which, it might be thought, would hinder, or even prevent, the building of houses was not a concern of the Central Land Board and afforded no reason for implying any power in the Act of 1947 which was not there in express terms. The
- G power to acquire land, conferred on the Central Land Board by s. 43 (1) of the Act of 1947 "for the purpose of disposing of it for development for which permission has been granted," is not (he submitted) a separate and independent power, but a power which can be exercised only in connection with the performance by the board of their functions under the Act. The power conferred by the second part of s. 43 (1) is limited by the power conferred by the first part. If the power were intended to be separate and independent, the words
- H "in particular" would not have been inserted, as the statute would have made it plain. If it be an independent power, it would be more liberal than any such power of compulsory purchase hitherto conferred, and would enable the Central Land Board to acquire and dispose of land for the purpose of securing the proper planning of the area, a function expressly entrusted by the Act to local authorities under s. 38 and s. 39. Finally, the functions of the Central Land Board are confined to the assessment and collection of the development charge and matters relating thereto, and do not include the function to see that land is not

sold at a price greater than its existing use value. If, in fact, Mr. Rodgers in this case did acquire the land in question on the applicants' terms, it would make no difference to the board so far as any of their functions are concerned.

It was contended on behalf of the respondents that the powers of the Central Land Board under s. 43 had been properly exercised and that, in any event, the power in the second part of s. 43 (1) was a separate and independent power enabling the board to do exactly what they had done in this case. That being so, the decision of the Central Land Board at the meeting on May 13, 1949, as recorded in para. 8 of the affidavit of Sir William Robert Fraser, and the decision of the Minister, as recorded in para. 8 of the affidavit of Mr. Lewis Silkin, could not be impugned and, indeed, could not be inquired into. It having been conceded that both deponents acted in complete good faith, the matter was concluded. The board and the Minister must decide and the courts could not inquire into it.

In support of that contention the learned Attorney-General cited *Point of Ayr Collieries, Ltd. v. Lloyd-George* (4), the headnote to which reads ([1943] 2 All E.R. 546):

"Control of the appellants' undertaking was taken by the Ministry of Fuel and Power by an order made under the Defence (General) Regulations, 1939, reg. 55 (4). The appellants contended that there were no adequate grounds upon which the Minister could find as he stated he had found, namely, that it was necessary to take control in the interests of the defence of the realm and the efficient prosecution of the war and for maintaining supplies and services essential to the community:—*Held*: there was no jurisdiction to interfere with what was an admittedly *bona fide* decision of the Minister within his delegated authority. The exercise of executive power under such a regulation cannot be questioned in the courts and can be questioned only in Parliament."

LORD GREENE, M.R., said ([1943] 2 All E.R. 547):

"If one thing is settled beyond the possibility of dispute, it is that, in construing regulations of this character expressed in this particular form of language, it is for the competent authority, whatever Ministry that may be, to decide as to whether or not a case for the exercise of the powers has arisen. It is for the competent authority to judge of the adequacy of the evidence before it. It is for the competent authority to judge of the credibility of that evidence. It is for the competent authority to judge whether or not it is desirable or necessary to make further investigations before taking action. It is for the competent authority to decide whether the situation requires an immediate step, or whether some delay may be allowed for further investigation and perhaps negotiation. All those matters are placed by Parliament in the hands of the Minister in the belief that the Minister will exercise his powers properly, and in the knowledge that, if he does not do so, he is liable to the criticism of Parliament. One thing is certain, and that is that those matters are not within the competence of this court. It is the competent authority that is selected by Parliament to come to the decision, and, if that decision is come to in good faith, this court has no power to interfere, provided, of course, that the action is one which is within the four corners of the authority delegated to the Minister."

I understood from counsel for the applicants that, if the Central Land Board had, in fact, power, which he denied, then it would not be competent for this court to inquire into the facts on which they had come to the conclusion that they ought to exercise it.

The learned Attorney-General submitted, further, that, even if one of the considerations in the mind of the board had been to enforce their view as to the sale of land at existing use value, nevertheless the board, having the power to

"acquire . . . land for the purpose of disposing of it for development for which permission had been granted under Part III of [the Act of 1947] on terms inclusive of any development charge payable" under the provisions of the said Act, and the board being unable to acquire the land by agreement on reasonable terms, they were entitled in the circumstances of this case to exercise the power. Alternatively, if the power in the second part of s. 43 (1) was not a separate and independent power, the compulsory purchase order made in this case was not outside the functions of the board, as one of the functions of the board might reasonably be taken to be to see that land was not sold at a price greater than its existing use value in all the circumstances of the case. He referred to the Town and Country Planning (Development Charge) Regulations, 1948 (S.I. 1948, No. 1189), which were made by the Minister with the consent of the Treasury under s. 70 (3) and s. 111 of the Act of 1947. Paragraph 2 is:

"Subject to the provisions of the Act and of any regulations made thereunder and for the time being in force, the general principles set out in the schedule to these regulations shall be followed by the board in determining under Part VII of the Act whether any, and if so what, development charge is to be paid thereunder in respect of any operations or use of land."

Paragraph 1 of the schedule reads:

"Development charge shall be determined so as to secure, so far as is practicable, that land can be freely and readily bought and sold or otherwise disposed of in the open market at a price neither greater nor less than its value for its existing use. This object is the governing principle by which the board are to be guided in determining development charge."

Counsel for the applicants expressly asked that I should make a decision on the facts relating to the making of the compulsory purchase order. He invited me to say that the reason why the board made the order in this case was because the applicants declined to adopt one of the three methods set out in the board's circular, and that the order was made to further the policy of the board that land should not be sold at a price greater than its existing use value and to punish the applicants for not conforming to their policy. The Attorney-General submitted that, if the board possessed the power to make the order, the exercise of the power was not rendered invalid because one of the reasons for making it had been the desire to enforce a particular policy. If they had the power, the exercise of it was a matter for the board and the Minister, and not for the court. Counsel for the applicants contended that the board had no power to make the order under the powers conferred on them by the Act of 1947.

Before proceeding further, I think that I ought to say that, if the issue in this case had been one of this comparative simplicity, whether the powers conferred on the Central Land Board were powers which enabled them to exercise and to enforce a policy that land should not be sold at a price greater than its existing use value, I should have held that the board had no such power. If it were

conclusively shown, for example, that the board had exercised their compulsory powers under s. 43 with the sole purpose of enforcing the policy of ensuring that land should not be sold save at existing use prices, I should be of the opinion that their power of compulsory purchase under the statute could not be used for that purpose. But the issue is not quite so simple as that. It has to be remembered that the board have nowhere stated directly their reasons for making the order. The affidavit made by Sir William Robert Fraser recites the history and merely records that he was present when the board passed the resolution which I have cited. As counsel for the applicants pointed out several times, it is a matter of inference from the documents and the actions in this case. The chief elements appear to me to be the correspondence and the documents which I have read, and, in particular, the resolution of the board of May 13, 1949, the affidavit of Sir William Robert Fraser, the confirming order of Dec. 3, 1949, and the affidavit of the Minister, Mr. Lewis Silkin.

It seems tolerably clear that, if the applicants had been willing to adopt any one of the three methods set out in the board's circular, the order would never have been made, because the necessity for, or the desirability of, such an order being made would then not have arisen. This, of itself, does not, I think, necessarily lead to the inference that the order was made to enforce a policy or to punish the applicants. The applicants' refusal to adopt any of the three methods brought about the situation in which the order was made, but the whole of the facts of that situation must, I think, be considered before any inference can be drawn. For example, and just for example, the board may have taken the view that s. 43 gave them the power on the facts of this case to make the order in any event, and, if they were right in that view and they did possess the power, the precise motives with which they exercised it would not be material and would not be a matter for the court to inquire into, the good faith of the board and the Minister not being in question. They may have taken the view that, as, under the regulations of 1948, a governing principle in the assessment of development charges was to procure the sale of land at existing use prices, their functions under the Act were concerned with the sale of land at existing use prices and their compulsory powers under the Act were to comprehend that matter, however s. 43 (1) was construed.

The city council of Sheffield had expressed the view to the Central Land Board that the site in Whirlow Lane should be made immediately available for housing development in the public interest. Planning permission to build a house on the land had been given to Mr. Rodgers in 1948. Mr. Rodgers had asked the board to assist him by exercising their powers under s. 43 when it appeared that the applicants were asking a price which represented more than the existing use value. The view of the board was that the approved development might be hindered, if not prevented, unless the land was made available: see their letter of Dec. 23, 1948, to the applicants' surveyors. All these matters may, as I say by way of example, have been in the mind of the board. It seems reasonable to suppose that the board would never have issued their circular, "House 1," unless they had wished to see this advice carried out in practice, but I do not think that the whole of the evidence, considered dispassionately, would justify me in drawing the inference that the order was made to punish the applicants. It is difficult to resist the conclusion that in making the order one of the purposes was to enforce the view which the board held, *viz.*, that it was desirable that land should be sold only at existing use value. To come to any other conclusion would be, I think, to ignore the true meaning of the correspondence. It is clear, I think, that the board viewed the applicants' terms in the proposed transaction with Mr. Rodgers with great disfavour, because they felt it to be in opposition to what they had expressed as being fair and reasonable in the new situation created by the Act of 1947. They had before them the express view of the Sheffield City Council that it was in the public interest that this site should be made immediately available for housing development, and the proposals of the applicants were likely to prevent or to impede this. Mr. Rodgers, to whom permission to build a house had been granted, was unwilling to accept the applicants' terms and had appealed to the board for assistance. They had themselves been unable to acquire the land in question on what they regarded as reasonable terms. They, therefore, exercised their compulsory powers, following the words in the latter part of s. 43 (1) of the Act of 1947, and, applying them to the exact facts of this case, to purchase the land compulsorily

"... for the purpose of disposing of it for development for which permission has been granted under Part III of this Act on terms inclusive of any development charge payable under those provisions in respect of that development."

I do not think that the evidence leads to the inevitable inference that the compulsory purchase order in this case was made solely to enforce the policy of

the board, as laid down in the advice given in the circular, "House 1," but that it entered their consideration, as I have said, seems to admit of no doubt. In the absence, however, of any declaration of the board stating the precise reason for making the order, it would appear to be reasonable to suppose that the decision was determined by many considerations, of which this was one. Neither do I think that I should be justified on the evidence in drawing the inference that one of the considerations was to punish the applicants for their refusal to conform to the board's wishes.

It seems to me that the real question in this case is: What were the powers of the Central Land Board under s. 43 of the Act of 1947. Section 43 (1) is:

"The Central Land Board may, with the approval of the Minister, by agreement acquire land for any purpose connected with the performance of their functions under the following provisions of this Act, and in particular may so acquire any land for the purpose of disposing of it for development for which permission has been granted under Part III of this Act on terms inclusive of any development charge payable under those provisions in respect of that development."

Those are the exact words of the resolution of the board, of the order and of the confirmation by the Minister. Section 43 (2) is:

"If the Minister is satisfied that it is expedient in the public interest that the board should acquire any land for any such purpose as aforesaid, and that the board are unable to acquire the land by agreement on reasonable terms, he may authorise the board to acquire the land compulsorily in accordance with the provisions of this section."

Section 43 (4) is:

"Any land acquired by the Central Land Board under the provisions of this section shall be disposed of by them in accordance with such directions as may be given to them in that behalf by the Minister, and until the land is so disposed of the board may manage it in accordance with such directions . . ."

Under the first part of s. 43 (1) and s. 43 (2), the board may be authorised by the Minister to acquire any land compulsorily "for any purpose connected with the performance of their functions" under the subsequent provisions of the Act, if the Minister is satisfied that it is expedient in the public interest. Of the subsequent provisions of the Act dealing with this matter, the most important appear to be s. 61, which deals with the ascertainment of development values, and s. 70, the determination of development charges. Under the first part of s. 43 (1) the board can exercise their compulsory powers in suitable cases to test the market prices, to assist them in ascertaining development values, in fixing development charges, and in collecting information necessary for these purposes. In view, however, of the second part of s. 43 (1), which is the part which has been followed by the order in this case. I cannot think that the powers of the board to make a compulsory purchase order are confined strictly to those matters.

Let me take a purely hypothetical case. In a particular neighbourhood there is a plot of land which happens to be the only plot available and suitable for the erection of a new building which some individual desires to erect for public purposes and in the public interest, such as a memorial hall, a library, or some institution of that kind. The landowner, recognising the strength of his position, holds out for a price which is utterly unreasonable. In these circumstances the individual appeals to the Central Land Board to assist him by the use of their compulsory powers under s. 43, for he himself cannot acquire suitable land at all or at a reasonable price. I think that the board would then have power, under s. 43, to exercise their compulsory powers to assist in the accomplishment of this particular development, notwithstanding that it should happen to be

fully in accord with views which they had previously expressed as to the proper administration of the Act and of the desirable course to be taken.

Counsel for the applicants contended that the second part of s. 43 (1) must be read in conjunction with the first part of the sub-section, and that the power to acquire land, under the sub-section, was governed by the words "for any purpose connected with the performance of their functions" under the subsequent provisions of the Act, whereas the Attorney-General contended that the power contained in the second part of the sub-section was a separate and independent power. Counsel are unable to help me with any authorities on the use of the words "in particular" which appear in the sub-section. These words have not the same meaning as "for example" or "and also," and their use has created a considerable difficulty in my own mind. I suppose it is possible, reading English in its ordinary way, to read that part of the sub-section in this way: "acquire land for any purpose connected with the performance of their functions under the following provisions of this Act, and in particular may so acquire any land—and this is an example of what they may do." Counsel for the applicants suggests that the words, "in particular," are really particularising one of the things which the board may do in exercise of their functions—their functions being covered by the subsequent provisions of the Act—and that is to acquire and dispose of land, to assist them in their functions of ascertaining development values and determining development charges, and not otherwise. A B C

The Attorney-General contended that the power was not to be restricted in that way, but was a separate power to be exercised in particular cases, subject to the approval of the Minister. He contended that the particular purpose in the second part of the sub-section, which is introduced by the words "in particular," enlarged the general powers given under the first part of the sub-section, or, alternatively, he contended that the words, "in particular," meant that this was an instance of the general performance of the powers conferred on the Central Land Board. D

The matter is not free from doubt, but, having given to it the very best consideration that I can—and I confess freely that it has been a matter of considerable difficulty, because this was an uncharted field in a very difficult part of the law of town and country planning—I have come to the conclusion, as a matter of construction, that the inclusion of the words "in particular" in the second part of the sub-section was not intended to confine the Central Land Board in the exercise of their compulsory powers of purchase to cases which bore directly and solely on the ascertainment of development values or the determination of development charges, but their powers were wide enough to allow them to do what they have done in this case, *i.e.*, to acquire the land of the applicants E F

"...for the purpose of disposing of it for development for which permission has been granted under Part III of this Act on terms inclusive of any development charge payable under those provisions in respect of that development." G

In these circumstances, holding, as I do, that the power so to act is conferred on the Central Land Board in the circumstances of this case, the Minister having stated in his confirming order that he "is satisfied that it is expedient in the public interest that the board should acquire the . . . land and that the board are unable to acquire the land by agreement on reasonable terms," I have come to the conclusion that the order was properly made and that it is not open to me to interfere with it. The motion must, therefore, be dismissed. H

Motion dismissed with costs.

Solicitors: Warren, Murton & Co., agents for Newman & Bond, Barnsley (for the applicants); *The Treasury Solicitor* (for the respondents).

[Reported by F. A. AMIES, ESQ., Barrister-at-Law.]

R. v. SANDBACH JUSTICES. *Ex parte* SMITH.

[KING'S BENCH DIVISION (Lord Goddard, C.J., Hilbery and Byrne, JJ.), July 18, 19, 26, 1950.]

Infant—Custody and maintenance—Application to justices by mother for order against father—Venue—Child living out of England—Power of justices to make order.

On the complaint of the mother of an infant Cheshire justices made an order under the Guardianship of Infants Acts, 1886 and 1925, giving her the custody of the child and ordering the father to pay maintenance. The mother lived in Cheshire in the district where the order was made, the father lived in Oxfordshire, and the child lived with a relative of the mother in Northern Ireland.

HELD: (i) proceedings under the Guardianship of Infants Acts, 1886 to 1925, other than any taken in the High Court, must be brought in the area where the respondent lived, and, therefore, the Cheshire justices had no jurisdiction to make the order and an order for *certiorari* to quash it must be made.

(ii) although the justices had jurisdiction to make an order under the Acts when the child was living outside the jurisdiction of the English courts, such an order should only be made in most exceptional circumstances.

Harris v. Harris ([1949] 2 All E.R. 322), *applied*.

[FOR THE GUARDIANSHIP OF INFANTS ACT, 1886, s. 5 and s. 9, see HALSBURY'S STATUTES, 2nd Edn., Vol. 12, pp. 943 and 945, respectively, and for the GUARDIANSHIP OF INFANTS ACT, 1925, s. 7, see *ibid.*, p. 958.]

Cases referred to:

- (1) *Harris v. Harris*, [1949] 2 All E.R. 318; 113 J.P. 495; 2nd Digest Supp.
- (2) *M'Lean v. Leftley* (or *M'Lean*), 1947 S.C. 79; 2nd Digest Supp.

APPLICATION for an order of *certiorari* to remove to the High Court to be quashed an order for contribution to the maintenance of an infant made against the father of the infant by the justices for the petty sessional division of Sandbach, Cheshire, on Feb. 7, 1950. The ground for the application was that the justices had no jurisdiction to make an order under the Guardianship of Infants Acts, 1886 and 1925, because the father was living in Oxfordshire, outside the Sandbach petty sessional area, and the child was living in Northern Ireland. The facts appear in the judgment of the court delivered by LORD GODDARD, C.J.

Blomefield for the applicant.

H. J. I. Summerfield for the respondent.

Cur. adv. vult.

July 26. LORD GODDARD, C.J., read the following judgment of the court. Counsel for the applicant moved for an order of *certiorari* to quash an order made by justices for the Sandbach petty sessional division of Cheshire whereby on the application of the respondent, the mother of an infant, they awarded her the legal custody and directed the applicant, the father, to pay £1 weekly for maintenance until the child attains the age of sixteen years. The ground on which leave to move for the order was given was that the petty sessional division in question was not a proper venue for the making of or hearing of the complaint and that the justices had no jurisdiction to hear it or to make the order.

It appears that when the complaint was heard the father was living in the village of Filkins, Oxfordshire, and the mother at Alsager, Cheshire, while the

infant was living with the mother's aunt in Northern Ireland. Objection seems to have been taken at the court to the jurisdiction of the justices both on the ground that the child was living out of the jurisdiction and that the court in Cheshire was not a court to which jurisdiction had been given under the Act.

The Guardianship of Infants Act, 1886, s. 5, provides:

"The court may, upon the application of the mother . . . make such order as it may think fit regarding the custody of such infant and the right of access thereto of either parent, having regard to the welfare of the infant, and to the conduct of the parents, and to the wishes as well of the mother as of the father, and may alter, vary or discharge such order on the application of either parent . . ."

By s. 9 it is provided:

" . . . the expression 'the court' shall mean—in England the High Court or the county court of the district in which the respondent . . . may reside."

By s. 3 (2) of the Guardianship of Infants Act, 1925—which Act is to be treated as one with the Act of 1886—it is provided that where the court under s. 5 of the Act of 1886 gives the custody of the infant to the mother it may further order that the father shall pay to the mother towards the maintenance of the infant such weekly or other periodical sum as the court, having regard to the means of the father, may think reasonable. By s. 7:

"For the purposes of the Guardianship of Infants Act, 1886, as amended by this Act, the expression 'the court' shall include a court of summary jurisdiction . . ."

The question, therefore, arises whether, when an application is made to justices for the purpose of obtaining the custody of an infant, the mother can apply to any court of summary jurisdiction or whether the application must be made to the court for the district in which the father resides. These proceedings are, by the statutory rules made under the Act, to be begun by complaint, and by s. 1 of the Summary Jurisdiction Act, 1848, it is provided that where a complaint shall be made to any justice or justices upon which he or they have or shall have authority by law to make any order for the payment of money or otherwise it shall be lawful for such justice or justices to issue a summons stating shortly the matter of the complaint and requiring the person against whom it is directed to appear before them. So far as this section is concerned, it has to be borne in mind that the jurisdiction of a justice is purely local. There are, no doubt, certain statutory provisions with regard to offences committed outside or on the borders of counties or other jurisdictions, but, generally speaking, the matter of a complaint must be alleged to have arisen within the limits of the justices' local jurisdiction. In cases concerning the guardianship of infants, it is difficult, if not impossible, to say that the cause of complaint arose in any particular place. This, no doubt, is why the Act of 1886 expressly provides that the county court for the district in which the respondent resides is the court that shall have jurisdiction if application is not made to the High Court. Moreover, the general policy of the County Courts Acts, 1934, is that proceedings should be taken in the district in which the defendant resides. There is certainly nothing to bring this case within the jurisdiction of the Cheshire justices except the fact that the mother lives in Cheshire. The child is in the custody of someone in Northern Ireland and the father lives in Oxfordshire.

The statutes of 1886 and 1925 have to be read together, and it seems to us, therefore, that, as the effect of the statute of 1925 is to provide another inferior court as one of the courts to which application can be made, we ought

to read s. 9 of the Act of 1886 as "the expression 'the court' shall mean in England the High Court of Justice, and the county court or court of summary jurisdiction acting in and for the district in which the respondent may reside." It would, indeed, be a strange state of affairs in which, if recourse is had to the county court, it must be the county court of the respondent's district, whereas, if resort is had to the justices, an application can be made to any bench in any part of England. In our opinion, the intention of the Act is that proceedings other than any taken in the High Court must be brought where the respondent lives and not where the applicant lives, and for these reasons the Cheshire justices had no jurisdiction to make the order.

The other point that was argued is, perhaps, of more general importance. It is whether or not the court can make an order relating to the custody of an infant at a time when the infant is outside the jurisdiction. This question not infrequently comes before the Probate, Divorce and Admiralty Division on applications for custody, and there, when custody is given, it is the common practice to insert in the order that the parent to whom custody is given is not to take the child out of the jurisdiction of the court without permission. In *Harris v. Harris* (1), LORD MERRIMAN, P., said ([1949] 2 All E.R. 322):

"It is the rarest possible thing for a judge of this Division of the High Court to make a custody order in respect of a child who is out of the jurisdiction."

Counsel for the mother contended that the words of the President would imply that the court has jurisdiction to make the order but would rarely exercise it. He also referred us to a decision of the Court of Session in *M'Lean v. Leftley* (or *M'Lean*) (2). Undoubtedly, the court there decided that they had power to make the order as both the parents were domiciled in Scotland although the child was living in England outside their jurisdiction. In view of that case and of the expression of the learned President's opinion which I have quoted, we think we must take it that the court has jurisdiction to make the order though it would be very unusual to do so, and in many cases most undesirable, more especially for justices, to make such an order. It is a strong thing for a court of summary jurisdiction to make an order which the High Court makes only in most exceptional circumstances.

The reasons why this should not be done are many. In the present case, suppose the father had made the application and the custody had been committed to him. How could it be enforced? The child is living in Northern Ireland in the custody of a person who is not before the court. If that person refused to give up the child, we know of no means by which the English court could enforce its order. *Habeas corpus* proceedings would have to be brought in Northern Ireland. No doubt, if the mother took active steps to prevent the child being brought over, she could be dealt with under s. 34 (2) of the Summary Jurisdiction Act, 1879, but only if she still remained within the jurisdiction and so was amenable to the jurisdiction. Moreover, provisions are made by s. 5 of the Guardianship of Infants Act, 1886, for the altering, varying or discharging of such order, and, no doubt, the court might exercise such powers if it were satisfied that the parent to whom the custody had been entrusted was not fulfilling his or her duties as guardian properly. It is obvious that, if the child remains out of the jurisdiction, great difficulties in the way of the court exercising jurisdiction or being informed of matters relating to the conduct of the guardian would arise. Provision, also, is made for the court giving access to the parent who is deprived of the guardianship, and in this case, indeed, the justices have given the father access to the child once a week, which is purely illusory so long as the child remains in Northern Ireland. Such considerations as these show, we think, how very slow justices should be in making an order in respect of an infant who is not within the jurisdiction when it is asked to act. By jurisdiction I mean, of course, within the jurisdiction of the

English courts. I am referring, not to the local jurisdiction of the justices, but to where the writ of *habeas corpus* will run. If the child is brought within the jurisdiction, no difficulty will arise. *Certiorari* can only be granted if a court acts without jurisdiction, and proceedings by way of *certiorari* cannot be used as a method of appeal. While, therefore, we cannot grant an order of *certiorari* on the ground that the child was out of the jurisdiction when the order was made, however much we may disapprove of an order being made in such circumstances, the order will go on the other ground, namely that the justices of Cheshire had no jurisdiction to make an order as the mother was not resident in the district for which they act.

Order for certiorari; decision quashed.

Solicitors: *Stafford Clark & Co.*, agents for *Soanes & Welch*, Burford (for the applicant); *Boxall & Boxall*, agents for *Norris & Mellor*, Stoke-on-Trent (for the respondent).

[Reported by F. GUTTMAN, ESQ., Barrister-at-Law.]

DUCHESNE v. DUCHESNE.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Pearce, J.), July 19, 20, 31, 1950.]

Divorce—Maintenance—Assessment—Factors to be considered—Conduct of parties—Matters excluded from consideration—Not brought forward at trial—Inconsistency with decree—Matters calculated to produce different result at trial—Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 190 (1).

The wife obtained a decree *nisi* of dissolution of the marriage on the ground of desertion. The husband did not put in an answer or defend the proceedings, but his solicitors wrote to the wife's solicitors during the pendency of the petition saying that it was the husband's intention on the wife's application for maintenance to put forward the conduct of the parties during their married life as affecting the proper proportion of his income which the court should order as provision for the wife. Affidavits were, accordingly, filed in the maintenance proceedings dealing with quarrels and unhappiness and the wife's lack of co-operation and refusal to be reconciled, on which matters the husband asked leave to cross-examine her. The registrar refused on the ground (*inter alia*) that the matters mentioned had not been put forward at the trial.

HELD: the correct principle in maintenance proceedings was that the husband was estopped from asserting matters inconsistent with the decree, and also, for reasons of public policy, he was prohibited from asserting matters known to him which would reasonably have been expected, if proved, to provide an effective answer to the petition or to produce a different result at the trial, *e.g.*, mutual decrees instead of a decree to the petitioner or a discretionary decree instead of one as of right.

Lindsay v. Lindsay ([1934] P. 162) and *Robinson v. Robinson* ([1943] 1 All E.R. 251), *applied*.

Quere, whether the last prohibition extended to matters of which the husband was ignorant at the time of the trial, but which he might have known but for his own carelessness.

[AS TO THE CONDUCT OF PARTIES, see HALSBURY, Hailsham Edn., Vol. 10, pp. 788, 789, para. 1249; and FOR CASES, see DIGEST, Vol. 27, pp. 501, 502, Nos. 5,361-5,378, Digest Supp., and 2nd Digest Supp.]

Cases referred to:

- (1) *Wood v. Wood*, [1891] P. 272; 60 L.J.P. 66; 64 L.T. 586; 27 Digest 506, 5424.
- (2) *Trestain v. Trestain*, [1950] 1 All E.R. 618.
- (3) *Dunbar (otherwise White) v. Dunbar*, [1909] P. 90; 78 L.J.P. 35; 100 L.T. 380; 27 Digest 501, 5365.
- A (4) *Chapple v. Chapple*, (1929), 98 L.J.P. 95; 140 L.T. 699; Digest Supp.
- (5) *Restall v. Restall*, [1930] P. 189; 99 L.J.P. 123; 143 L.T. 225; Digest Supp.
- (6) *Mould v. Mould*, [1933] P. 76; 102 L.J.P. 21; 148 L.T. 499; Digest Supp.
- (7) *Lindsay v. Lindsay*, [1934] P. 162; 103 L.J.P. 100; 151 L.T. 283; Digest Supp.
- (8) *Ord v. Ord*, [1923] 2 K.B. 432; 92 L.J.K.B. 859; 129 L.T. 605; 27 Digest 237, 2080.
- B (9) *Kingston's (Duchess) Case*, (1776), 1 Leach. 146; 168 E.R. 175; 27 Digest 554, 6080.
- (10) *Barrs v. Jackson*, (1842), 1 Y. & C. Ch. Cas. 585; 62 E.R. 1028; 21 Digest 165, 232.
- (11) *Robinson v. Robinson*, [1943] 1 All E.R. 251; [1943] P. 43; 112 L.J.P. 47; 168 L.T. 158; 2nd Digest Supp.
- C (12) *Dailey v. Dailey (otherwise Smith)*, [1947] 2 All E.R. 269 n.; 2nd Digest Supp.
- (13) *Bass v. Bass*, [1915] P. 17; 84 L.J.P. 53; 112 L.T. 70; 27 Digest 416, 4215.

APPEAL by the husband from the decision of a registrar on a summons for maintenance under the Supreme Court of Judicature (Consolidation) Act, 1925, s. 190 (1). The facts appear in the judgment of PEARCE, J.

- D R. J. A. Temple for the husband.
- Loudoun for the wife.

Cur. adv. vult.

- July 31. PEARCE, J., read the following judgment. This is an appeal from a registrar's order in maintenance proceedings refusing leave to a respondent husband to cross-examine his wife who has obtained against him a decree *nisi* on the ground of desertion. The husband did not put in an answer or defend the divorce proceedings. His solicitors merely wrote a letter to the wife's solicitors during the pendency of the petition saying that they observed that it contained a prayer for maintenance and that on that application in due course it was their client's intention to put forward conduct of the parties during the married life as affecting the proper proportion which the court should order as provision for the wife. In the maintenance proceedings, accordingly, the husband filed various affidavits dealing (not very specifically) with quarrels and unhappiness during the marriage, the wife's early lack of response to the husband's love, her lack of co-operation in the husband's economy and in his efforts to succeed in his profession, and her more recent lack of response to overtures for reconciliation. On the matters alleged in these affidavits he now asks that the parties should be cross-examined. The registrar refused the application on two grounds—first, that it was premature owing to discovery having been barely concluded, and, secondly, that since these matters had not been put forward at the trial the husband was not entitled to investigate or have oral evidence of the wife's conduct during the married life. The question of the conduct of the parties was limited in his view to evidence that had emerged at the trial. The second ground is the important question to be decided.
- H The Supreme Court of Judicature (Consolidation) Act, 1925, s. 190, says that in assessing maintenance the court shall have regard to "the conduct of the parties." There is nothing in the Act defining or limiting these words. The judgment of the Court of Appeal in *Wood v. Wood* (1) puts the conduct of the parties first in the list of considerations that should affect the court: see also the observations of DENNING, L.J., in *Trestain v. Trestain* (2). In

Dunbar (otherwise White) v. Dunbar (3) the wife had obtained a decree of nullity. In her subsequent application for maintenance the husband proved that she had gone to live with a man before the proceedings began, and, largely on that ground, the registrar refused her maintenance. The Court of Appeal confirmed the report. It is to be noted that the misconduct of the wife was not a matter that was relevant to or could have been raised in the nullity proceedings. In *Chapple v. Chapple* (4) a wife having obtained an undefended decree of nullity, the husband on the maintenance proceedings alleged that she had been guilty of delay, and that, therefore, she should not be entitled to a full share of maintenance since during that delay his financial position had improved. HILL, J., said (98 L.J.P. 97):

"Regard has to be had to the fortune of the wife, if any, to the ability of the husband, and to the conduct of the parties. In general the proceedings in court leading to a decree *nisi* in an undefended case can hardly be expected to provide sufficient evidence of the conduct of the parties, and therefore the registrar must receive further evidence before he can determine what is a proper sum to allot to a wife having regard to the conduct of the parties. Here there was not sufficient evidence, and I do not think the question of conduct was *res judicata* because the learned President held on decree *nisi* that the delay was not unreasonable. The President may have thought it reasonable or unreasonable but he made a decree *nisi*. The registrar, however, has to investigate the conduct of the parties."

In that case, the question of delay being apparent to the judge at the trial, there was no mischief in the husband failing to contest the nullity suit on the ground of delay and raising it in the subsequent proceedings.

In *Restall v. Restall* (5) a wife had obtained a decree of nullity on the ground of consanguinity, and the Court of Appeal held that in maintenance proceedings the moral conduct of the wife both before and after the ceremony of marriage could be investigated. LORD HANWORTH, M.R., said ([1930] P. 195):

"It is said that so to hold will be to cast a further burden on the court. I doubt this, because I think the registrar will be able to keep the matters in issue within reasonable limits. It is not in every case that the question of the imposition of a *dum casta* clause arises. I should deprecate this decision being taken as justifying a large number of petty or irrelevant acts between the parties being included in those which the court must consider; but when there is a petition for maintenance, and the term of the continuance of the maintenance has to be fixed, and also perhaps the question of the imposition of a *dum casta* clause arises, I think it is most important that the court should have before it the relevant evidence to enable it to investigate thoroughly the conduct of the parties. It is quite true that in the majority of cases the question before the court is simply one of the financial position of the parties; but there are certain cases in which it is necessary for the court to go outside that, and to make a full investigation into their general conduct."

LAWRENCE, L.J., said (*ibid.*, p. 196);

"I agree. In exercising its discretion under s. 190, the court is to have regard to the conduct of the parties, and indeed in *Wood v. Wood* (1) LINDLEY, L.J., places the conduct of the parties first in order in his enumeration of the circumstances which have to be taken into account."

It is to be noted again that in that case the conduct of the wife was irrelevant to the issue of nullity and could not properly have been raised at the trial.

In *Mould v. Mould* (6) the husband allowed his wife's petition for divorce on the ground of adultery to go undefended. Subsequently, on the wife's petition for maintenance he wished to set up facts justifying him in leaving

his wife, namely, her cruelty and undue intimacy with a man (not amounting to adultery). It was held that he could do so. BATESON, J., said ([1933] P. 81):

A "Counsel for the wife seeks to distinguish *Restall v. Restall* (5) not only on the ground that they were proceedings for nullity and not for divorce, but also, as he says, because all these matters which are now set up in this answer could have been pleaded in the divorce suit and might well have been a bar to the decree. He says that it is not right that the respondent should get the benefit of an undefended decree, and then be allowed to set up what would have been possibly a good defence to the petition. I agree with him to a very large extent that it is most inconvenient and very unsatisfactory that such should be the case, but it seems to me I am obliged to follow the decision in *Restall v. Restall* (5). Counsel says that as these matters [could]* have been raised by him on the divorce petition, the husband is estopped from setting them up now. I cannot see any estoppel. The matter has never been decided. He says it is estoppel by implied *res judicata*. The matter has never been investigated. It is quite true that if the husband had appeared he might well have gone into these matters. C How far these matters may be matters going to the question of amount or going to the question of a *dum casta* clause on a maintenance petition has not been decided, and I do not see how the husband can be estopped from raising them now. The other point counsel makes is that it is in the discretion of the registrar, and that I ought not to interfere with it. It may be that it is to a certain extent within the discretion of the registrar to strike out a pleading or not, but I think that that discretion must be exercised in accordance with the decisions that have been given; and much as I regret that this method of dealing with the case should be allowed, I think I am bound to allow it; although I think that it is most inconvenient and undesirable that a husband should be allowed to lie by, with all these charges, until the maintenance petition comes on to be heard. It leads, at any rate in my view, to something very like collusion, although it may not perhaps amount to it in this case. It means that the registrar will have to try what is practically a divorce case in going into all these matters, though no doubt the conduct of the husband in lying by like this may be a matter which will have to be considered when the whole case comes to be dealt with."

F The decision in *Mould v. Mould* (6) was questioned by SIR BOYD MERRIMAN, P., in *Lindsay v. Lindsay* (7). In that case a wife had, by her petition for judicial separation on the ground of desertion, alleged that her child was a child of the marriage. The husband by his answer did not dispute this allegation. She subsequently filed a supplemental petition alleging adultery to which the husband filed no answer. A decree was pronounced dissolving the marriage and giving to the wife custody of the child. Thereafter in maintenance proceedings the husband sought to reduce the amount of maintenance by alleging that the child was not his and also by putting forward the conduct of the wife as a ground for reduction. It was held that he could not do so. SIR BOYD MERRIMAN, P., said ([1934] P. 166):

H "Now it is quite clearly laid down by the Court of Appeal in *Restall v. Restall* (5) that in exercising its discretion as to the amount of maintenance it is essential that the court should have before it all the relevant evidence of the conduct of the parties both before and after the marriage. It is obvious that evidence that the wife has given birth to another man's child during the marriage, is, of itself, relevant evidence of conduct, if the

* Omitted from report in the Law Reports, but included in reports in Law Journal Reports and Law Times Reports.

evidence is in the circumstances admissible. In *Mould v. Mould* (6) BATESON, J., held that the rule laid down in *Restall v. Restall* (5) extended to maintenance proceedings in a case of dissolution of marriage in which there had been no defence to the original petition, although the conduct in question might have afforded possible defences which would have been an answer to the original petition, if pleaded. Speaking for myself, I should desire to consider the matter further before holding that that result followed from the decision in *Restall v. Restall* (5). I would point out that that was a nullity suit based upon the consanguinity of the parties. It is manifest, therefore, that misconduct on the part of the petitioner would not of itself have afforded any answer; and in fact no question of estoppel arose in that case. In considering the doctrine of *res judicata*, the distinction is to be borne in mind between a case in which a party who has had an opportunity of proving a fact in support of his claim or defence, and has not chosen to rely on it, is afterwards precluded from putting that fact before any tribunal, and a case in which the very fact itself has been judicially determined. The principles relating to both these classes of case are fully dealt with in the judgment of LUSH, J., in *Ord v. Ord* (8). The present case is, indeed, one of the former class, inasmuch as the respondent deliberately abstained from putting in issue the paternity of the child in his answer to the wife's original petition, and made no answer to the supplemental petition. Although the Matrimonial Causes Rules, 1924, do not deal in terms with the effect of the failure of a respondent to deny specific allegations in the petition, as is the case in Ord. 19, r. 13, r. 17 and r. 19, of the Rules of the Supreme Court, I think that it is plain that Matrimonial Causes Rules, 1924, r. 21 and r. 22 (a), coupled with the form of answer given in Appendix No. VI, have the same effect. The specimen form indicates that the matrimonial offence charged should be specifically denied; that any counter-charge should be pleaded, and there is this note: 'In like manner respondent is to state connivance, condonation or other matters relied on as a ground for dismissing the petition.' I have no doubt, as I was assured is the case, that the practice of this court is to treat as being admitted any material fact alleged in the petition which is not expressly stated in the answer to be denied or not to be admitted. As I have already said, if the matter depended solely on this branch of the doctrine of *res judicata*, I should have wished to consider further whether, as was held by BATESON, J., in *Mould v. Mould* (6), there is anything in the decision in *Restall v. Restall* (5) which obliges this court to receive on a maintenance petition evidence of facts which would have afforded a defence to the petition for divorce, but which the respondent spouse deliberately refrained from raising in answer to that petition. But, in my opinion, however the matter might stand on a mere failure by the respondent to raise the issue when he had the opportunity of doing so, this is essentially one of the class of cases in which, as between these parties, a fact 'directly in issue in the case has actually been decided by the court and appears from the judgment itself to be the ground on which it was based'; to use the words taken from SIR JAMES STEPHEN'S DIGEST OF EVIDENCE (10th ed., p. 53), which was quoted by LUSH, J., in *Ord v. Ord* (8), already referred to. I do not think that this is merely a case of a matter coming collaterally in question, or of a matter incidentally cognizable, or of a matter to be inferred by argument from the judgment: see *Kingston's (Duchess) Case* (9) and the passage from the judgment of KNIGHT BRUCE, V.-C., in *Barrs v. Jackson* (10), cited by LUSH, J., in *Ord v. Ord* (8)."

In *Robinson v. Robinson* (11) a wife had obtained a decree of divorce on her undefended petition alleging adultery, and subsequently the husband, in maintenance proceedings, sought to impugn her conduct by alleging that she had

committed adultery. HENN COLLINS, J., held that he could not do so. He said ([1943] P. 44):

A "It has been contended on behalf of the wife that it is no longer open
to the husband to raise the issue of her adultery because it is *res judicata*.
That phrase is used to include two separate states of things. One is where
a judgment has been pronounced between parties and findings of fact
are involved as a basis for that judgment. All the parties affected by the
judgment are then precluded from disputing those facts, as facts, in any
subsequent litigation between them. The other aspect of the term arises
where a party seeks to set up facts which, if they had been set up in the
first suit, would or might have affected the decision. That is not strictly
raising any issue which has already been adjudicated, but it is convenient
B to use the phrase *res judicata* as relating to that position. In the present
case I have to consider both aspects. First, on the strict interpretation
of *res judicata*, was the issue of the wife's adultery involved in the decree
which was granted in the divorce? If it was, that issue would be concluded
between the parties and could not be litigated again in these proceedings:
C *Lindsay v. Lindsay* (7). An allegation of the wife's adultery might, but
not necessarily would, have afforded a conclusive answer to her petition.
She might still, although convicted of adultery, have obtained a decree
because her adultery would only be a discretionary bar. The issue of
adultery does not seem to me to be fundamental to the decree nor necessarily
involved in it. I, therefore, do not think that the matter is *res judicata*
D in the strict sense of the term. That, however, does not necessarily dispose
of the case because there is the statutory direction in s. 190 (1) of the Act
of 1925, that, in considering a question of maintenance and security, the
court must have regard, among other things, to the conduct of the parties.
Mr. Fairweather, relying on *Mould v. Mould* (6), says that the conduct of
the husband in not producing the evidence at the hearing of the suit does
not affect the position under the sub-section. On the other hand, Mr.
E Harold Brown says that in the public interest a man ought not to be
allowed to stand by and allow his wife to obtain a decree which she might
not have been granted if the court had known certain facts, and then to
set up those facts in opposition to an application for maintenance. This
aspect of the matter raises the greater difficulty. I do not think that the
question would have arisen but for a doubt which SIR BOYD MERRIMAN, P.,
F expressed in *Lindsay v. Lindsay* (7), where he said: 'In *Mould v. Mould* (6),
BATESON, J., held that the rule laid down in *Restall v. Restall* (5) extended
to maintenance proceedings in a case of dissolution of marriage in which
there had been no defence to the original petition, although the conduct
in question might have afforded possible defences which would have been
an answer to the original petition, if pleaded. Speaking for myself, I
G should desire to consider the matter further before holding that that result
followed from the decision in *Restall v. Restall* (5).' *Restall v. Restall* (5)
was a case in which the misconduct which was sought to be set up in main-
tenance proceedings would have had no bearing on the matters in issue
between the parties, and, therefore, the learned President, if I may respect-
fully say so, very wisely declined to regard *Restall v. Restall* (5) as extending
H to a case in which such misconduct was material to the issue, and I have
to decide whether the doubt he expressed whether it extended even to a
case where that misconduct might have been material to the issue is well
founded. The view to which I have come is that, although proceedings
under s. 190 (1) are separate proceedings from those for dissolution, a
party ought not to be allowed to refrain from using at the hearing of a suit
for divorce information which he had, or which, but for his carelessness,
he might have had, and then, when his pocket begins to be affected, propose

to prove that information and put the petitioner to the expense of a separate issue."

Counsel for the husband relies on *Mould v. Mould* (6) and argues that *Robinson v. Robinson* (11) was wrongly decided. He argues that the statute says in clear terms that the conduct of the parties is to be considered; that, if *Robinson v. Robinson* (11) was rightly decided, all serious consideration of conduct is excluded since there is no blameworthy conduct that might not have been "material to the issue" under a plea of conduct conducing; that he gave notice before the trial that a question of conduct would be raised on the argument; and that *Chapple v. Chapple* (4) was not cited to the learned judge in *Robinson v. Robinson* (11). He also argues that, unless his contentions are correct, the memorandum of appearance, Form 5 (RAYDEN ON DIVORCE, 5th ed., p. 728) which, by the Matrimonial Causes Rules, 1947, r. 7, must be served on respondents, is misleading to a respondent husband, since it leads him to believe that he can defend on maintenance without defending the petition, and does not warn him that he will not be allowed to raise in maintenance proceedings matters which might have been relevant to the divorce proceedings. He further relies on Direction 20 (RAYDEN ON DIVORCE, 5th ed., p. 759):

"Where an issue of adultery (not determined in the suit itself) is raised upon a petition for maintenance, permanent alimony, or periodical payments, the direction of a judge should be taken as to how the several issues in the pleadings shall be determined. In order to avoid delay by first taking an appointment before a registrar, the matter may be brought before the judge by summons."

It is, I think, important to note that this direction was given on Mar. 28, 1934—a year after the decision in *Mould v. Mould* (6) and a month before the learned President considered and doubted that case in *Lindsay v. Lindsay* (7).

Counsel for the wife, on the other hand, relies on *Robinson v. Robinson* (11) and submits that *Mould v. Mould* (6) was wrongly decided. He contends that the only conduct which can be investigated by the registrar is: (i) conduct of which the husband did not know or could not reasonably have known at the trial; (ii) matters proved in evidence at the trial, e.g., in the petitioner's discretion statement; and, possibly, (iii) matters which must have been irrelevant at the trial. He relies on *Dailey v. Dailey* (otherwise *Smith*) (12), where the Court of Appeal referred back the case to the learned judge to consider facts shown on the transcript of the evidence at the trial without making any suggestion that he or the registrar should hear the evidence of the parties. Counsel for the wife in the present case argues that the husband is not entitled to make against his wife any allegations that are not so trivial that the court ought to disregard them as valueless, and that, therefore, he ought to be precluded from putting them forward. He suggests that the direction of 1934 refers only to adultery by the petitioner of which the respondent could not have known at the trial, a suggestion which makes the direction of extremely limited application. It cannot be intended to refer to adultery subsequent to the maintenance proceedings since in that case it would have said "on an application to vary" not "on a petition for maintenance." He agrees that on his contention the memorandum of appearance (Form 5) in its present form is misleading to respondents.

Either view in its extreme form may lead to practical inconvenience and injustice. If, as counsel for the husband argues, all questions of conduct are open to the husband on maintenance proceedings, it is possible for a husband to allow his wife to secure an undefended decree on the ground of desertion because he wishes to be free, and then, when it has been made absolute, to reduce or extinguish his financial liability by proving that the parting was consensual or even that it was the wife who deserted him. In my view, this offends both against the rule of estoppel and also against public policy since

it is a fraud on the court. The fact that a husband, while not defending, writes *pendente lite* to say that he will raise certain matters in the maintenance proceedings does not affect the matter. In this case the letter was, admittedly, not read to the trial judge. If it had been read, the judge could not have dealt with it effectively except by referring it for investigation to the King's Proctor. Such a practice would be obviously undesirable. On the other hand, if a husband is to be estopped from raising anything that might have been material to the issue in the petition, and if those words are understood to mean that any blameworthy conduct of the wife is to be excluded from consideration (as counsel for the wife argues) unless it is so trivial as to be valueless, it would mean that a husband whose wife's conduct was bad but did not actually justify his leaving her would either have to turn an undefended into a defended suit by putting in an answer that to his knowledge would not succeed in order that a judge could deal with it at the trial from the point of view of maintenance, or he would have to allow her to obtain as much maintenance as would have been awarded to a loving and devoted wife.

I do not think that the authorities compel me to either view in its extreme form. In my view, the correct principles (and they are the principles to be drawn from the judgment of SIR BOYD MERRIMAN, P., in *Lindsay v. Lindsay* (7) and from that of HENN COLLINS, J., in *Robinson v. Robinson* (11) which was founded on it) are these. The husband is estopped in maintenance proceedings from asserting matters inconsistent with the decree. Further he is, for reasons of public policy, prohibited from asserting matters (of which he knew) which would reasonably have been expected, if proved, to provide an effective answer to the petition or to produce a different result at the trial (*e.g.*, mutual decrees instead of a decree to the wife alone, or a discretionary decree instead of a decree as of right). I am not satisfied that this further prohibition extends to matters of which he was ignorant at the time of the trial, but which he might have known "but for his carelessness," to quote the words of HENN COLLINS, J. If and in so far as the judgment of HENN COLLINS, J., in *Robinson v. Robinson* (11) goes further than this I cannot agree with him. In that case the wife's adultery, if known to the court, would have produced a different result. The court would have granted a decree, not as of right to the wife, but under its discretionary power, and there might well have been mutual decrees.

I have ventured to put the matter in words slightly different from those in which it has previously been put, because I feel that in this case too narrow a view has been taken of the words in the judgments. In cases near the border line the registrar will, on clearly defined allegations and on a reasonable view, have to decide on which side of the line the allegations fall, bearing in mind both the importance, on the one hand, of not excluding a just consideration of conduct which the Act in terms requires and which the Court of Appeal has declared to be of primary importance, and the importance, on the other hand, of not allowing a husband to lie by in order to obtain a decree, and, when it has been made absolute, to raise matters which ought to have been before the court at the trial. There are cases where the earlier conduct of the wife has contributed to the final break-up of the marriage although such conduct would provide no effective answer to the petition and would not amount to conduct conducing. It is not just that such conduct should be put beyond the scope of criticism. The rights of a wife who has always been selfish and unloving ought not to be identical with those of a wife who has always been loving and unselfish. Where the husband's income leaves available for an injured wife only enough to supply the bare necessities of life, the difference may be negligible, but where the husband's means enable the wife's portion to be more generous I do not think that a bad wife should enjoy as much luxury as a good wife. I respectfully agree with LORD HANWORTH, M.R., in *Restall v. Restall* (5) that this does not justify "a large number of petty or irrelevant acts . . . being included in those which the court must consider" and that "the registrar will

be able to keep the matters in issue within reasonable limits." Such limits will also probably be observed by the parties owing both to the fact that it is the respondent husband who will probably be paying the cost of the investigation and to the fact that he will realise that too tyrannical an investigation is likely to have an effect the reverse of that which he desires. Registrars have a wide knowledge of humanity and its frailties. They will not lightly condemn a wife merely because on the long and eventful journey of married life she has been found wanting in good temper or good judgment on isolated occasions retrospectively collected by an erring husband.

In this case the alleged conduct of the wife may affect the amount of maintenance. I do not say that it will, but it would certainly be wrong to say that it cannot. That conduct (with the exception of her lack of response to attempts at reconciliation) would not have been reasonably expected to provide an effective answer to the petition or to produce a different result, since it would not amount to reasonable cause for his leaving her. The allegations are, therefore, admissible, but they must be reduced to greater precision in an affidavit by the husband. As to her alleged lack of response to attempts at reconciliation, if it is intended thereby to say that a reasonable wife ought not to have acted as she did, and that, in consequence, there was no reconciliation and the marriage came to an end, that allegation is inconsistent with the decree. If it is merely intended to say that, though it was reasonable for her to act as she did, a more loving and forgiving wife could have prevented the breakdown of the marriage, it cannot, in my opinion, have any effect on maintenance. A wife should not be penalised for failing to show more love and forgiveness than it was reasonable to expect. That allegation is, therefore, not admissible. If, as I understand, the other allegations are denied by the wife, the proper course is for the parties to be cross-examined before the registrar: see the observations of the Court of Appeal in *Bass v. Bass* (13) where cross-examination was ordered in similar circumstances under r. 191 of the Divorce Rules, 1865, which was in the same terms as the present r. 52. It is suggested that this involves the trial of an issue. I do not agree. Subject to the direction of 1934 relating to questions of adultery, the correct procedure is a hearing before the registrar (with oral evidence where necessary) as envisaged by LORD HANWORTH, M.R., in the passage in *Restall v. Restall* (5) already cited. The question of the prematurity of this application (which was only a subsidiary point and could have been cured by adjournment of the summons) is not now of any importance. If the husband delivers within twenty-eight days a fresh affidavit more clearly defining his allegations, the wife can deal with them by affidavit, and unless she admits them examination and cross-examination of any witnesses will take place in accordance with r. 52.

Appeal allowed.

Solicitors: *Jaques & Co.*, agents for *David Thomas, Williamson & Co.*, Colwyn Bay (for the husband); *Holt, Beever & Kinsey* (for the wife).

[Reported by R. HENDRY WHITE, Esq., Barrister-at-Law.]

DARLING v. ATTORNEY-GENERAL AND ANOTHER.

[DURHAM ASSIZES (MORRIS, J.), June 12, 13, 1950.]

Negligence—Work on land under statutory authority—Entry on land by contractors under contract with Ministry—Negligence of contractors—Liability of Ministry—Defence (General) Regulations, 1939, reg. 50 (1).

A The plaintiff was the owner of a field on which a firm of contractors, in performance of a contract between them and the Ministry of Fuel and Power, acting in conjunction with the Minister of Works, entered to do work in connection with the making of boreholes or trial holes to see whether workable seams of coal lay under the land. The Minister of Works, as a competent authority under reg. 49 (1) of the Defence (General) Regulations, 1939, had authorised the entry of the contractors on the field under reg. 50 (1) of the regulations. Owing to the negligence of the contractors in leaving a heap of timber lying in the field, a horse belonging to the plaintiff, which was grazing there, was injured. In an action against the Ministries and the contractors for damages for negligence,

C HELD: the Ministries, having availed themselves of the power given in reg. 50 (1) to do work on the land, had a duty to the occupier of the land not to cause unnecessary danger or damage to him, and they could not escape from the responsibility of seeing that duty performed by delegating it to a contractor, and, therefore, both Ministries were liable to the plaintiff in damages.

D Dicta of LORD GREENE, M.R., in *Fisher v. Ruislip-Northwood U.D.C. and Middlesex County Council* ([1945] 2 All E.R. 460), and LORD BLACKBURN in *Dalton v. Angus* (1881) (6 App. Cas. 829), applied.

[FOR THE DEFENCE (GENERAL) REGULATIONS, 1939, regs. 49 (1) and 50 (1), as amended, see HALSBURY'S STATUTES, Vol. 40, pp. 1357, 1358.]

Cases referred to:

- E (1) *Penny v. Wimbledon Urban Council*, [1899] 2 Q.B. 72; 68 L.J.Q.B. 704; 80 L.T. 615; 34 Digest 161, 1260.
- (2) *Padbury v. Holliday & Greenwood, Ltd.*, (1912), 28 T.L.R. 494; 34 Digest 159, 1246.
- (3) *Fisher v. Ruislip-Northwood U.D.C. and Middlesex County Council*, [1945] 2 All E.R. 458; [1945] K.B. 584; 115 L.J.K.B. 9; 173 L.T. 261; 110 J.P. 1; 2nd Digest Supp.
- F (4) *Dalton v. Angus*, (1881), 6 App. Cas. 740; 50 L.J.Q.B. 689; 44 L.T. 844; 46 J.P. 132; 34 Digest 158, 1234.
- (5) *Quarman v. Burnett*, (1840), 6 M. & W. 499; 9 L.J.Ex. 308; 151 E.R. 509; 34 Digest 23, 29.
- (6) *Reedie v. London & North Western Ry. Co.*, *Hobbit v. Same*, (1849), 4 Exch. 244; 20 L.J.Ex. 65; 154 E.R. 1201; 34 Digest 27, 56.
- G (7) *Pearson v. Cox*, (1877), 2 C.P.D. 369; 36 L.T. 495; 42 J.P. 117; 34 Digest 157, 1233.
- (8) *Hardaker v. Idle District Council*, [1896] 1 Q.B. 335; 65 L.J.Q.B. 363; 74 L.T. 69; 60 J.P. 196; 34 Digest 161, 1255.

ACTION for damages for negligence.

H The plaintiff's horse was injured by running into a pile of timber placed on the plaintiff's land by the second defendants, a firm of contractors under contract to the Ministry of Fuel and Power. The second defendants, pursuant to the contract, entered on the land by virtue of a notice given to the plaintiff by the Ministry of Works, who were acting in conjunction with the Ministry of Fuel and Power, under powers given them by reg. 50 (1) of the Defence (General) Regulations, 1939. For the Ministries it was contended that the work on the plaintiff's field was undertaken by the second defendants as inde-

pendent contractors, and that, therefore, the Ministries were not liable for the negligence, if any, of the second defendants. Alternatively, the Ministries claimed to be entitled to be indemnified by the second defendants under the terms of the contract between them and the Ministry of Fuel and Power. The facts appear in the judgment.

Waller for the plaintiff.

Alastair Sharp for the Attorney-General.

J. Harvey Robson for the second defendants.

MORRIS, J.: The plaintiff, Mr. William Darling, is a farmer and dealer in hunters, at Sacriston, Durham. In 1947 the Ministry of Fuel and Power thought it desirable to prospect in the region of the plaintiff's house to see whether there were seams of coal that could, with advantage, be worked, and to have made boreholes and trial holes to test the quantity of coal that might be found. The procedure adopted was to employ the powers given by the Defence (General) Regulations, 1939, reg. 49 (1) of which (as amended) provides that for the purposes of any regulation contained in Part IV of the regulations, the competent authorities should include the Minister of Works. Regulation 50 (1) (as amended) provides:

"Any person authorised by a competent authority to act under this regulation . . . may . . . for any of the purposes specified in sub-s. (1) of s. 1 of the Supplies and Services (Transitional Powers) Act, 1945, do any work on any land . . ."

In the present case, for purposes of administrative convenience, the Minister of Works acted in conjunction with the Minister of Fuel and Power, and on Mar. 3, 1948, a notice was served on the plaintiff, signed for and on behalf of the Minister of Works, informing the plaintiff that the power was being exercised of going on to the plaintiff's land to make boreholes or trial holes.

It was the practice of the Ministry of Fuel and Power, who were responsible for these boreholes and trial holes to see whether coal could be discovered, to employ firms of contractors to do the work for them, and the Ministry employed the second defendants to do the work that the Ministry desired to have done on the plaintiff's land. The plaintiff did not pay any special attention to the notice of Mar. 3, 1948, because he had had similar previous notices. It was, apparently, not the practice of the contractors who were to go on to the land of an occupier to make boreholes or trial holes to inform the occupier that they were proposing to proceed to start their work. The result was that when the second defendants went on the plaintiff's land they did not give him any intimation in advance of the day on which they were coming. One evening early in July, 1948, the plaintiff went for a walk on his land and found that operations were in progress in Field 212.

By cl. 8 of an agreement made between the Ministry of Fuel and Power and the second defendants on May 20, 1947, it was provided:

"The contractor shall be responsible for and make compensation for any injury (including injury resulting in death) or damage occasioned to any person whomsoever."

Condition 6 of the specification, headed "Safety Precautions," provides:

"The contractor will be responsible that at all times persons and animals are safeguarded from damage or injury arising from whatsoever cause in connection with the work."

The plaintiff knew nothing about that contract or its terms and he has only seen it in the course of this litigation. In Field 212 the plaintiff had a number of horses—some of them were young carthorses and some were hunters. Among the hunters was a black gelding which he had bought in 1947 for £225. He says that he has suffered serious loss because this gelding was lamed as a result

of running into a pile of timber which was left in the field near where a borehole was being sunk. The horse was kept for some time in the hope of recovery, but eventually it was found that recovery was not taking place, and the plaintiff sold the horse at a considerable loss. He, therefore, claims that he has lost most of the value of the horse because of an act of negligence in leaving the timber unfenced and exposed near the trial borehole.

A The plaintiff brings his action against two defendants. The first defendant is the Attorney-General, who represents the Ministry of Fuel and Power and the Ministry of Works. The second defendants are the firm of contractors who were employed by the Ministry of Fuel and Power to go on the land and do the work. The plaintiff says he is entitled to recover against both defendants, and he claims that the loss which he has suffered resulted from negligence for which both defendants are responsible. Both defendants invite me to say that it has not been shown that the horse was injured by running into the timber. They B further say that, even if that is shown, the plaintiff is not entitled to recover as it has not been established that it was an act of negligence to leave the timber in the position in which it was on the ground. The Attorney-General further says that, in any event, the Ministries are not responsible, for the second defendants are independent contractors, and, if there is liability in anyone, it rests C with them alone. Alternatively, the Attorney-General says that, if it should be held that the Ministries are liable, they should be indemnified by the second defendants because of the contractual position between the Ministry of Fuel and Power and the second defendants. The second defendants do not dispute that, if the Ministries are liable, they must be indemnified by them (the second defendants).

D I am satisfied that there was a heap of loose timber at the north-west corner of the fence that had been put up round the trial borehole. When the second defendants went on Field 212, it was apparent to them that there were horses on the field, and, indeed, their attention was called to the matter by Mr. Rayner, the prospecting officer of the Ministry of Fuel and Power. When he went on Field 212 with the defendant's foreman, he not only pointed E out the site and measured the size of the trial borehole, which was to be six feet by four feet, but he told the foreman that a fence must be erected before night time because there were horses in the field. So, it was clearly within the knowledge of the representative of the Ministry and that of the sub-contractors that there were horses in the field in which operations were to take place. The work of the sub-contractors was due to finish each day between 4.30 and 5 p.m. F On the evening of July 7, 1948, a lorry-load of planking arrived just as work was finishing for the day. It would have taken about a quarter of an hour to do what, undoubtedly, would have been done had the timber arrived earlier, namely, to stack it within the fencing. As it was, it was left in the disarray in which it had been tumbled out of the lorry.

G The plaintiff says that after he went for the walk to which I have referred he saw the horses come from the south part of the field, which is at a lower level than that of the north part, and run in a bunch near the fence round the trial hole. He says that he saw the black gelding and a brown horse rather on the inside of the horses, *i.e.*, on the side nearer to the fence around the trial hole, and that the horses on the outside jostled those on the inside so that the black gelding and the brown horse came suddenly on the pile of loose timber. The H two horses jumped on that timber and both fell down. They rolled over, but they were able to get up and continue galloping with the rest. The plaintiff says that next morning he found that the two horses that had fallen were both lame. The brown horse recovered, but the black gelding never did so, and he claims that the lameness resulted through running into the timber and falling over. After seeing and hearing the plaintiff I am satisfied that he has not invented this story and that his horses were injured on the evening of July 7 because they ran into the loose timber.

That being so, the question arises whether that was the result of negligence on the part of anyone. If it was, the further question arises: Who is responsible for that negligence? It has been strongly submitted by counsel for both defendants that they had a right to go on the land and that it could not have been a negligent or careless thing, in itself, merely to leave timber on the land near the fence. In the statement of claim the plaintiff pleaded that there was an act of trespass, but I think counsel for the Attorney-General is right when he submits that there was authority under reg. 50 (1) to enter on the land, and so it does not seem to me that the act of placing the timber somewhere near to the operations, can be said to amount to trespass on the land.

Was it an act of negligence? In my judgment, it was. I agree that it does not necessarily follow that because within a few hours of the putting of this loose timber on the land two horses were injured, it was a negligent act to have left the timber as it was, but it was all left in a tumbled heap, and, in my judgment, was in such a state as to constitute a peril to the horses. The fact that two horses did, within so short a time, come in contact with the timber lends confirmation to the view that it was a careless act to have left the timber where it was. That being so, in my judgment, there was a negligent act, and I now come to the question whether the Ministries are responsible. Counsel for the Attorney-General submits that the act of leaving that loose timber about should be regarded as a typical example of a collateral act of negligence, a kind of casual collateral act, for which only the second defendants as independent contractors are responsible. There have been many cases arising in regard to this subject, and it is not always easy to steer a definite course between one side and the other. I was referred, for example, to *Penny v. Wimbledon Urban Council* (1), and counsel for the plaintiff submitted that no difference in principle could be found between the reasoning in that case and the reasoning of his argument for the plaintiff in the present case. I was referred to other cases showing illustrations of merely casual acts of a contractor for which responsibility rests with him alone. In *Padbury v. Holliday & Greenwood, Ltd.* (2), for example, a tool, left on a ledge, was projected on to a pavement below through the negligence of some servant of the sub-contractor. In the present case, the Ministry of Fuel and Power were not performing a statutory duty, but they were availing themselves of powers given them by the Defence Regulations. When they chose to avail themselves of those powers, in my judgment, they owed a duty to the occupier of the land. I was referred by counsel for the plaintiff to a passage in the judgment of LORD GREENE, M.R., in *Fisher v. Ruislip-Northwood U.D.C.* (2) where he said ([1945] 2 All E.R. 460):

"The duty of undertakers in respect of the safety of works executed under statutory powers has been considered on many occasions. Statutes conferring such powers do not as a rule in terms impose a duty on the undertakers to exercise care in the construction or maintenance of the works. No such duty was imposed by the Civil Defence Act, 1939, in respect of shelters constructed under its powers. Nevertheless, it is quite clearly established that undertakers entrusted with statutory powers are not in general entitled in exercising them to disregard the safety of others. The nature of the power must, of course, be examined before it can be said that a duty to take care exists, and, if so, how far the duty extends in any given circumstances. If the legislature authorises the construction of works which are in their nature likely to be a source of danger and which no precaution can render safe, it cannot be said that the undertakers must either refrain from constructing the works or be struck with liability for accidents which may happen to third persons; so to hold would make nonsense of the statute. If, on the other hand, the legislature authorises the construction and maintenance of a work which will be safe or dangerous to the public according as reasonable care is or is not taken in its construc-

tion or maintenance, as the case may be, the fact that no duty to take such care is expressly imposed by the statute cannot be relied on as showing that no such duty exists. It is not to be expected that the legislature will go out of its way to impose express obligations or restrictions in respect of matters which every reasonably minded citizen would take for granted."

A In my judgment, when the Ministry decided to avail themselves of the power given in reg. 50 (1), they had a duty to the occupier of the land not to cause unnecessary danger or damage to him. The duty is, of course, not an absolute one, but, in my judgment, they did owe a duty to take reasonable care towards the occupier of the land having regard to all the circumstances. The Ministry knew they were going to enter on Field 212, and they contemplated that the occupier who had horses on the field would continue to occupy the rest of the field. It was contemplated, therefore, that the operations of the Ministry of Fuel and Power would not be exclusive in occupancy of the field. In those circumstances, it seems to me only natural that there was a duty to take reasonable care towards the occupier of the field so as to avoid causing danger and so as to avoid causing damage to the occupier. I was referred, further, to the well-known passage in the speech of LORD BLACKBURN in *Dalton v. Angus* (3) C (6 App. Cas. 829):

D "Ever since *Quarman v. Burnett* (4) it has been considered settled law that one employing another is not liable for his collateral negligence unless the relation of master and servant existed between them. So that a person employing a contractor to do work is not liable for the negligence of that contractor or his servants. On the other hand, a person causing something to be done, the doing of which casts on him a duty, cannot escape from the responsibility attaching on him of seeing that duty performed by delegating it to a contractor."

E In my judgment, that principle is applicable in the present circumstances. When the Ministry availed themselves of the power given them, they owed a duty to the occupier of the nature which I have described, and, in my judgment, they do not absolve themselves from that duty which they owed to the occupier by employing an independent contractor.

F That being so, in my judgment, both defendants are liable. The plaintiff is entitled to recover the sum of £309 5s. 0d. from both defendants, and the first defendant is entitled to be indemnified by the second defendants.

Judgment accordingly with costs.

Solicitors: *Swinburne & Jackson*, Durham (for the plaintiff); *Botterell, Roche & Temperley*, Newcastle, agents for the *Treasury Solicitor* (for the first defendant); *Frank J. Lambert & Co.*, Gateshead (for the second defendants).

[Reported by G. M. SMAILES, ESQ., Barrister-at-Law.]

BEST v. SAMUEL FOX AND CO., LTD. AND ANOTHER.

[LEEDS ASSIZES (Croom-Johnson, J.), July 6, 7, 20, 1950.]

Negligence Wife's loss of consortium—*Injury to husband causing sexual incapacity*
—*Tortfeasor's liability to wife.*

Husband and Wife—Consortium—Right of consortium—Husband injured and losing sexual capacity owing to defendant's negligence—Defendant's liability to wife.

By reason of the negligence of the defendants the plaintiff's husband sustained physical injuries, one of the results of which was that he became incapable of sexual intercourse, and, in consequence, the plaintiff suffered in health. There was no evidence that the defendants knew that the plaintiff's husband was a married man. In an action by the plaintiff claiming damages from the defendants in respect of the interference with her right to her husband's consortium,

HELD: (i) the novelty of the action was no bar to it provided that it was only a new instance of a principle known to the law and not new in principle.

Principle laid down by ASHHURST, J., in *Pasley v. Freeman* (1789) (3 Term. Rep. 63), *applied.*

(ii) on the analogy of the law relating to the enticement of a spouse the defendants were not liable for the plaintiff's loss of consortium or for interference with her right to such consortium because they were unaware that her husband was married, nor had they committed any deliberate act which was intended to interfere with her right.

Place v. Searle ([1932] 2 K.B. 497) and *Newton v. Hardy* (1933) (149 L.T. 165), *applied.*

(iii) although the violation of a legal right committed knowingly gave a cause of action, any interference by the defendants with the plaintiff's rights in relation to her husband was innocent and unintentional, and, therefore, was insufficient to support an action.

Lumley v. Gye (1853) (22 L.J.Q.B. 463), *distinguished.*

(iv) the defendants were under no duty to take care in relation to the plaintiff, and, therefore, were not liable for the consequences to her of their negligence.

[AS TO RIGHT OF CONSORTIUM, see HALSBURY, Hailsham Edn., Vol. 16, pp. 610-612, paras. 956-960; and FOR CASES, see DIGEST, Vol. 27, pp. 78-83, Nos. 607-649.]

Cases referred to:

- (1) *Chapman v. Pickersgill*, (1762), 2 Wils. 145; 95 E.R. 734; 1 Digest 24, 193.
- (2) *Ashby v. White*, (1703), 1 Bro. Parl. Cas. 62; 1 E.R. 417; 1 Digest 23, 187.
- (3) *Russell v. Men of Devon*, (1788), 2 Term. Rep. 667; 100 E.R. 359; 26 Digest 587, 2780.
- (4) *Pasley v. Freeman*, (1789), 3 Term. Rep. 51; 100 E.R. 450; 26 Digest 31, 186.
- (5) *Winsmore v. Greenbank*, (1745), Willes, 577; 125 E.R. 1330; 27 Digest 81, 640.
- (6) *Place v. Searle*, [1932] 2 K.B. 497; 101 L.J.K.B. 465; 147 L.T. 188; Digest Supp.
- (7) *Sanderson v. Hudson*, (1923), *Times*, Jan. 29, 1923; Digest Supp.
- (8) *Gray v. Gee*, (1923), 39 T.L.R. 429; 27 Digest 82, 645.
- (9) *Allen v. Flood*, [1898] A.C. 1; 67 L.J.Q.B. 119; 77 L.T. 717; 62 J.P. 595; 1 Digest 33, 253.
- (10) *Butterworth v. Butterworth and Englefield*, *Collins v. Collins and Harrison*, *Barratt v. Barratt and Fox*, *Howell v. Howell and Walker*, *Adams v. Adams and Ward*, *Ellworthy v. Ellworthy and Ledgard*, [1920] P. 126; 89 L.J.P. 151; 122 L.T. 804; 27 Digest 452, 4676.

- (11) *Newton v. Hardy*, (1933), 149 L.T. 165; Digest Supp.
- (12) *Lynch v. Knight*, (1861), 9 H.L. Cas. 577; 5 L.T. 291; 11 E.R. 854; 27 Digest 82, 644.
- (13) *Lumley v. Gye*, (1853), 2 E. & B. 216; 22 L.J.Q.B. 463; 118 E.R. 749; 42 Digest 987, 169.
- (14) *Quinn v. Leathem*, [1901] A.C. 495; 70 L.J.P.C. 76; 85 L.T. 289; 65 J.P. 708; 42 Digest 971, 30.
- (15) *Re Polemis and Furness, Withy & Co.*, [1921] 3 K.B. 560; *sub nom.*, *Polemis v. Furness, Withy & Co.*, 90 L.J.K.B. 1353; 126 L.T. 154; 36 Digest 29, 151.
- (16) *Mallett v. Dunn*, [1949] 1 All E.R. 973; [1949] 2 K.B. 180; [1949] L.J.R. 1650; 2nd Digest Supp.
- (17) *Guy v. Livesey*, (1618), Cro. Jac. 501; 79 E.R. 428; 27 Digest 80, 632.
- (18) *Brockbank v. Whitehaven Junction Ry. Co.*, (1862), 7 H. & N. 834; 31 L.J.Ex. 349.
- (19) *R. v. Creamer*, [1919] 1 K.B. 564; 88 L.J.K.B. 594; 120 L.T. 575; 83 J.P. 120; 15 Digest 974, 10,898.
- (20) *Weatherley v. Weatherley*, [1947] 1 All E.R. 563; [1947] A.C. 628; [1947] L.J.R. 869; 176 L.T. 434; 111 J.P. 220; 2nd Digest Supp.
- (21) *Newton v. Hatter*, (1705), 2 Ld. Raym. 1208; 92 E.R. 298.
- (22) *Philp v. Squire*, (1791), Peake, 114; 27 Digest 81, 641.

ACTION for damages tried by CROOM-JOHNSON, J., without a jury.

On Mar. 23, 1946, the plaintiff's husband, in the course of his employment with the defendants, met with an accident and sustained severe personal injuries as a result of which he became incapable of sexual intercourse. On July 20, 1948, the husband recovered damages in an action against the defendants. By her original statement of claim the plaintiff in the present action pleaded that, as a result of the negligence of the defendants, she had been deprived of the consortium of her husband, but during the trial this was amended by leave to a plea that her consortium had been interfered with without justification. She alleged that she had been deprived of the opportunity of having further children and of normal marital relations, and had suffered in health, and she claimed damages.

Hinchcliffe, K.C., and *N. J. Black* for the plaintiff.

Shepherd, K.C., and *Leslie* for the defendants.

Shepherd, K.C., and *Withers-Payne* for the third party.

Cur. adv. vult.

July 20. **CROOM-JOHNSON, J.:** This is an action by a married woman against her husband's former employers, in which she seeks to recover damages against them *per quod consortium amisit*, or because she has lost the comfort and the companionship of her husband.

The plaintiff is a young woman, now aged about twenty-four. Her husband, Rex Holroyd Best, is now aged about twenty-nine, and he was employed by the defendants as a steel erector. He was knocked off the track of an overhead travelling crane and sustained severe personal injuries, as a result of which, among other things, he lost the ability to perform his sexual functions. He brought an action against the defendants which was tried at the assizes here on July 20, 1948, and he recovered £4,288 15s., including special damages, with costs. On Jan. 12, 1949, Mrs. Best caused the writ in the present action to be issued.

The husband of the plaintiff, therefore, has become sterile. It is a form of impotence which leaves him with all the urge for sexual intercourse, but at the same time a complete inability to give himself any satisfaction or to give his wife any sexual gratification. The result is that she merely gets irritated. She suffers from headaches, irritability, periods of depression, and her dreadful situation is the source of considerable discord between her husband and herself.

To sum up the whole position so far as she is concerned, according to the agreed medical report she has the symptoms of an anxiety neurosis of moderate intensity. The result is that one of the most beautiful sides of the relationship between husband and wife, properly understood and properly appreciated by sensible people, is completely denied to this unhappy woman, and she says, in effect, that this is to deprive her of the right which she has—a right recognised by our law—to the comfort and the decent and proper enjoyment of the affection of her husband. A

The case is put in two ways. It is said, first, that she has been deprived of the privileges of matrimony, as I have already described, and that, somewhat by analogy to the cases relating to so-called enticement, her legal rights have been interfered with by the defendants, and she is entitled to be compensated. It is said, secondly, that, irrespective of anything else, she has, as it were, a vested right in the consortium of her husband and if anybody, however innocently, interferes with that vested right, she is entitled to maintain suit against him and to recover damages, much on the analogy, as I understand it, of a trespass to land. I have searched in vain through the papers in the original action which have been supplied me and the few that have been submitted to me in the present action, and I cannot find a scrap of evidence to suggest that the defendants knew that the plaintiff's husband was a married man. B C

It is admitted that a claim of this nature is completely novel. It has not, apparently, arisen before, and there is no case which indicates that anything of this sort has ever been canvassed before. That has been properly pressed on me at the Bar, but the law of England is a living law. It develops, and must develop, according to changes in the social life and social outlook. It has long since been pointed out that under our system of law the novelty of a claim is no answer to it. In *Chapman v. Pickersgill* (1) PRATT, C.J., in answer to an objection that the action was of a novel description, said (2 Wils. K.B. 146): "... so it was said in *Ashby v. White* (2). I wish never to hear this objection again." Some years later, perhaps, with great respect to that learned judge, I may be permitted to echo his sentiments. In the course of *Ashby v. White* (2) this question whether novelty can be an objection was a little further examined. In SMITH'S LEADING CASES, 13th ed., vol. 1, p. 280, the principle is stated in effect that where a legal right is infringed a court, if possible, will find a remedy for the wrong so suffered. Reference is there made to *Russell v. Men of Devon* (3), in which ASHHURST, J., said (2 Term. Rep.): D E

"It is a strong presumption that that which never has been done cannot by law be done at all. And it is admitted that no such action as the present has ever been brought, though the occasion must have frequently happened." F

The same judge is quoted as saying in *Pasley v. Freeman* (4) (3 Term. Rep. 63):

"Another argument which has been made use of is, that this is a new case, and that there is no precedent of such an action. Where cases are new *in their principle*, there I admit that it is necessary to have recourse to legislative interposition in order to remedy the grievance: but where the case is only new *in the instance*, and the only question is upon the application of a principle recognised in the law to such new case, it will be just as competent to courts of justice to apply the principle to any case which may arise two centuries hence as it was two centuries ago; if it were not, we ought to blot out of our law books one fourth part of the cases that are to be found in them." G H

I take that passage as my direction to myself on the correct approach to this topic. However attractive the last suggestion made by ASHHURST, J., may be to one who has authority cited to him daily about all sorts of topics, I must not allow that will of the wisp to lead me over the wrong moor. It seems to me that, applying that principle as I must, the question is whether the present case is

new in principle or new in the instance, and that involves an examination of what the suggested principle is and the authorities which give rise to it.

The class of case which springs to mind is the now well-known action brought originally, according to the books, by a husband against another man for enticing away his wife. As long ago as 1745 in *Winsmore v. Greenbank* (5) it was held that an action lies by a husband against another man for enticing away his wife. That was an action on the case, and the basis of the decision is not clear from the decision itself. It was a question whether the damages which had been awarded (I think £3,000) were excessive, I gather, in principle. As I understand that the present case is intended to go to higher courts, I think it is desirable that I should trace the subsequent history of that cause of action which is the origin of the claim which I have to examine. Having come to the conclusion, as I must, being constrained by authority, that such an action lies, I shall consider the question whether the contrary action will lie by a wife against another woman or another person who entices away her husband.

Place v. Searle (6) was an action brought by a grocer's assistant at Cambridge to recover damages against a doctor of medicine, practising in the same city, for enticing away his wife. The action was tried at assizes with a jury before McCARDIE, J., who examined all the cases on the point. He came to the conclusion, after examining *Winsmore v. Greenbank* (5), that that case could only be recognised as good law when read subject to modern legislation and modern binding decisions which have established the freedom of wives at the present day, and he came to the conclusion that there was no evidence fit to be submitted to the jury and gave judgment for the defendant. He was, apparently, induced to take that view by examining a decision of DARLING, J., in *Sanderson v. Hudson* (7) in which the learned judge had, apparently, relied on the proposition that the defendant in such an action was not liable unless the wife's will had been overborne by the stronger will of the defendant. When *Place v. Searle* (6) came before the Court of Appeal the attention of the court was drawn to *Gray v. Gee* (8) in which DARLING, J., had examined the position afresh. The Court of Appeal considered the whole matter, and McCARDIE, J.'s ruling that there was no evidence fit to be submitted to the jury was reversed and the case was ordered to be set down for a new trial. In his judgment in the Court of Appeal, SCRUTTON, L.J., made observations on the right to consortium. It may well be that, as they stood, those observations were *obiter dicta*, but inasmuch as the whole matter has since been examined I had better read what he is reported to have said ([1932] 2 K.B. 512):

"It seems to be clear that at the present day a husband has a right to the consortium of his wife, and the wife to the consortium of her husband, and that each has a cause of action against a third party who, without justification, destroys that consortium . . . There being such a right it follows, and it has been so decided in numerous cases, that any person who, without justification, interferes with that right is liable to an action in tort."

I do not think GREER, L.J., said anything on that matter, but SLESSOR, L.J., puts it a little differently, and it is a very important difference. He said (*ibid.*, 520):

"If the matter is considered as one of principle, this kind of action is founded upon a violation of a legal right, and so we have to inquire whether the defendant has done something which amounts to such a violation. The matter is put very clearly in *Allen v. Flood* (9) by LORD WATSON in these words ([1898] A.C. 107): 'He who wilfully induces another to do an unlawful act which, but for his persuasion, would or might never have been committed, is rightly held to be responsible for the wrong which he procured.' That, it appears to me, is the proper test to apply in asking the question in this case: did the defendant induce Mrs. Place to do an unlawful act which, but for his persuasion, she would or might not have committed?"

In *Gray v. Gee* (8) DARLING, J., having had an opportunity of considering the whole position, came to the conclusion that an action would lie by a married woman against another woman. McCARDIE, J., then discussed it also in a series of cases, known generally as *Butterworth v. Butterworth and Englefield* (10) where the learned judge was examining the basis of claims for damages for adultery, and he expressed the view that the action would not lie. In *Newton v. Hardy* (11), SWIFT, J., came to the conclusion that a married woman had a legal right to the consortium of her husband and could recover damages from any one who violated that right. I think it necessary that I should consider what the basis of that judgment was, because the learned judge decided that the action was unsuccessful where the plaintiff proved that the defendant had committed adultery with her husband but failed to prove that the defendant had induced him to cease from cohabiting and consorting with her. The learned judge, in the course of a very thorough judgment, says (149 L.T. 166):

"... if a wife can prove that her husband has been enticed, procured, persuaded to leave the consortium which is common between husband and wife, she is entitled to recover damages against the enticer. Had I not formed that opinion for myself, I should, sitting in this court, have held that it was the law of England ..."

He cites part of the passage which I have read from the judgment of SCRUTTON, L.J., in *Place v. Searle* (6), and continues (*ibid.*):

"Had I not arrived for myself, after the extremely full and able argument which has been put before me, at that same conclusion, I should have felt bound to follow the *dictum* of SCRUTTON, L.J., in that case. It is perfectly true that that was a case in which a husband was suing for the loss of consortium of his wife, and it is perfectly true that there are different arguments to be advanced according to whether it is a husband or a wife who is suing, but I cannot for myself think that now, as LORD CAMPBELL said in *Lynch v. Knight* (12), the right to sue for damaging the consortium is limited to the husband. It is a mutual right of husband and wife, and, if anybody breaks into it and violates it, then either of them, in my view, is entitled to sue for damages in respect of that wrong... My attention has been called to the precedent of a declaration before 1863 which is to be found in BULLEN AND LEAKE, 3rd ed. It is a declaration by a husband for enticing away his wife, and it states: 'C. B. was and is the wife of the plaintiff, and the defendant, well knowing the same, wrongfully enticed and procured the said C. B. unlawfully and without the consent and against the will of the plaintiff to depart and remain absent from the house and society of the plaintiff'."

As I read that judgment and from what I have cited in the other judgments, it looks as if, so far, the authorities indicate two things—(i) that the person sued must know that there is the relationship of husband and wife, and (ii) must have done some active act in the way of enticement (some wilful act) to deprive the person suing of the benefits and advantages of that consortium. SWIFT, J., continues (*ibid.*, 167), quoting GREER, L.J., in *Place v. Searle* (6):

"'I agree that there is no room for dispute as to the law to be applied. It is accurately stated in the words quoted by SCRUTTON, L.J., from LUSH ON HUSBAND AND WIFE, although I should like to make one or two verbal alterations in the proposition there stated. At the foot of p. 3 of that work it is said that: "Corresponding to the husband's dominion over the person of his wife is the duty of the wife to reside and consort with her husband. This is a duty which she owes to him, and a person who tempts or entices her to violate this duty commits a wrong towards the husband for which he is entitled to recover damages; unless the person who harboured her acted from 'principles of humanity'." I think it would verbally be more accurate,

if, instead of using the words "tempts or entices her," it were said "procures, entices, or persuades," and then, instead of the word "harboured," were substituted "procured, enticed, or persuaded" her, the statement then continuing as in the text."

The learned judge applied that and came to the conclusion that it was not proved in that particular case.

A That being so, in view of the way in which I regard the facts in this case, it seems to me that there is no evidence and no facts are agreed on which I could possibly come to the conclusion that the defendants, within the principle laid down in the enticement cases, have committed any intentional act or deliberate act which was intended to break up the consortium, and, so far as that branch of the subject goes, I have come to the conclusion that this action would fail.

B In advancing his second argument, counsel for the plaintiff did not shrink from putting it as a simple case of a trespass, as it were, on the right of the wife. He said the innocence of the intention of the defendants—and, as I gather, even the fact that they did not know that the injured man had a wife—makes no difference. The defendants have infringed the right which the plaintiff indubitably has. He says that, once it is shown that a right has been infringed, the innocence of the intention of the defendants does not matter. There certainly is nothing in any of the enticement cases which goes so far as that, and, accordingly, I have considered whether there is any assistance to be derived by examining and co-ordinating authorities on other branches of the law.

C First, what is the relationship between husband and wife? It certainly is not a contractual relationship, however people may talk about it in modern days.

D The parties may have some rights, the one against the other, but not on a contractual basis. Until certain modern legislation a wife could not maintain an action against her husband for failing to maintain her. Remedies were provided, as, for example, in the Summary Jurisdiction (Married Women) Act, 1895, which were designed to meet that state of affairs. In *Lumley v. Gye* (13) the defendant had taken away from the plaintiff a singer with whom he had made a contract to sing in public. If it is right that the mere innocent infringement of a right enables the person whose right is infringed to bring an action, it is a little difficult to understand why it was considered necessary in *Lumley v. Gye* (13) to consider whether the plaintiff was entitled to recover damages. *Lumley v. Gye* (13) was expressly affirmed in *Quinn v. Leatham* (14) where that great master of the law, LORD MACNAGHTEN, examined *Lumley v. Gye* (13) to see whether it was rightly decided and he says ([1901] A.C. 510):

"I think it was ... In this case the question arises directly, and it is necessary to express an opinion on the point ... I have no hesitation in saying that I think the decision was right, not on the ground of malicious intention—that was not, I think, the gist of the action—but on the ground that a violation of legal right committed knowingly is a cause of action, and that it is a violation of legal right to interfere with contractual relations recognised by law if there be no sufficient justification for the interference."

G In *Lumley v. Gye* (13) knowledge of the contractual relationship was proved, and, even if the present were a case of contractual relations, it seems to me that

H the plaintiff would have to prove at least knowledge of the contractual tie before her action could be maintained. As I have said, there is no evidence and there is no agreed statement that the defendants knew that the workman, to whom they owed a duty, was married. What is now said, apparently, involves the proposition that an innocent infringement of the plaintiff's right to consortium involves the defendants in a liability to pay her damages. In *Lynch v. Knight* (12) it was made quite clear that the remedy that was given in that case was so given because the act complained of was intentional. In *Lumley v. Gye* (13) also it

seems to me that intent to interfere with the contractual relations was proved. It may be that it is an anomalous class of action. On the other hand, an action on the case lies for any malicious action: see COMYN'S DIGEST, Vol. 1, p. 221, on the type of case for this type of misfeasance.

I have examined one other matter to see whether it is any help for the plaintiff. It used to be thought to be a rule that when a person committed a tort he was only responsible to pay damages for the natural and probable consequences of his act. Since 1921, and as the law now stands, that has not been the rule. The Court of Appeal in *Re Polemis and Furness, Withy & Co.* (15) rejected it, and they there lay down the rule that, if a person is negligent, he is liable for the physical consequences, whether probable or not. Can it be said that if an employer, in breach of the duty which he has to a workman, causes injury to the workman, the workman can maintain an action for damages and the employer becomes liable for all the physical consequences, whether probable or not? If the workman had been maintaining the action, I should have said: "Yes," as the law stands. The *Polemis* case (15) binds me as a judge of first instance until it has been reviewed in the House of Lords, but I think that it lays down a rule which relates only to the measure of damage. I do not think that it is apt to make the wrongdoer liable for all conceivable consequences, including those suffered by a person to whom he owed no duty and of whom, as in this case, he had no knowledge. I think that that would be to make a new case, a case demanding legislation, within the limits of what I have read from the judgment of ASHHURST, J., in *Pasley v. Freeman* (4). I cannot see that the defendants' responsibility for negligence to the workman concerned can be extended to make them responsible to his wife when they had no intention, wilfully or knowingly or impliedly, of putting an end to or interfering with the consortium which the plaintiff says has been infringed.

In conclusion, I had better just mention one argument of counsel for the defendants. He said that an action of this nature is based on the destruction of the consortium and the result of that point being taken was an amendment to the statement of claim, which I gave leave to be made, so that instead of reading: "The defendants owed a duty to the plaintiff not to deprive her of the consortium" it now reads: "not to interfere, without justification, with her consortium with her husband." I do not think that is a good point. In this case, counsel says, the consortium still existed, the husband and wife were still living together. So they were, but I do not think, either in an enticement action or even if, in analogy with *Lumley v. Gye* (13), the plaintiff were entitled to maintain an action on the ground of some conscious interference, that it would be an answer to say: We did not interfere with the consortium completely. We only interfered with it partially." I rest on the observation of SCRUTTON, L.J., in the latter part of the passage which I read from his judgment in *Place v. Searle* (6) ([1932] 2 K.B. 513). If there is interference which comes within the principle which I have enunciated in this judgment, I do not think it makes any difference, except as to the quantum of damage, whether interference is partial or complete. I have come to the conclusion that this very interesting attempt to provide the plaintiff with a remedy in the form of damages for the loss which she has indirectly sustained by reason of the breach of duty which the defendants owed to her husband fails.

Judgment for the defendants with costs, and for the third party without costs.

Solicitors: *W. H. Thompson* (for the plaintiff); *Raworth, Lomas-Walker & Co.*, Harrogate (for the defendants); *Neal, Scorah, Siddons & Co.*, Sheffield (for the third party).

[Reported by G. M. SMAILES, Esq., Barrister-at-Law.]

resd. C.A. [1952] 2 All E.R. 349.

WESTWOOD v. CANN.

[KING'S BENCH DIVISION (Pritchard, J.), July 26, 27, October 3, 1950.]

Plate—Gold plate—Wedding ring—Need to bear hall-mark—Plate (Offences) Act, 1738 (c. 26), s. 1, s. 5—Gold Plate (Standard) Act, 1798 (c. 69), s. 1, s. 2, s. 6—Wedding Rings Act, 1855 (c. 60), s. 1—Gold Wares (Standard of Fineness) Order, 1932 (S.R. & O., 1932, No. 654), art. 2.

A *Plate—Silver plate—Cigarette case—Below statutory standard—Exposure to sale—Absence of hall-mark—Obligation to mark sub-standard goods—Liability of seller to penalty—Forfeiture of article—Stat. 8 & 9 Will. 3 c. 8, s. 8 (as amended by Plate Duty Act, 1719 (c. 11), s. 3)—Plate (Offences) Act, 1738 (c. 26), s. 1, s. 5.*

A jeweller exposed to sale in his shop window twenty-one gold rings which were below the 9 carat standard, four which were above the 9 carat standard but below the 14 carat standard, one which was of the 14 carat standard, and one which was above the 18 carat standard but below the 22 carat standard. None of them bore the hall-mark of a British assay office. In addition he exposed to sale a silver cigarette case containing only 856 parts of fine silver in one thousand parts alloy, instead of the 925 parts of fine silver in one thousand parts alloy required by the Plate (Offences) Act, 1738, s. 1, and not bearing the mark prescribed by s. 5 of that Act.

C **HELD:** (i) in view of the provisions of the Plate Offences Act, 1738, s. 1, the Gold Plate (Standard) Act, 1798, s. 1, the Wedding Rings Act, 1855, s. 1, and the Gold Wares (Standard of Fineness) Order, 1932, art. 2, gold wedding rings were in the same position as other gold plate or manufacture of gold, with the result that they might be of any of the four standards permitted by law, namely, 22, 18, 14, and 9 carat, and must not be exposed to sale unless marked as provided by s. 5 of the Act of 1738, s. 2 of the Act of 1798, and art. 2 of the order of 1932.

D (ii) the twenty-one rings below the 9 carat standard were mere base metal and no offence had been committed by exposing them to sale unmarked, but in respect of the other rings the jeweller had committed offences under s. 6 of the Act of 1798.

E (iii) although, under the Plate (Offences) Act, 1738, s. 1, a penalty of £10 was recoverable from the jeweller for having exposed to sale a silver cigarette case which was below the statutory standard of fineness, no penalty was recoverable from him for so exposing it when it was not marked as required by s. 5 of the Act, because only silver wares complying with the standard laid down by s. 1 were required by s. 5 to be marked.

F (iv) the cigarette case would be forfeited to the claimant under the statute 8 & 9 Will. 3 c. 8, s. 8, as amended by the Plate Duty Act, 1719, s. 3, which required all silver plate to be marked before being offered for sale, whether it were of the standards permitted by those sections or not.

G [FOR THE PLATE (OFFENCES) ACT, 1738, s. 1, s. 2, s. 4 and s. 6, see HALSBURY'S STATUTES, 1st edn., Vol. 19, pp. 768, 769, 770, and 771; FOR THE GOLD PLATE (STANDARD) ACT, 1798, s. 1, s. 2, s. 4 and s. 6, see *ibid.*, Vol. 19, pp. 811, 812, and 813; FOR THE GOLD AND SILVER WARES ACT, 1854, s. 1, s. 3 and s. 4, see *ibid.*, Vol. 19, p. 829; and FOR THE WEDDING RINGS ACT, 1855, see *ibid.*, Vol. 19, p. 831.]

H FOR THE STATUTE 8 & 9 WILL. 3 (c. 8), see HALSBURY'S STATUTES, Vol. 19, pp. 758, 759; FOR THE PLATE DUTY ACT, 1719, s. 3, see *ibid.*, Vol. 19, p. 765; and FOR THE PLATE (OFFENCES) ACT, 1738 (c. 26), s. 1 and s. 5, see *ibid.*, Vol. 19, pp. 768 and 770.]

Case referred to:

(1) *Buckley v. Alexander* (unreported).

Action for penalties tried at Manchester Assizes.

The plaintiff, the assayer to the Guardians of the Standard of Wrought Plate

within the city of Birmingham, claimed from the defendant, a jeweller carrying on business in Manchester, penalties for having exposed to sale gold rings which fell short of the legal standard of fineness and were not marked as required by law under the provisions of the Plate (Offences) Act, 1738, the Gold Plate (Standard) Act, 1798, and the Gold Wares (Standard of Fineness) Order, 1932, and also for having exposed to sale a cigarette case which was of a fineness less than eleven ounces, two penny weight, of fine silver in every pound weight troy and not bearing the prescribed mark under the Plate (Offences) Act, 1738, s. 1. He also claimed to have the cigarette case or its value forfeited on the ground that the defendant had exposed it to sale without its bearing the appropriate mark under the statute 8 & 9 Will. 3, s. 8, as amended by the Plate Duty Act, 1719, s. 3.

Nelson, K.C., and Wingate-Saul for the plaintiff.

Blackledge, K.C., Oakes and Dobbs for the defendant.

Cur. adv. vult.

Oct. 3. **PRITCHARD, J.**, read the following judgment. The Guardians of the Standard of Wrought Plate within the city of Birmingham are a statutory body which owed their original existence to the Plate Assay (Sheffield and Birmingham) Act, 1772, an Act which was repealed and replaced as regards the city of Birmingham by the Birmingham Assay Act, 1824. The plaintiff in this case is the assayer to those guardians. He sues to recover from the defendant, a jeweller carrying on business in Manchester, certain penalties and forfeitures to which the defendant is alleged to have become liable by having exposed to sale in his shop window twenty-seven gold wedding rings and a silver cigarette case all of which are alleged to fall short of the standard of fineness permitted by law, and none of which, it is alleged, bears the hall-mark which the law requires. The plaintiff, in the course of his evidence, produced twenty-seven rings and a silver cigarette case. The first question which I have to determine is whether the plaintiff has proved that those rings and that cigarette case were exposed to sale by the defendant.

[His LORDSHIP reviewed the evidence and found as a fact that the rings and cigarette case were exposed to sale in his shop window by the defendant, that they were wares assayed by a Dr. Watson, the senior assayer to the Royal Mint, in 1949, and that the rings were wedding rings, and he continued:] Having decided these disputed questions of fact in favour of the plaintiff, I now proceed to consider the evidence of Dr. Watson and its effect on this case in the light of the various Acts of Parliament referred to at the trial. It is convenient to consider these matters separately in so far as they relate respectively to the gold wedding rings and to the silver cigarette case and I will deal first with the gold wedding rings.

To understand Dr. Watson's evidence about the rings, it is necessary to say something first about the two words "alloy" and "carat." The word "alloy", if given its scientific meaning, means "a mixture of metals not being a mechanical mixture nor an amalgam," but the word has another meaning which—for the want of a better title—I may call its "legal" meaning, namely, "the allowed addition to gold or to silver of base metal." The meaning of the word "carat" is important and occasioned some confusion during the trial because the word is used in some of the material statutes in a context which both Dr. Watson and the plaintiff admitted they did not understand. Since the trial I have had opportunity to refer to various text-books, among them being DE CASTRO'S LAW AND PRACTICE OF HALL-MARKING GOLD AND SILVER WARES. On p. 143 of that book is to be found a useful glossary in which the author sets out on the subject of the word "carat" a quotation from Sir William Roberts-Austen's 1884 Cantor lectures. From this it appears that the carat system of weights on which the computation of the standard fineness of alloys of gold is based is historically obscure, but that the origin of the carat is Grecian. The ceratium

was a small Greek weight. Its use came to us through Arabian alchemists or through the Roman mints, and it seems probable that the Greek keration and the Arab kyvat were applied to beans or seeds by native merchants, who made them serve provisionally as weights. If this view is correct the original conception connoted by the word "carat" is the conception of weight. This is not the conception connoted by the word as used by Dr. Watson and by the plaintiff. Both these witnesses told me that the sense in which they used the word was to imply "a twenty-fourth part" of a whole, and although, of course, a twenty-fourth part must have a weight, they used the word as meaning or implying, not weight, but proportion. According to them, pure, fine or unalloyed gold is denoted as 24 carat gold, which means that all twenty-four parts of a given whole would be gold. Twenty-four carat gold, however, is too soft a material from which to manufacture wares, and, therefore, by virtue of various statutes various wares from time to time have been permitted to be manufactured from lower standards which Dr. Watson describes as follows: (i) 22 carat gold, or twenty-two parts gold in twenty-four parts alloy, or 916.6 parts gold in one thousand parts alloy; (ii) 18 carat gold, or eighteen parts gold in twenty-four parts alloy, or 750 parts gold in one thousand parts alloy; (iii) 14 carat gold, or fourteen parts gold in twenty-four parts alloy, or 585 parts gold in one thousand parts alloy; and (iv) 9 carat gold, or nine parts gold in twenty-four parts alloy, or 375 parts gold in one thousand parts alloy. From the legal point of view material below the 9 carat standard is properly described as base metal. Applying his conceptions of these standards to the rings which he assayed in 1949, the result of Dr. Watson's evidence (which was not disputed and which I accept) is as follows: twenty-one rings were below the 9 carat standard; four rings were above the 9 carat standard but below the 14 carat standard; one ring was of the 14 carat standard; and one ring was above the 18 carat standard but below the 22 carat standard. Dr. Watson said further—agreeing with the witness Mr. Dorey—that none of those twenty-seven rings bore the hall-mark of a British assay office.

Such was the evidence on which the plaintiff claimed to be entitled to recover from the defendant the penalties which are imposed by the law on a person who exposes to sale gold wedding rings which (a) fall short of the legal standard of fineness and (b) are not marked as required by law. Therefore, it is now necessary to turn to the various statutes which lay down the required standard of fineness and demand that wares should be appropriately marked. There are three material statutes dealing with the permitted standards for industrial gold alloys, the Plate (Offences) Act, 1738, the Gold Plate (Standard) Act, 1798, and the Gold and Silver Wares Act, 1854. The Plate (Offences) Act, 1738, is entitled

"an Act for the better preventing frauds and abuses in gold and silver wares,"

and its material sections for the purposes of this case are s. 1, s. 5, s. 6 and s. 22.

Section 1 forbids any gold plate or manufacture to be made, sold, or exposed to sale after May 28, 1739, if it is less in fineness than 22 carats of fine gold in every pound weight troy, and imposes for every offence against this prohibition a penalty of £10 or imprisonment for six months in default of payment. Section 5 deals with the marking of such 22 carat gold wares and provides that from the said date no gold plate or manufacture made after that date shall be sold or exposed to sale unless it (being of the said standard) is marked as provided in the section. For the purposes of this case it will suffice if I refer to this mark as "the 22 carat mark." The section imposed the same penalty for offences against it as that imposed by s. 1. Section 6 contains a list of wares which are excepted from the requirements of s. 5. The list includes rings. At this time, therefore, gold rings, although they could not lawfully be made less in fineness than the 22 carat standard, could lawfully be sold or exposed to sale without the 22 carat mark. Section 22 provides that the penalties imposed by the Act

shall and may be recovered, with full costs of suit, by action in His Majesty's Court of Record at Westminster, and provides that one half of such penalties shall go to the Crown and the other half to the person who shall sue for them.

The Gold Plate (Standard) Act, 1798, is entitled

"an Act for allowing gold wares to be manufactured at a standard lower than is now allowed by law,"

and its material sections for the purposes of this case are s. 1, s. 2, s. 4 and s. 6. Section 4 preserved the legality of making, selling, and exposing to sale gold wares of the 22 carat standard, but s. 1 made it lawful after Oct. 1, 1798, to make, sell, and expose to sale or export gold plate or manufacture of the standard of 18 carats of fine gold in every pound weight troy. Section 2 provided a new mark for the newly permitted 18 carat standard. It will suffice if I call this mark "the 18 carat mark." The section then provided that after Oct. 1, 1798, gold plate or manufacture made after that date of the newly permitted 18 carat standard must not be sold or exposed to sale until it had been marked with the 18 carat mark instead of with the 22 carat mark, and for every offence against this provision a penalty of £10 is made recoverable. Section 6, which at first sight seems to resemble very closely s. 2, is, I think, different and is aimed at a different evil. In 1798 there must have been in existence a number of 22 carat marks which had been in use since 1738. The object of s. 2 was to ensure that the new 18 carat marks should be used for the newly permitted 18 carat wares. It was conceivable that a trader might inadvertently offer for sale a piece of gold plate of the newly permitted 18 carat standard marked with the 22 carat mark. In any event—whether he acted inadvertently or intentionally—the degree to which a buyer could be deceived in such circumstances was measurable by the difference of four carats in fineness. To check this evil the legislature imposed a penalty of £10, but there were still the traders who were prepared to offer for sale gold wares of less fineness than either of the then permitted standards and to sell as gold that which was legally mere base metal, possibly avoiding the consequences of making false pretences by failing to have any mark at all on the wares they were offering for sale. It was this evil, with its far greater opportunities for fraud, which, I think, the legislature had in mind when, by s. 6, it imposed a penalty of £50 on any person who, after Oct. 1, 1798, made or sold or exposed to sale or export any gold plate or manufacture not being duly marked either with the 22 carat mark or with the 18 carat mark, those being in 1798 the only two standards permitted by the law. Such then was the statutory position at the end of the eighteenth century.

The Gold and Silver Wares Act, 1854, by s. 1, enables the Crown by Orders in Council from time to time to order that gold plate or manufacture may be wrought of any standard, not being less than one third part in the whole of fine gold, to be declared in any such order, and also to approve thereby of the instrument with which gold plate and manufacture shall be marked or stamped, setting forth in figures the actual fineness thereof, according to the standard so declared. By s. 4 it is provided that the statutes then in force relating to standards of gold wares or to the marks for denoting the same and all the provisions, prohibitions, penalties and forfeitures enacted thereby shall continue in force and be construed with and as forming part of that Act, save only that in the interpretation thereof all standards authorised by the Crown in pursuance of that Act shall be deemed and taken to be lawful standards. In pursuance of this Act, and four months after it came into force, an Order in Council dated Dec. 11, 1854, declared that from and after that date gold plate and manufacture might be wrought of three new standards, namely, 15, 12, and 9 carats of fine gold in every pound weight troy. The order also specified three several dies or instruments with which gold plate and manufactures of the three new standards should be marked or stamped. The order of 1854 subsisted for seventy-eight years and then, in 1932, it was revoked by the Gold Wares (Standard of Fineness) Order of that year (S.R. & O.,

1932, No. 654) which provides, in language not previously employed in the Acts to which I have referred, that gold plate and manufacture may, after Aug. 15, 1932, be wrought of either (i) the standard of 585 parts of fine gold in every one thousand parts by weight (called the standard of 14 carats) or (ii) the standard of 375 parts of fine gold in every one thousand parts by weight (called the standard of 9 carats). The order specifies the marks by which gold wares of these two standards shall be marked, which I will call respectively the 14 and the 9 carat marks. Therefore, to-day there are four statutory standards for industrial gold alloys in force in England which authorised assay offices will mark with appropriate hall-marks when fashioned into wares, namely: (1) the 22 carat standard created by the Plate (Offences) Act, 1738; (2) the 18 carat standard created by the Gold Plate (Standard) Act, 1798; (3) the 14 carat standard; and (4) the 9 carat standard, these last two being created by the Gold Wares (Standard of Fineness) Order, 1932, made under and by virtue of the Gold and Silver Wares Act, 1854.

In so far as the plaintiff's claim alleges that the wedding rings were less in fineness than a standard permitted by law, the allegation is to be found in para. 10 of the statement of claim where the words used are "less in fineness than nine carats of fine gold in every pound weight troy." In using these words the pleader (who was not the junior counsel who appeared for the plaintiff at the trial) seems to have overlooked the revocation of the order of 1854 and to have added to his allegation that the rings were less in fineness than the 9 carat standard the words "in every pound weight troy," which do not appear in the order of 1932, but which do appear in the Act of 1738, the Act of 1798, and the order of 1854. It was in this context that, as I have said, Dr. Watson and the plaintiff confessed they did not understand the word "carat." In view of their evidence counsel for the plaintiff candidly admitted that he felt a difficulty in proving the allegation as pleaded, and, ultimately he withdrew the claim for penalties in so far as it was based on the allegation that the rings were not of one of the permitted standards of fineness. In these circumstances I need not consider further this part of the case, and I pass from it with the comment that in view of the evidence of Dr. Watson and the plaintiff it seems possible that between 1854 and 1932 there has been a change in the methods used and the terminology employed by those who carry on the profession of assayers of gold, which has been reflected in the order of 1932 and, for the sake of uniformity and simplicity, the language used to describe the standards of 22 and 18 carat might well be amended.

The other allegation in connection with the rings which is made in the statement of claim is that they were not marked with one of the marks by law required to denote one of the standards of fine gold, and on this ground the plaintiff claims in respect of each ring so found not to have been marked the penalty of £50 imposed by s. 6 of the Gold Plate (Standard) Act, 1798. This claim involves consideration of the question whether the four statutory standards for industrial gold alloys to which I have already referred and the complementary statutory requirements that wares made in accordance with such standards should be appropriately marked have been made to apply to wedding rings. By s. 6 of the Plate (Offences) Act, 1738, rings (including wedding rings) were excepted from the provisions of s. 5 of that Act, and this excepting of wedding rings from the necessity of being marked was not altered by the Gold Plate (Standard) Act, 1798. Thus, at the end of the eighteenth century, although, like other gold wares, wedding rings had to be of either the 22 or the 18 carat standard, unlike other gold wares of those standards, wedding rings of those standards could lawfully be offered for sale although unmarked. When the Gold and Silver Wares Act, 1854, permitted the lowering by Orders in Council of the permitted standards for the making of gold wares, it applied the existing law to gold wares which might be made of the newly permitted standards, but it left untouched the existing exemption of wedding rings from being marked. That this was so is

made clear beyond doubt by the preamble to an Act passed in the following year called the Wedding Rings Act, 1855. From this preamble it appears that, although, according to the existing law, wedding rings were not liable to be assayed and marked, nevertheless in practice gold wedding rings had been assayed and marked, and it was, therefore, expedient that such rings should be made liable to the provisions of the statutes then in force relating to the assaying and marking of gold plate. The Act then proceeded by s. 1 to do what was said to be expedient and removed gold wedding rings from the exception which had been created by and maintained since the passing of s. 6 of the Plate (Offences) Act, 1738. A

Counsel for the defendant, reading the Wedding Rings Act, 1855, from the nineteenth volume of THE COMPLETE STATUTES OF ENGLAND (1st ed., 1930) argued that that Act had exempted gold wedding rings from the operation of the Gold and Silver Wares Act, 1854, because the Act of 1855 is entitled (*inter alia*) B

“an Act for excepting gold wedding rings from the operation of the Act of the last Session relating to the standard of gold and silver wares . . .”

He submitted that in these circumstances the state of the law to-day is that it is not lawful to make gold wedding rings below the 18 carat standard, and that, therefore, any gold wedding rings below that standard cannot come within the statutory provisions relating to the marking of gold plate. This argument, which, if successful, would cause consternation to many donors and recipients of the gold nuptial emblem, is, in my judgment, without foundation. Counsel overlooked the fact, I think, that the COMPLETE STATUTES OF ENGLAND are in a sense incomplete. The volumes published under this title do not reproduce sections which have been repealed. In the case of the Wedding Rings Act, 1855, only the first section is printed in the volume to which I have referred. Reference to the Act in the STATUTES AT LARGE shows that the only part of the Act of 1854 from which gold wedding rings were excepted by the Act of 1855 was s. 3 of the Act of 1854 relating to the duty levied on gold plate with which subject this case is not concerned. The thus immaterial exception was effected by s. 2 of the Act of 1855, which in its turn was repealed by the Statute Law Revision Act, 1875. I, therefore, reject counsel's submission, and I hold that, as a result of the various statutes and Orders in Council to which I have referred, gold wedding rings are now in no different position from other gold plate or manufacture of gold; that they may lawfully be made of any of the four standards permitted by law (namely, the standards of 22, 18, 14 and 9 carats); and that, if so made, they must not be offered for sale unless appropriately marked as provided respectively by the relevant statute or order. In my judgment, there can be no real doubt about this, but, if authority is needed, I think that what I have decided is consistent with the charge to the jury which was given by MANISTY, J., in *Buckley v. Alexander* (1) tried at Birmingham Assizes on Mar. 26 and 27, 1889, the report of which in the BIRMINGHAM DAILY POST has been made available for me by the courtesy of the proprietors of that newspaper. C D E F G

The result of my findings, therefore, is as follows. The defendant offered for sale twenty-seven rings. Of those rings twenty-one were below the 9 carat standard. In respect of those twenty-one rings no offence against any statute with which this case is concerned was committed by reason of their having been offered for sale unmarked. They were legally mere base metal. Of the remaining six rings one was above the standard of 18 carat, but below the 22 carat standard, and ought not to have been offered for sale unless marked accordingly in compliance with the Gold Plate (Standard) Act, 1798; one was of the 14 carat standard and four were above the 9 carat standard but below the 14 carat standard, and these five ought not to have been offered for sale unless marked accordingly in compliance with the Gold Wares (Standard of Fineness) Order, 1932, made by virtue of the Gold and Silver Wares Act, 1854. None of these H

six rings bore any hall-mark, and, therefore, in respect of each of them the plaintiff has established his claim to recover the penalty of £50 imposed by s. 6 of the Gold Plate (Standard) Act, 1798. I have already mentioned the circumstances in which the plaintiff withdrew his claim for penalties based on the standard of fineness of the rings, and it follows that the sum to which the plaintiff is entitled in respect of the rings is the sum of £300.

A I now turn to consider the claims which the plaintiff makes in respect of the silver cigarette case. According to the provisions of s. 1 of the Plate (Offences) Act, 1738, it is an offence to expose to sale any silver plate or manufacture, made after May 28, 1739, if it is less in fineness than eleven ounces, two penny weight of fine silver in every pound weight troy. Dr. Watson, who did not experience the difficulty with regard to the language used to denote the standard of fineness of silver wares which he experienced in the case of gold wares, said that this
B statutory standard was equivalent to a standard represented by 925 parts of fine silver in one thousand parts alloy. He found that the silver cigarette case exposed to sale by the defendant contained only 856 parts of fine silver in one thousand parts alloy. It was, therefore, below the statutory standard, and, having offered it to sale, the defendant becomes liable to forfeit £10, the penalty fixed
C by s. 1 of the Plate (Offences) Act, 1738. The plaintiff also claims in respect of the cigarette case a further sum of £10 as the penalty which he says is due under s. 5 of the same Act, because the defendant exposed the article to sale when it did not bear the mark prescribed by that section. In my judgment, this claim is misconceived. The silver wares which by s. 5 are required to be marked before
D being exposed to sale are silver wares which comply with the standard laid down by s. 1. This cigarette case did not comply with that standard, and in these circumstances s. 5 does not apply to it because s. 5 applies only in terms to silver wares "being of the standard of eleven ounces, two penny-weight of fine silver pound troy." The plaintiff's claim for £10 under s. 5, therefore, must fail.

Finally the plaintiff claims the forfeiture of the cigarette case itself or its value on the ground that it was offered for sale by the defendant without having been assayed and marked as required by law. The plaintiff bases this claim upon s. 8
E of an Act of Parliament passed in the year 1696 entitled

"An Act for Encouraging the bringing in wrought plate to be coined,"

as amended by s. 3 of the Plate Duty Act, 1719. I have considered these two sections, and, in my judgment, they differ from s. 5 of the Plate (Offences) Act, 1738, in this respect. Whereas that section only required to be marked
F before being exposed to sale plate which was in accordance with the standards of gold and silver wares permitted by that Act, the two sections which I am now considering required all silver plate to be marked before being offered for sale, whether it was of the standards permitted by those sections or not. In these circumstances, the cigarette case in question having been offered for sale unmarked, the plaintiff has established his claim to its forfeiture. No argument
G was addressed to me on this part of the case and no evidence was given as to the value of the cigarette case, and, accordingly, I order that that article itself be forfeited to the plaintiff. In addition, and for the reasons which I have given, there must be judgment in favour of the plaintiff for £310.

Judgment for the plaintiff for £310 and the forfeiture of the cigarette case, with costs.

Solicitors: *Sharpe, Pritchard & Co.*, agents for *Ryland, Martineau & Co.*,
H Birmingham (for the plaintiff); *J. H. Milner & Son*, agents for *Leslie M. Lever & Co.*, Manchester (for the defendant).

[Reported by F. A. AMIES, ESQ., Barrister-at-Law.]

Re ST. SAVIOUR'S, WALTHAMSTOW.

[COURT OF ARCHES (Sir Philip Wilbraham Baker-Wilbraham, sitting as Dean of Arches), July 27, August 22, 1950.]

Ecclesiastical Law—Ornaments—Candlesticks—Legality of six candlesticks on the Holy Table or retable.

On the east wall of a church, which was built in 1874, was a reredos of mosaic work, having as its central figure a representation of Our Lord on the cross. Immediately in front of the reredos was a retable on which were a small cross, standing on a pedestal, in the centre and six candlesticks, three on each side of the cross. The candlesticks were in that position from 1886 until June 6, 1945, when the church was partly destroyed by fire, and the reredos, cross and candlesticks were damaged beyond repair. In January, 1950, the incumbent and churchwardens lodged a petition for a faculty to authorise, *inter alia*, a crucifix and six candlesticks on the retable. The petition was supported by the parochial church council, and the designs of the candlesticks had been approved by the diocesan advisory committee. The chancellor granted a faculty authorising the introduction of all the articles prayed for, except four of the six candlesticks. On appeal,

HELD: (i) although the use of two altar lights must be regarded as the traditional and recognised use in the Church of England, the use of more than two lights on or behind the Holy Table was not necessarily illegal, and it was within the discretion of a diocesan chancellor, in a proper case, to allow more than two lights, though this discretion ought to be exercised with great care.

(ii) in the present case, six candlesticks had been used on the retable for sixty years and it was merely sought to replace them; on the evidence there was no danger of a ceremonial use being made of them; and in those and the other circumstances of the case they would be allowed.

Decision of CHELMSFORD CONSISTORY COURT, ante, p. 70, reversed.

[AS TO THE USE OF LIGHTED CANDLES ON HOLY TABLE, see HALSBURY, Hailsham Edn., Vol. 11, p. 802, para. 1463; and FOR CASES, see DIGEST, Vol. 19, pp. 439, 440, Nos. 2810-2818.]

Cases referred to:

- (1) *Read v. Lincoln (Bp.)*, [1892] A.C. 644; 62 L.J.P.C. 1; 67 L.T. 128; 56 J.P. 725; *affg.*, [1891] P. 9; 64 L.T. 149; 19 Digest 315, 1146.
- (2) *St. Andrew's, Haverstock-Hill*, (1909), 25 T.L.R. 408; 19 Digest 438, 2784.
- (3) *Capel St. Mary, Suffolk (Rector and Churchwardens) v. Packard*, [1927] P. 289; Digest Supp.
- (4) *Re St. Saviour's, Hampstead*, [1932] P. 134; Digest Supp.
- (5) *Re Holy Trinity, Woolwich*, [1949] P. 369; 2nd Digest Supp.
- (6) *Peek v. Trower*, (1881), 7 P.D. 21; 45 J.P. 797; 19 Digest 462, 3091.

APPEAL by the Reverend C. W. Nye, the incumbent, and Mr. W. H. Phillips and Mr. F. J. Darby, the churchwardens, of St. Saviour's Church, Walthamstow, from a decision of Chelmsford Consistory Court, dated May 9, 1950, that not more than two candlesticks might lawfully be on the Holy Table, and that the use of six candlesticks, either on the Holy Table or on a retable, was unlawful.

Hutchinson, K.C., Humphrey King, D. H. Mervyn Davies, and Chavasse for the appellants.

The appeal was unopposed.

Cur. adv. vult.

Aug. 22. SIR PHILIP WILBRAHAM BAKER-WILBRAHAM, read the following judgment. This is an appeal from a judgment of the Chancellor of Chelmsford (LINTON THORP, K.C.) deciding the legality of placing more than two candlesticks on or behind the Holy Table.

St. Saviour's Church, Walthamstow was consecrated in 1874. At the east end was a reredos of mosaic work, having as its central figure a representation of Our Lord on the cross. Immediately in front of the reredos was a retable, on which were a small cross standing on a central pedestal and six brass candlesticks, three on either side of the cross. The candlesticks were in that position from the year 1886 onwards. In 1945 there occurred a fire, which rendered most of the church unfit for use. The reredos, cross and candlesticks were damaged beyond repair. After the fire the vicar and his parishioners set to work to restore the church, as nearly as might be, to its original condition. In January, 1950, the vicar and churchwardens lodged a petition for a comprehensive faculty to authorise (a) an altar table, (b) a crucifix and six candlesticks, (c) a communion rail, (d) a sedilia, (e) clergy and choir stalls, and (f) a pulpit. The petition was supported by the parochial church council with one objector (whose objection was, I understand, only to the cost of the scheme) and all the work proposed was approved by the diocesan advisory committee.

The petition was heard by the learned chancellor on Mar. 28, 1950, and he gave judgment on May 9, authorising the introduction of all the articles prayed for except four of the six candlesticks. He allowed the crucifix on the ground that the mosaic representing the crucifixion had been damaged beyond repair, and that the crucifix would

“represent so far as possible today some continuity in the appearance of the church.”

He did not feel able to apply the same principle to the six candlesticks. After a review of the authorities he felt compelled to hold that the use of more than two lights on the Holy Table or on a retable is unlawful, and that, accordingly, a faculty to place six candlesticks on the retable must be refused.

On the hearing of the appeal it was argued that unless the candlesticks were used ceremonially they were merely articles of church furniture like flower vases or banners, and that it was the use to which an ornament was put which rendered it lawful or unlawful.

Before I come to the authorities, there are two matters to which I ought to draw attention. First, in the course of his judgment the learned chancellor referred to the presence in this church of certain other articles, including two statues of the Blessed Virgin Mary, and pictures representing the stations of the cross, in respect of which no faculty could then be produced. He pointed out that reservation of the sacrament was practised in the side chapel, that a sanctus bell was used at the time of the consecration, and that on Fridays in Lent a short service with an address was held at each of the fourteen stations of the cross. He was careful to make it clear that he did not express directly, or by implication, either approval or disapproval of these ornaments or the use thereof. Those issues were not before the court. Nevertheless, he conceded that the evidence as to the stations of the cross, the sanctus bell, the statues of the Virgin Mary, and the services on Fridays in Lent had led him to apprehend with some anxiety the possibility of a ceremonial use being made of the candlesticks.

Since the hearing in the court below, three faculties have been discovered and produced, *viz.* (a) a faculty granted in 1926 for the renovation of the side chapel, which included the placing of an aumbry in the south wall thereof: this was said to be “for the reservation of the Blessed Sacrament for the sick”; (b) a faculty granted in 1934 to beautify the side chapel which was then referred to as the Lady Chapel—by erecting oak screens and otherwise; (c) a faculty granted in 1940 authorising the erection of a small statue of the Madonna and Child in the Lady Chapel. Although these faculties do not cover all the matters mentioned in the learned chancellor's judgment, they do, at any rate, show that some attention has been paid to legal requirements. Secondly, on the hearing of the appeal new evidence was produced in the shape of an affidavit by the Rev. Harold Riley, secretary of the Church Union, who had, in view of the conflicting

decisions, been collecting as complete information as possible as to the number of parish churches in the province of Canterbury which, in fact, have more than two candles on or behind their principal Holy Tables. For this purpose he had sent a questionnaire to a priest in every rural deanery in the province. The replies from the diocese of Chelmsford covered twenty-seven of the twenty-nine rural deaneries in that diocese. They dealt with 287 parish churches, and stated that in eighty-eight of those churches there were more than two candles on or behind the principal Holy Table. Taking the province of Canterbury as a whole, replies had been received concerning 3,913 churches, and of these 1,013 were stated to have more than two candles on or behind the principal Holy Table. The value of evidence of this kind is doubtless open to question, since a practice is not necessarily legal because it is widespread. Nevertheless, I do not think that this evidence can be completely disregarded.

Coming now to the authorities, I think I need not deal in detail with the earlier ritual cases of the nineteenth century, since they were concerned, not so much with the number of altar lights permissible (although I think it may be assumed that the number referred to was generally two), as with the legality of having any altar lights at all. Before *Read v. Lincoln (Bp.)* (1) it seems to have been established as settled law that the mere use of lighted candles on the Holy Table, when not needed for the purpose of giving light, was unlawful. Since *Read v. Lincoln (Bp.)* (1) the whole situation has been altered, not so much by the actual decision in that case (which in itself was hardly conclusive) as by the extremely full and learned judgment of the Archbishop of Canterbury (ARCH-BISHOP BENSON) ([1891] P. 19), and the judgment of LORD HALSBURY, L.C., in the Privy Council ([1892] A.C. 652), advising that the appeal should be dismissed. Since that time it has become the common practice to allow two lighted candles on or behind the Holy Table, provided that they are not used ceremonially, and the mere fact that they are kept lighted during the service of Holy Communion is not regarded as a ceremonial use.

The question of the number of lights allowable is a different one, on which the authorities are not conclusive. In *St. Andrew's, Haverstock-Hill* (2) the Chancellor of London, in 1909, dismissed a petition for the removal of four out of six candlesticks which had been placed in the church without a faculty and granted a confirmatory faculty for the use of all six. This was a strong decision, but the reasons which led DR. TRISTRAM, K.C., to make it are not obvious from his judgment as reported. More important is *Capel St. Mary, Suffolk (Rector and Churchwardens) v. Packard* (3) which was decided in this court by my predecessor, SIR LEWIS DIBDIN. There a faculty was issued for the removal of four out of six candlesticks on a retable. It was argued before me that the point was not really decided since counsel for the appellants did not press for the retention of all six, and the case, therefore, went by default. The reasons why this line was taken are not clearly apparent, and *St. Andrew's, Haverstock-Hill* (2) does not seem to have been referred to. It is clear, however, that in the *Capel St. Mary* case (3) there had been much ceremonial use of lighted candles which could not be justified. I am unable to treat this case as a clear decision that the use of six candles is necessarily illegal in all cases.

The *Capel St. Mary* case (3) was followed in 1932 by *Re St. Saviour's, Hampstead* (4), in which the vicar of the parish had introduced without faculty six candlesticks on a retable behind the Holy Table. The Chancellor of London (F. H. L. ERRINGTON) confirmed the placing of two candlesticks on the retable, and added ([1932] P. 141):

"... I will not require the removal of the other four from the church provided I have a satisfactory undertaking by Mr. Luxmoore-Ball [the incumbent], as to their use."

Whether any such undertaking was given, and, if so, what was its nature, I

do not know. Finally, in *Re Holy Trinity, Woolwich* (5), the Chancellor of Southwark (E. GARTH MOORE) granted a faculty for six candlesticks, in place of two which were to be removed, subject to the direction that, until further order, not more than two of the lights should be on the altar at the same time. He added ([1949] P. 373):

- A "The petitioners should in due time approach the bishop and discuss the number with him. I am prepared to leave the decision as to the number of lights at any given moment to the directions of the Ordinary."

In coming to this decision the Chancellor of Southwark felt himself free to express his own view in the light of modern scholastic research. He was not bound by *Re St. Saviour's, Hampstead* (4), which was decided in another diocese, and he

- B did not feel himself bound by the *Capel St. Mary* case (3), because there no argument had been put forward in favour of retaining six candles.

In the present case, the learned chancellor in the court below found it impossible to reconcile the decision of CHANCELLOR ERRINGTON in *Re St. Saviour's, Hampstead* (4) with that of CHANCELLOR GARTH MOORE in *Re Holy Trinity, Woolwich* (5). I am not sure that the gulf between these two decisions is quite

- C as wide as he supposed, but certainly there is a discrepancy.

The question which I have to decide is simply one of legality, and, unfortunately, I have not had the advantage of hearing argument on both sides of the question. After careful consideration I have come to the conclusion that, although the use of two altar lights must be regarded as the traditional and recognised use in the Church of England, I cannot hold that the use of more than two is necessarily illegal. The two lights are there according to the injunctions of Edward VI

- D

"... for the signification that Christ is the very true light of the world..."

I have not been able to discover that the use of more than two lights on or behind the Holy Table has any other significance. They are lit on the more important occasions to give greater dignity to the service. On this point I questioned the vicar. He had been incumbent of St. Saviour's, Walthamstow, from December, 1942. Six candlesticks were then on a retable behind the altar, and remained so until the fire in 1945. They were used at the sung eucharist, being lit before and extinguished after the service. They were also used at choral evensong, but then they were extinguished after the third collect. If six new candlesticks were

- E

now authorised, they would be used in exactly the same way. He attached no special significance to six lights (instead of two) except that they emphasised the more important services, and gave an additional dignity to them. I cannot think, therefore, that there is any danger of misuse of the six candlesticks in the present case. That being so, I think they ought to be allowed. For the circumstances of the case are special. Six candlesticks have been used in this church,

- F

if not from the time of its consecration, at any rate from 1886 until the fire in 1945, a period of nearly sixty years. Had it been possible to save the old six candlesticks from the fire, they would doubtless have been replaced without question. I cannot see that the fact that these are new and different candlesticks makes any great difference. For all practical purposes the result is mere replacement. The petition is unopposed. It has the support of the parochial church council, and the designs have been approved by the diocesan advisory committee. In these circumstances I think the faculty should be amended so as to include all six candlesticks.

- G

I should be sorry if this decision were construed as encouraging the use of more than two lights on or behind the Holy Table. As I have already indicated, I think the use of two lights is the recognised use in English churches, and it seems to date back to very early days. All that my decision involves is that it is within the discretion of a diocesan chancellor, in any proper case, to allow more

- H

than two, but this is a discretion which ought to be exercised with great care. As LORD PENZANCE said in *Peek v. Trower* (6) (7 P.D. 27):

"All presumption is to be made in favour of things as they stand."

This is especially so where there is opposition, or any evidence of dissatisfaction. If I may borrow the words of ARCHBISHOP BENSON in *Read v. Lincoln (Bp.)* (1) ([1891] P. 88):

"... where that is the case, even in a small degree, charity and good sense ought not to be violated."

Faculty amended so as to include six candlesticks.

Solicitors: *Trollope & Winckworth* (for the appellants).

[Reported by R. HENDRY WHITE, ESQ., Barrister-at-Law.]

R. v. HARRIS.

[COURT OF CRIMINAL APPEAL (Humphreys, Morris and Sellers, JJ.), August 22, 1950.]

Criminal Law—Vagrancy—"Known character"—Evidence—Previous conviction—Accused discharged conditionally on previous conviction—Vagrancy Act, 1824 (c. 83), s. 4—Prevention of Crimes Act, 1871 (c. 112), s. 15—Criminal Justice Act, 1948 (c. 58), s. 12 (1).

When arrested for an offence under the Vagrancy Act, 1824, s. 4, as amended by the Prevention of Crimes Act, 1871, s. 15, and the Penal Servitude Act, 1891, s. 7, on the ground that, being a suspected person, he was loitering with intent to commit a felony, the appellant was found to be in possession of an imitation firearm and was charged on indictment with an offence under the Firearms Act, 1937, s. 23 (2). At the magistrate's court a detective constable gave evidence that on Dec. 21, 1949, he was present in court when the appellant was conditionally discharged for twelve months, and that a certificate of conviction, which was exhibited, related to the appellant on that occasion. The certificate stated that on Dec. 13, 1949, the appellant was convicted on his own confession of having been found in possession of housebreaking implements. At the trial the certificate was put in as evidence after the detective constable's deposition had been read. It was contended by the appellant that, under the Criminal Justice Act, 1948, s. 12 (1), evidence of the previous conviction was inadmissible.

HELD: under s. 12 (1) of the Act of 1948 the conviction of Dec. 13, 1949, was not to be regarded for the purpose of another case as a conviction, and, therefore, the certificate of conviction should not have been accepted in evidence, but evidence would have been admissible by a witness who had heard the appellant confess in court to the charge of having been found in possession of housebreaking implements or had heard him convicted of that offence and conditionally discharged.

[FOR THE CRIMINAL JUSTICE ACT, 1948, s. 12 (1), see HALSBURY'S STATUTES, Second Edn., Continuation Vol. 1948, p. 167.]

Cases referred to:

- (1) *Clark v. R.*, (1884), 14 Q.B.D. 92; 52 L.T. 136; 49 J.P. 246; *sub nom.*, *R. v. Clark*, 54 L.J.M.C. 66; 37 Digest 364, 1658.
- (2) *R. v. Fairbairn*, [1949] 2 K.B. 690.
- (3) *R. v. Clarke*, [1950] 1 All E.R. 546; [1950] 1 K.B. 523; 114 J.P. 192.

(4) *R. v. Middlesex Quarter Sessions, Ex parte Director of Public Prosecutions*, [1950] 1 All E.R. 916; 114 J.P. 276.

APPEAL against conviction.

A The appellant was convicted at the County of London Sessions on an indictment charging him with an offence under the Firearms Act, 1937, s. 23 (2), in that he was in possession of an imitation firearm when arrested for an offence under the Vagrancy Act, 1824, s. 4, as amended by the Prevention of Crimes Act, 1871, s. 15, and the Penal Servitude Act, 1891, s. 7. The deposition of a witness stating that he was in court on a previous occasion when the appellant was conditionally discharged was read at the trial and the certificate relating to that conviction was put in as evidence. The appellant contended *inter alia* that, under the Criminal Justice Act, 1948, s. 12 (1), that evidence was inadmissible. The facts appear in the judgment of the court delivered by B HUMPHREYS, J.

Craymer for the appellant.

Durand for the Crown.

C HUMPHREYS, J., delivered the following judgment of the court. The appellant was charged on an indictment with a composite offence which is created by the Firearms Act, 1937, s. 23 (2), a sub-section which provides an additional penalty where a person, who has committed an offence under *inter alia* such of the provisions of the Vagrancy Act, 1824, s. 4, as are referred to in, and amended by, the Prevention of Crimes Act, 1871, s. 15, and the Penal Servitude Act, 1891, s. 7, is found, when arrested for that offence, to be in possession of a firearm or imitation firearm, unless he shows that he had it in his possession for a lawful object. There is no question that the appellant was found in possession of an imitation firearm when he was arrested on a charge, under s. 4 of the Act of 1824 (as amended), that he, being a suspected person, was loitering with intent to commit a felony. At quarter sessions the deposition of a detective constable, who had been bound over conditionally to attend the trial, was read. The evidence which he had given at the police court was as follows:

E "On Dec. 21, 1949, I was present at the County of London Sessions when Harris was conditionally discharged for twelve months. I produce the certificate of conviction. The defendant Harris in this case is the man to whom the certificate relates."

F The document was then put in. It showed that on Dec. 13, 1949, the appellant was in due form of law on his own confession convicted on an indictment against him for that he, in November, 1949, was found having in his possession, without lawful excuse, certain implements of housebreaking. The appellant was convicted by the jury and sentenced, and the first point which is taken on this appeal is that the Criminal Justice Act, 194 , s. 12, prohibited any reference to that previous conviction.

G Section 12 (1) provides:

H "Subject as hereinafter provided, a conviction of an offence for which an order is made under this Part of this Act placing the offender on probation or discharging him absolutely or conditionally shall be deemed not to be a conviction for any purpose other than the purposes of the proceedings in which the order is made and of any subsequent proceedings which may be taken against the offender under the foregoing provisions of this Act . . ."

The effect of the sub-section is that, if the offender commits a further offence during the next twelve months, he may be brought up and sent to prison, or otherwise dealt with, for the earlier offence, but the conviction shall be deemed not to be a conviction for any other purpose. In the opinion of the court, the intention of the legislature was to provide that this method of dealing with persons who have been convicted, *viz.*, either putting them on probation, dis-

charging them absolutely, or ordering that they be conditionally discharged, should not have the effect of a previous conviction for the purpose of other Acts which render a person, who is convicted of an offence under one of them, subject to certain disabilities if he has already been convicted of an offence. The matter is, I think, very well put in MORRISON AND HUGHES ON THE CRIMINAL JUSTICE ACT, 1948, p. 35, where, in a note to s. 12, it is said:

“ The section absolves the offender from legal consequences which otherwise would flow from a conviction.”

That is exactly what it does do.

In the present case the offence was under the Vagrancy Act, 1824, s. 4, which was amended by the Prevention of Crimes Act, 1871, s. 15 (headed “ Amendment of criminal law in certain cases ”). Section 15 of the Act of 1871 provides that:

“ . . . in proving the intent to commit a felony it shall not be necessary to show that the person suspected was guilty of any particular act or acts tending to show his purpose or intent, and he may be convicted if from the circumstances of the case, and from his known character as proved to the justice of the peace or court before whom or which he is brought, it appears to such justice or court that his intent was to commit a felony . . . ”

That section obviously renders admissible in such a case that which would otherwise, according to the common law of England, be inadmissible, *viz.*, evidence of the previous bad character of the accused person although he has not himself put his character in issue. No possible objection, in our view, could have been taken to the procedure adopted in this case if the detective constable, whose deposition I have read, had been present at the trial and had given evidence to the following effect: “ I was present at the court on the day named when the accused was there. I heard him confess to a charge of having been found in possession of certain implements of housebreaking, and he was then discharged subject to the condition that he commit no offence during the period of twelve months thereafter.” That would have been, not merely proof of a previous conviction, but proof of the appellant’s “ known character ” in that he was a person who had admitted in a court of justice that he had committed a certain offence. What was done was merely to produce a document which purported to be a record of a conviction in regard to the appellant, and no other evidence was given in regard to the matter. In any future case we think that courts—whether courts of summary jurisdiction or courts trying a case on indictment with a jury—should be careful to see that evidence is given, not that the accused has been previously convicted, because the conviction itself is not to be regarded for the purpose of any other case as a conviction, but that he was seen doing this, that, or the other, which showed that he is a person of bad character. Among the matters which could be proved would be the fact that on a particular day he admitted that he was, or was found by a jury to be, a person who had committed a criminal offence.

[HIS LORDSHIP added that the learned deputy chairman, in telling the jury that they were entitled to consider the appellant’s “ known character as proved ” under s. 15 of the Act of 1871, said that the appellant had been bound over previously for being a suspected person loitering with intent to commit a felony, and there was no evidence of that before the jury, although there was no question about it being accurate. To tell the jury that the appellant had been convicted of an offence when there was no evidence before them that he had was such a serious matter that it was impossible to uphold the conviction.]

Conviction quashed.

Solicitors: *Solicitor to the Metropolitan Police* (for the Crown); *Registrar of the Court of Criminal Appeal* (for the appellant).

[*Reported by H. McL. MORRISON, Esq., Barrister-at-Law.*]

FENN v. GAZE.

[KING'S BENCH DIVISION (Lord Goddard, C.J., Byrne and Ormerod, JJ.),
October 5, 1950.]

Food and Drugs—Samples—Delivery of sample to consignor—Consignor's name, but no address, appearing on container—Consignor's address known to sampling officer—Validity—Food and Drugs Act, 1938 (c. 56), s. 70 (2).

A Seven churns of milk were sent by a farmer to the place of delivery under a contract of sale. Six of the churns bore a label with his name only, but the seventh bore a label with his name and address. A sampling officer took samples from all seven churns, divided each sample into three parts, and sent one part in each case to the farmer. The results of the analysis showed that each of the samples analysed contained added water. On the question whether, under s. 70 (2) of the Food and Drugs Act, 1938, in six of the seven cases the sampling officer should have retained the parts of the samples delivered to the farmer, since in those cases the farmer's address did not appear on the containers,

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C HELD: the requirement in s. 70 (2) that the sampling officer should retain the part of the sample to be sent to the consignor unless the consignor's name and address appeared on the container containing the article sampled did not preclude the sampling officer from sending the sample to the consignor in cases where the consignor's name and address were known, although the address did not appear on the container, and, therefore, the sampling had been carried out in accordance with the terms of s. 70 (2).

D [FOR THE FOOD AND DRUGS ACT, 1938, s. 70 (2), see HALSBURY'S STATUTES, Second Edn., Vol. 10, pp. 445, 446.]

CASE STATED by Norfolk justices.

E At a court of summary jurisdiction sitting at Beccles seven informations were preferred by the appellant, a sampling officer of the East Suffolk County Council, under the Food and Drugs Act, 1938, s. 24 (1) (c), charging the respondent, a farmer, with having unlawfully sold milk to which an addition of water had been made. At the hearing before the justices on May 12, 1950, it was found that the respondent delivered seven churns of milk to the dairy of the Beccles Working Men's Co-operative Association under a contract between himself and the Milk Marketing Board. One label bearing only the respondent's name was attached to each of six of the churns, and a label bearing his name and address was affixed to the seventh. The appellant took samples from each of the churns on its arrival at the dairy, divided each sample into three parts, and sent one part in each case to the respondent, submitting another part to the public analyst, and retaining the third part. It was contended for the respondent that the part of the sample sent to him should, in the six cases, have been retained by the sampling officer in accordance with s. 70 (2) of the Act of 1938, because the respondent's address did not appear on the labels attached to the churns. The justices convicted the respondent on the information relating to the seventh churn, but dismissed the informations in respect of the other six on the ground that s. 70 (2) of the Act of 1938 required both the name and the address of the consignor to appear on the container if the first part of the sample was not to be retained by the sampling officer.

H Boreham for the appellant.
The respondent did not appear.

LORD GODDARD, C.J.: This is a Case stated by justices for the county of Suffolk raising yet another question under the Food and Drugs Act, 1938, with regard to sampling. The respondent, a farmer, sent to a depot, which was the place of delivery of his milk, seven churns, six of which bore a label with his name only while the seventh bore his name and the name of the village in

which he lived. The sampling officer, knowing who the respondent was and, I suppose, having no doubt where the milk came from, having taken samples from each of the churns, sent a one-third part of each of the samples to the respondent, a fair thing to do if he was going to bring charges against the respondent that the analysis showed added water, as it did. At the hearing of seven informations against the respondent charging him with unlawfully selling to the Milk Marketing Board milk to which water had been added, objection was taken by the respondent that the sampling had been improperly done, because the sampling officer should not have sent to the respondent samples from the six churns the labels on which did not bear the respondent's address. The respondent was convicted on the information in regard to the seventh sample, *i.e.*, from the churn which bore a label with his address on it, but not on the informations in regard to the other six samples.

The Food and Drugs Act, 1938, s. 70 (2), provides:

"A person taking a sample of any food while it is in transit or at the place of delivery to the purchaser, consignee or consumer shall, if he intends to submit it to be analysed by a public analyst, deal with it in the manner provided by the preceding sub-section, except that he shall retain the first-mentioned part of the sample unless the name and address of the consignor appear on the container containing the article sampled, in which case he shall forward that part of the sample to the consignor by registered post or otherwise, together with a notice informing that person that he intends to have part of the sample analysed by the public analyst."

That seems to me to be merely a provision that, if the sampling officer takes a sample of milk and there is no indication where the milk comes from, he may retain not only the part of the sample which he ordinarily keeps himself and produces in court, but also the part which he would otherwise send to the consignor. If the consignor's address is not on the container, he may not know to whom to send the sample. I do not think that s. 70 (2) means that, if the sampling officer knows who the consignor is, he does anything wrong by sending the sample to him, or that the sampling is thereby invalidated. In my opinion, that would be an absurd result.

I can see the difficulty which the justices felt. They felt difficulty over the word "shall" in s. 70 (2), but it seems to me clear that the sampling officer can retain for as long as he likes the part of the sample which is intended for the consignor, and then, when he knows who the consignor is, he can send it to him. In this case, the sampling officer took the sample and retained it in his possession until he caused it to be delivered to the respondent, and, although he might not have been under an obligation to deliver it as the respondent's address was not on the label on the churn, the fact that he did deliver it does not, in my opinion, invalidate the sample. Therefore, the case must go back to the justices with an intimation that the sampling was carried out in accordance with the statute and they must hear the rest of the case.

BYRNE, J.: I agree. It appears to me that the sampling officer did something which he was not obliged to do, but it was not something which he was not permitted to do.

ORMEROD, J.: I agree.

Appeal allowed with costs.

Solicitors: *Sherwood & Co.*, agents for *G. C. Lightfoot*, County Hall, Ipswich (for the appellant).

[*Reported by F. A. AMIES, Esq., Barrister-at-Law.*]

MIDLAND COUNTIES MOTOR FINANCE CO., LTD. v. SLADE.

[COURT OF APPEAL (Somervell, Cohen and Denning, L.J.J.), October 4, 1950.]

Guarantee—Hire-purchase agreement—Indemnity against loss sustained through breach by hirer—Term that guarantor should be informed if payment of instalment more than thirty days overdue—Agreement to give time to hirer—When payment “overdue.”

A A motor-car dealer, having found a purchaser who wished to acquire a car on hire-purchase terms, sold the car to a finance company who entered into a hire-purchase agreement with the purchaser. The agreement provided for the payment of a deposit and twelve monthly instalments falling due on the last day of every month. As part of the transaction the dealer entered into a contract of guarantee with the finance company for the due performance of the hire-purchase agreement. It was a term of the guarantee that it should not be avoided, released or affected by the company giving time to the purchaser, but this term was qualified by two provisos, under the second of which the finance company undertook to inform the guarantor when any payment or instalments should be more than thirty days overdue. The customer failed to pay the instalment due on Oct. 31, and on Nov. 17 the finance company, in consideration of the payment of the additional sum of £1 15s., agreed to give the customer until Nov. 30 to pay the instalment due on Oct. 31. The instalment was not paid on Nov. 30 or at all, and on Dec. 28 the finance company informed the guarantor and called on him to fulfil his guarantee. The guarantor disclaimed liability on the ground that he had not been informed when the instalment was thirty days overdue.

D HELD: the instalment was thirty days overdue on Nov. 30, which was thirty days after the due date of payment fixed by the original agreement, and not thirty days after the date fixed by the agreement to give time, and, therefore, as the guarantor had not been informed of that fact within a reasonable time after Nov. 30, he was released from liability under the guarantee.

E Per DENNING, L.J.: Between Nov. 17 and 30 the debt was *debitum in praesenti solvendum in futuro*.

[AS TO AGREEMENT TO GIVE TIME TO PRINCIPAL DEBTOR, see HALSBURY, Hailsham Edn., Vol. 16, pp. 143-149, paras. 172-177; and FOR CASES, see F DIGEST, Vol. 26, pp. 175-184, Nos. 1313-1411.]

Case referred to:

(1) *McKenna v. City Life Assurance Co.*, [1919] 2 K.B. 491; 88 L.J.K.B. 1223; 122 L.T. 30; 29 Digest 361, 2921.

G APPEAL by the defendant from a decision of HILBERY, J., dated Apr. 18, 1950, whereby he held that the plaintiffs were entitled to recover under the contract of guarantee since, under the agreement of Nov. 17 by which they gave time to the principal debtor, the instalment in question was not due until Nov. 30, and, therefore, not overdue until thirty days thereafter. The facts appear fully in the judgment of SOMERVELL, L.J.

G. N. Black for the defendant.

Drabble for the plaintiffs.

H SOMERVELL, L.J.: This is an appeal by the defendant from a decision of HILBERY, J. The plaintiffs, who are a company who finance hire-purchase transactions, sued the defendant on a contract of guarantee, and the learned judge held that they were entitled to recover.

The defendant, the guarantor, was a dealer in motor-cars. A Mr. Hughes was anxious to purchase a motor-car from the defendant, and desired to obtain the car under a hire-purchase agreement. This agreement, which was between Mr.

Hughes and the plaintiffs, was dated July 31, 1948, and provided for the payment of a sum down and twelve instalments of £21 12s., the first of which became due on Aug. 31 and the succeeding instalments on the last days of the succeeding months. Contemporaneously with that agreement the defendant entered into the agreement of guarantee with the plaintiffs. Under the latter agreement the defendant guaranteed

“ the due and punctual fulfilment and performance by the said William John Hughes of the whole of the terms and provisions of the said agreement and to indemnify the company [the plaintiffs] against any loss damage or expenses they may sustain through any breach thereof by the hirer by my [the defendant's] taking over the said motor vehicle and paying to the company therefor the amount outstanding on their books in respect thereof or otherwise at the option of the company And I [the defendant] agree that this guarantee shall not in anywise be avoided released or affected by reason of any breach or breaches (wilful or otherwise) of the said agreement committed (with or without my knowledge or consent) by the company nor by the company giving time to the hirer or granting him any other indulgence or by the company or the hirer making any variation in the said agreement Provided that no such variation shall make me liable for a greater maximum sum under this guarantee than that for which I am liable as the said agreement now stands Also provided that the company shall inform me when any payment or instalments shall be more than thirty days overdue. Property in the vehicle not to pass from the company until paid for in full.”

The first two instalments were paid. The third instalment, due on Oct. 31, was not paid on that date and was never paid. On Nov. 17 there was an agreement between the plaintiffs and the hire-purchaser extending the time for payment for one month in consideration of Mr. Hughes paying a sum of £1 15s. The parties construed the extension of one month as meaning that Mr. Hughes had till Nov. 30 to pay the instalment due on Oct. 31, not that he had till Dec. 17. Mr. Hughes did not pay on Nov. 30, and on Dec. 13 the plaintiffs wrote expressing surprise that they had not received the money. On Dec. 20 Mr. Hughes wrote back regretting that he had not paid and saying that he could not manage to pay more than £6 a month, which he did not suppose would be satisfactory to the plaintiffs. On Dec. 28 the plaintiffs wrote to the defendant as follows:

“ We have received a communication from Mr. Hughes to the effect that he finds it impossible to meet his obligations to us under the agreement in respect of the above vehicle, and it would appear there is no alternative but for him to return it. We have informed Mr. Hughes that he must deliver the vehicle to your good self, in good condition and running order, and no doubt you will kindly advise us immediately the vehicle is in your possession. For your information, there is a total balance of £216 outstanding.”

That letter, of course, is based on the term of the guarantee under which the company have an option, if the hire-purchaser defaults, to get the guarantor to take over the motor vehicle and pay to the company the amount outstanding. Clearly the letter is based on the view that the amount outstanding means not such instalments as have at that date become due, but the total amount which is then due and the amounts which would have become due and payable, if the contract had continued in operation. On the view I take it is unnecessary to decide which construction is correct.

The defendant contends that the plaintiffs could not call on him to take over the motor-car under the provisions of the guarantee since the last words of the agreement of guarantee following “ Also provided ” were not complied with. It is argued that those words make it a condition of an extension of time that if a period exceeding thirty days elapses from the date when the instalment was originally due under the contract, the guarantor must be informed within a

reasonable time. The defendant contends that the instalment due on Oct. 31 was thirty days overdue on Nov. 30; he was not informed of this until Dec. 28; and, therefore, the plaintiffs failed to perform this term of the contract and it followed that they could not rely on the agreement that the giving of time should not have its normal effect in law and the defendant was not liable under his guarantee. The whole question turns on the construction of the last words of the agreement of guarantee. The plaintiffs contend that the thirty days referred to in this proviso operate in the circumstances which arose here as from Nov. 30 when, under the agreement to give time, the October instalment became due, and, therefore, it was not overdue until thirty days from the time when, under the agreement as varied, it could have been paid. Counsel for the plaintiffs points out that, having regard to the agreement to give time, nothing was due and, therefore, *a fortiori* nothing overdue on Nov. 30. That is the view which commended itself to the learned judge. He thought that there was an inconsistency between the earlier provisions in the guarantee allowing the plaintiffs to give time without prejudice to their rights against the guarantor and the provision that they should give him notice as contended for by the defendant.

This is one of those cases in which parties have used words which are not easy to apply to the circumstances which have arisen. Counsel for the plaintiffs emphasises the word "overdue"—"when any payment or instalments shall be more than thirty days overdue." It cannot, he submits, be overdue when the parties have agreed that, although it became due in the past, it shall be as a right not claimable or due until a future date. I have come to a different conclusion from that of the learned judge. I think the clue to the construction of these words is to be found in the fact that they are a second proviso to the agreement that the giving of time did not avoid the guarantee. Omitting certain words, I will read the latter part of the agreement to bring out what seems to me to be the structure of it:

"... I [the defendant] agree that this guarantee shall not ... be ... affected ... by the company ... giving time to the hirer or granting him any other indulgence ... Provided that no such variation shall make me liable for a greater maximum sum under this guarantee than that for which I am liable as the said agreement now stands Also provided that the company shall inform me when any payment or instalments shall be more than thirty days overdue."

That provision, appearing as a second proviso, must be construed as either limiting or conditioning the agreement which has gone before as to giving time or other indulgences, and so on. It does not seem to me that real effect is given to its place in the agreement on the construction put forward by counsel for the plaintiffs. On that construction time could be given and extended without the knowledge of the defendant who would only know when thirty days elapsed without payment beyond the extended time. That is a construction which seems to me to be unnatural, having regard to the position of these words as a second proviso. On the other hand, the construction put forward by the defendant seems to me the natural construction, having regard to the place of the proviso in the agreement, and also I think it is what one would expect. It, in effect, provides that the plaintiffs can enlarge the time, but if they enlarge it for a period longer than thirty days beyond the original date in the original agreement, then they must inform the defendant. As pointed out by COHEN, L.J., in the course of the argument, one of the words used is "instalments"—payment by instalments. The word "instalments" is not actually used in the hire-purchase agreement, but it plainly refers to the August, September and monthly rentals, and I think that the August rental would be overdue for thirty days on Sept. 30 even though in the meantime an arrangement had been come to for the giving of time. As was said during the argument, it is not a matter which is susceptible of great elaboration. The arguments on both

sides require serious consideration, but, for the reasons I have given, I have come to the conclusion that the learned judge was wrong. That being so, I think it is plain that the claim cannot succeed. I will ask DENNING, L.J., to give the second judgment."

DENNING, L.J.: It often happens that when a man gives a guarantee, he gains nothing out of it for himself. Not so here. This guarantee was given by a seller who was very much interested in seeing that the sale went through so as to obtain his own profit, but that does not affect the situation. The hire-purchase finance companies have gained great benefits from the courts holding that these documents operate according to the letter, and they must take them with the corresponding disadvantages. The plaintiffs bought the car and paid for it, and if they are now to make the seller liable, it is only on his guarantee of the performance by the hirer under the hire-purchase agreement, and they must take that guarantee subject to all the rules of law applicable to it.

The defendant guaranteed the due and punctual payment by the hirer of the instalments of £21 12s. a month, but subsequently the plaintiffs made a binding agreement to give time to the hirer. All we know about it is that the instalment due on Oct. 31 was unpaid, and there is an entry in the company's books on Nov. 18, 1948, whereby, in consideration of the sum of £1 15s. then paid by the hirer, they granted one month's extension. That is plain evidence of a binding agreement to give time, and *prima facie* the defendant was released by reason of it. How do the plaintiffs seek to avoid that result? They say there was an express term whereby they were allowed to give time and the guarantee was not to be avoided by it. I agree, but that was subject to a proviso. The proviso was that the plaintiffs should inform the defendant when any payment or instalment was more than thirty days overdue. Was this proviso fulfilled? In my judgment, this debt became due and payable on Oct. 31, 1948, and it was overdue from that date onwards. By the agreement of Nov. 17, 1948, the plaintiffs agreed that they would not exercise their remedies if the instalment was paid a month in arrear, but that did not affect the existence of the debt or the date when it became due. It was simply an agreement to give time. Its effect was that the debt remained due, but not enforceable. Between Nov. 17 and 30 it was *debitum in praesenti solvendum in futuro*. At the end of November, 1948, it was thirty days overdue, and in order to satisfy the proviso, the plaintiffs ought within a reasonable time thereafter to have told the defendant so, but they did not inform him for another twenty-eight days. The proviso, therefore, was not fulfilled and the plaintiffs have not performed the condition under which alone they could avoid the common law release. It seems to me that the proviso means that the plaintiffs must inform the defendant when any instalments under the original agreement, as originally made, are more than thirty days overdue, whereas the plaintiffs' argument involves that they need only give the information in respect of instalments under that agreement as varied by any subsequent agreement. The words are not clear enough to warrant such an unlikely intention. In my opinion, therefore, the condition contained in the proviso was not fulfilled and the plaintiffs cannot avoid the result of their binding agreement to give time. The surety is, therefore, released.

COHEN, L.J.: I am of the same opinion. I confess that I have changed my mind more than once in the course of the argument, but I am now satisfied that the appeal should succeed. The observation of SCRUTTON, L.J., in *McKenna v. City Life Assurance Co.* (1) ([1919] 2 K.B. 496), seems to me to show that the expressions "due" and "overdue" are each capable of two meanings and that in a certain context money may be due before it becomes payable. That being so, we have to consider what "overdue" means in the last proviso to the agreement of guarantee. The proviso is intended to qualify the relaxation by the defendant of his rights and to afford him some protection. If we accept the contention of counsel for the defendant that an instalment of rent is overdue if

it is not paid on the date originally fixed even though the creditor extends the time for payment, the proviso will ensure that no extension will be made for more than thirty days without the surety being aware of that fact, whereas, if we accept the construction of counsel for the plaintiffs, they can extend the time indefinitely without any communication with the defendant, who may well think that the instalments are being regularly paid. It is true that the defendant may not be able to establish any claim at law as a result of receiving the information that an instalment is overdue, but the receipt of the information may well enable him to prevent undue procrastination. I, therefore, prefer the construction of counsel for the defendant, which seems to me to give business efficacy to the document, to that of counsel for the plaintiffs, which, I think, would render the protection purported to be given by the second proviso practically illusory. I would add that, if I were still in doubt, the maxim that an instrument should be construed *contra proferentem* would lead me to the same conclusion. For these reasons I agree that the appeal should be allowed.

Appeal allowed with costs.

Solicitors: *J. R. Phillips & Co.* (for the defendant); *Barlow, Lyde and Gilbert*, agents for *Swann, Dodson & Co.*, Sheffield (for the plaintiffs).

[Reported by C. N. BEATTIE, ESQ., Barrister-at-Law.]

BARKER v. LEVINSON.

[KING'S BENCH DIVISION (Lord Goddard, C.J., Byrne and Ormerod, JJ.), October 4, 1950.]

Master and Servant—Liability of master—Criminal act of servant—Scope of employment—Rent collector employed by estate agent—Authorisation by master to determine suitability of tenant—Requirement of premium as condition of grant of tenancy, contrary to Landlord and Tenant (Rent Control) Act, 1949 (c. 40), s. 2 (1).

The respondent, who managed a block of flats on behalf of the owners, authorised P., whom he employed as a rent collector, to let one of the flats to Mrs. S. if he was satisfied regarding her suitability as a tenant. P. required of Mrs. S. a premium of £100 as a condition of the grant of the tenancy, contrary to the Landlord and Tenant (Rent Control) Act, 1949, s. 2 (1). The respondent was charged with a breach of s. 2 (1), in that, by his agent P., he had required the premium, but there was no evidence that he authorised P. to negotiate the terms of the tenancy.

HELD: in requiring and accepting the premium P. was not acting within the general scope of his employment, the authority delegated to him by the respondent being limited to satisfying himself that Mrs. S. was a satisfactory tenant and then to letting the flat to her, and, therefore, the respondent was not liable for P.'s criminal act in breach of the absolute prohibition imposed by s. 2 (1) of the Landlord and Tenant (Rent Control) Act, 1949.

Collman v. Mills ([1897] 1 Q.B. 396), distinguished.

[AS TO LIABILITY OF MASTER FOR CRIMINAL ACT OF SERVANT, see HALSBURY, Hailsham Edn., Vol. 22, pp. 231-234, paras. 410-412; and FOR CASES, see DIGEST, Vol. 14, pp. 40-43, Nos. 95-123.]

Cases referred to:

(1) *Linnett v. Metropolitan Police Comr.*, [1946] 1 All E.R. 380; [1946] K.B. 290; 115 L.J.K.B. 513; 174 L.T. 178; 110 J.P. 153; 2nd Digest Supp.

- (2) *Collman v. Mills*, [1897] 1 Q.B. 396; 66 L.J.Q.B. 170; 75 L.T. 590; 61 J.P. 102; 14 Digest 44, 128.

CASE STATED by Middlesex justices.

The respondent was the agent of the owners of a block of flats and had authority to let the flats. In October, 1949, he authorised Harry Purkis, whom he employed as a rent collector, to let one of the flats to Mrs. Irene May Smith if he, Purkis, was satisfied that she would be a satisfactory tenant. Purkis required and received from Mrs. Smith a premium of £100 as a condition of granting to her the tenancy. On May 4, 1950, at a court of summary jurisdiction sitting at Uxbridge, the respondent was charged on an information preferred by the appellant on behalf of the Ruislip-Northwood Urban District Council with requiring, through his agent, Purkis, a premium of Mrs. Smith as a condition of the grant of a tenancy, contrary to the Landlord and Tenant (Rent Control) Act, 1949, s. 2 (1). The justices held that it was not proved to their satisfaction that the respondent authorised Purkis to require the premium or that he knew that Purkis had required or accepted it, and they dismissed the information on the ground that the criminal act of Purkis was not within the scope of his authority from the respondent either expressly or by implication. The appellant appealed.

John Lawrence for the appellant.

E. J. P. Cussen for the respondent.

LORD GODDARD, C.J.: This is a Case stated by justices for the county of Middlesex, before whom the respondent, Benjamin Levinson, was summoned on an information which charged him with requiring a premium of £100 as a condition of the grant to one Mrs. Smith of the tenancy of certain premises at Pinner, contrary to the Landlord and Tenant (Rent Control) Act, 1949, s. 2. Section 2 (1) provides:

“A person shall not, as a condition of the grant, renewal or continuance of a tenancy to which this section applies, require the payment of any premium in addition to the rent.”

There is no doubt that that is an absolute prohibition against a person requiring any premium in addition to the rent. The justices found that the respondent was the agent of a company which owned a block of flats and that he had authority to undertake the care of and conduct the letting of the flats. He had in his employment, as a rent collector, one Purkis, and he authorised Purkis to let the premises in question, No. 10, Valley Close, to Mrs. Smith if Purkis was satisfied that she would make a satisfactory tenant. That is the extent of the authority which the justices find was given to Purkis. He had merely to satisfy himself that Mrs. Smith was a satisfactory tenant and he was then to let the premises to her, and there is no finding that he was authorised or entitled to negotiate the terms of the tenancy. The justices then found:

“As a condition of the grant to the said Mrs. Irene May Smith of the tenancy of No. 10, Valley Close, the said Harry Purkis required of and received from her a premium of £100. It was not proved to our satisfaction that the respondent authorised the said Harry Purkis to require or accept a premium or that the respondent knew that the said Harry Purkis had required or accepted a premium or that the respondent received the premium or any part thereof.”

It was contended that, as Purkis was the servant of the respondent, the respondent became liable for the criminal act which Purkis committed. So far as the findings in this case go, however, Purkis may have put the £100 in his pocket. He may have taken it as a bribe from Mrs. Smith, saying: “If you like to give me £100, I will tell my principal that you are a satisfactory tenant and let you in.” If the master were responsible in such a case, it would be a very serious matter, because it would mean that an estate agent who was managing property

could never safely trust one of his servants to do any act with regard to letting the premises, but would have to do everything himself in case the servant should take a bribe from a prospective tenant.

The principle underlying the cases which deal with the criminal responsibility of a master for the act of his servant can be stated in this way. The master is responsible for a criminal act of the servant if the act is done within the general scope of the servant's employment. In other words, if a master chooses to delegate the conduct of his business to a servant, then, if the servant, in the course of conducting the business, does an act which is absolutely prohibited, the master is liable, which is really only another way of saying that the act done must be within the general scope of the servant's employment. In *Linnett v. Metropolitan Police Comr.* (1), the question was whether one of two joint licensees of licensed premises could be criminally responsible for acts committed by the other joint licensee, the acts being connected with misconduct on the licensed premises. In giving judgment I said ([1946] 1 All E.R. 383):

"In this case, no relationship of master and servant exists between the two licensees, but they were joint licensees, and if one licensee chooses to say to his co-licensee: 'We both hold licences, we are both keepers of the house, but I am not going to take any part whatever in the management, I leave it entirely to you,' he is putting that other one into his shoes and he must then take responsibility for the acts which his co-licensee, who is placed there by him to exercise his own powers and duties, does, and he must take responsibility for what is done. That seems to me to be the principle which underlies all these cases."

If, in the case now before us, the respondent had put Purkis into the position of being a general agent in respect of the flats and had left the management to him, and Purkis had done an illegal act, it may be that the respondent would have been liable. The Case Stated, however, shows no such finding by the justices. Purkis had no authority to negotiate the terms. He had no authority to take a premium, and what he did was an illegal act which his master had in no way, either expressly or impliedly, authorised him to do, and which, moreover, the master had no means of preventing. I can find nothing in the facts found in the Case to show that what Purkis did was within the general scope of his authority.

In *Collman v. Mills* (2) the respondent was the licensed occupier of a slaughterhouse. He had ordered his foreman not to slaughter one beast in front of the other, but, during the absence of the respondent, the foreman did so. In that case the servant was doing that which he was left to do, *viz.*, to slaughter beasts in the course of the business, and, therefore, the respondent was held liable for the act of his servant. For the reasons which I have stated, I think that the justices applied their minds to the right principles in the case and came to a right decision, and, therefore, the appeal will be dismissed.

BYRNE, J.: I agree. It is plain that the authority which Purkis had was of a very limited character, and, therefore, this case does not fall within that line of cases which indicates that the principle is that the master is vicariously responsible if the servant commits an offence in the general scope of his employment. The servant in this case was not acting within the general scope of his employment, and for those reasons I entirely agree with LORD GODDARD, C.J.

ORMEROD, J.: I agree.

Appeal dismissed with costs.

Solicitors: *Sharpe, Pritchard & Co.*, agents for *E. S. Saywell*, Northwood, Middlesex (for the appellant); *Napier (Murray) & Co.* (for the respondent).

[Reported by F. GUTTMAN, ESQ., Barrister-at-Law.]

Re WEBB. SANDOM *v.* WEBB.

[CHANCERY DIVISION (Danckwerts, J.), October 4, 5, 1950.]

Easement—Implied reservation—Lease—Display of advertisements on outer wall of demised premises.

By a written agreement dated Feb. 10, 1939, the landlord granted to the tenant "all the premises on the first and second floors above 405, Footscray Road, New Eltham" for a term of three years from Mar. 6, 1939. The tenant was not under any obligation to repair the outside of the premises. On the expiration of the term, the tenant remained in possession, and on Aug. 11, 1949, the landlord demised to the tenant "all that the first and second floors of the building situate in and being No. 405, Footscray Road . . ." for a term of twenty-one years from Mar. 25, 1949. The tenant covenanted to repair the inside of the premises, but was under no obligation to repair the outside, and the lease contained no covenant by the landlord to repair the outside of the premises. At the date of the inception of the tenancy in 1939, and at all times since, there were two large advertisements painted on an outside wall of the demised premises, one of the landlord's business, which was carried on on the ground floor, and one of B.'s matches. The tenant claimed that the landlord was not entitled to have the two advertisements so displayed.

HELD: the outer walls were included in the demise to the tenant, but in the circumstances there was to be implied in the lease an easement to display the two advertisements which were in existence at the date of the lease, and to repair and generally to maintain them.

Hope Bros., Ltd. v. Cowan ([1913] 2 Ch. 312); *Simpson v. Weber*, (1925), (133 L.T. 46); and observation of GREER, L.J., in *Liddiard v. Waldron* ([1934] 1 K.B. 447), applied.

[AS TO IMPLIED RESERVATION OF EASEMENT, see HALSBURY, Hailsham Edn., Vol. 11, pp. 285-289, paras. 520-527; and FOR CASES, see DIGEST, Vol. 19, pp. 38-43, Nos. 201-229.]

Cases referred to:

- (1) *Hope Bros., Ltd. v. Cowan*, [1913] 2 Ch. 312; 82 L.J.Ch. 439; 108 L.T. 945; 31 Digest 31, 1781.
- (2) *Waterpark (Lord) v. Fennell*, (1859), 7 H.L. Cas. 650; 33 L.T.O.S. 374; 23 J.P. 643; 11 E.R. 259; 31 Digest 31, 1788.
- (3) *Simpson v. Weber*, (1925), 133 L.T. 46; Digest Supp.
- (4) *Wheeldon v. Burrows*, (1879), 12 Ch.D. 31; 48 L.J.Ch. 853; 41 L.T. 327; 19 Digest 46, 253.
- (5) *Jones v. Pritchard*, [1908] 1 Ch. 630; 77 L.J.Ch. 405; 98 L.T. 386; 19 Digest 43, 229.
- (6) *Pullback Colliery Co., Ltd. v. Woodman*, [1915] A.C. 634; 84 L.J.K.B. 874; 113 L.T. 10; 36 Digest 199, 386.
- (7) *Schwann v. Cotton*, [1916] 2 Ch. 459; 85 L.J.Ch. 689; 115 L.T. 168; 19 Digest 52, 291.
- (8) *Liddiard v. Waldron*, [1934] 1 K.B. 435; 103 L.J.K.B. 172; 150 L.T. 323; Digest Supp.
- (9) *Thomas v. Owen*, (1887), 20 Q.B.D. 225; 57 L.J.Q.B. 198; 58 L.T. 162; 52 J.P. 516; 19 Digest 34, 166.

ADJOURNED SUMMONS to determine the question whether, on the true construction of a lease and in the events which had happened, the landlord was entitled to use without the consent of the tenant for the purpose of advertising the outer walls, or any and if so what portion or portions of the outer walls, of the property demised by the lease.

Mulligan for the tenant.

Richmount for the landlord.

DANCKWERTS, J.: This is an originating summons in which the tenant under a lease asks for the construction of the terms of the lease, the defendant being the landlord. On Feb. 10, 1939, or Mar. 10, 1939 (both dates appear on the document) an agreement was entered into between the landlord and the tenant for a tenancy of the premises about which the dispute arises. The premises are described in this agreement as "all the premises on the first and second floors above 405, Footscray Road, New Eltham," the tenancy was to be for three years from Mar. 6, 1939, the rent was to be £65 a year, the tenant was to keep the interior of the demised premises in good condition and essential repair other than repair of a structural nature, and he was to leave the premises in good and substantial repair. There was, therefore, no obligation thrown on him to repair the outside of the premises. There was a provision for continuing the tenancy for a further period of three years by giving the appropriate notice, and, whether or not notice was given, the tenant did remain in possession of the premises after the expiration of that first period of three years. On Aug. 11, 1949, a lease was entered into between the parties whereby the premises were demised to the tenant for the period of twenty-one years from Mar. 25, 1949, the rent being increased to £104 a year. The premises in the lease are described as

"all that the first and second floors of the building situate in and being No. 405, Footscray Road, New Eltham, in the metropolitan borough of Woolwich, in the county of London, diagonally opposite the approach to New Eltham railway station."

There was a covenant by the tenant to repair the inside of the premises, but no obligation to repair the outside. There were certain covenants by the landlord, but not a covenant to repair the outside of the premises, though there was a covenant by him to pay

"all costs charges and expenses incurred by the lessee in abating a nuisance and executing all such works as may be necessary for abating a nuisance in obedience to a notice served by a local authority,"

and a covenant to perform the obligations affecting the demised premises which were contained in the superior lease. There was the usual covenant for quiet enjoyment.

The description of the premises, "all that the first and second floors of the building situate in and being No. 405, Footscray Road, New Eltham," plainly, in the absence of any provision to the contrary, includes the whole of those floors including the outside walls. That is obvious without authority, but counsel for the tenant referred me to *Hope Bros., Ltd. v. Cowan* (1), where that construction was given to "the demise of a floor or a room or an office bounded in part by an outside wall" notwithstanding that the landlords had covenanted to keep in repair the external parts of the demised premises and to permit the lessees to affix their trade signs, to be approved by the landlords, on the outside wall. That was, in fact, a stronger case, because there were provisions to the effect that the landlords should retain dominion over the outside wall, and, in my view, therefore, it is clear that *prima facie* the tenant in the present case obtained a tenancy of the outside walls, as well as one of the interior, of the first and second floors of this building. Counsel for the landlord attempted to argue that that *prima facie* meaning should be restricted in the circumstances of this case, but I do not think the argument can succeed.

It was said by a great authority, LORD WENSLEYDALE, in *Waterpark (Lord) v. Fennell* (2) (7 H.L. Cas. 684):

"The construction of a deed is always for the court; but, in order to apply its provisions, evidence is in every case admissible of all material facts existing at the time of the execution of the deed, so as to place the court in the situation of the grantor. In deeds, as well as wills, the state of the subject at the time of execution may always be inquired into . . ."

Therefore, I am entitled to look into the circumstances which existed at the date of the lease. There is evidence that at the date of the lease, and, indeed, at the date when the tenancy began in 1939, there was on the outside wall of the first floor demised to the tenant a large advertisement painted in these terms: "Webb's for Meat, Grocery and Provisions," and giving a telephone number. That refers to the landlord's business, which he conducted on the ground floor. There was also an advertisement contained in a frame attached to the outer wall of the first floor advertising Brymay Safety Matches, for which, no doubt, some payments was at all material times obtained by the landlord from the persons whose products were advertised. The tenant is a ladies' hairdresser, and there are two advertisements of his business: "John Sandom, Hair Stylist," on the same outer wall as the other two advertisements.

The presence of the advertisements of Webb's business and Brymay Safety Matches is the subject of the present proceedings. It is contended on behalf of the tenant that, as the outer walls are included in his tenancy—and I have held that to be correct—the landlord has no right to have these advertisements on the outside wall, and the tenant may in other proceedings be entitled to damages or to an injunction or some other relief. It seems to me that, as I have ruled against the landlord on the question of the demise of the property, the point remains whether there is to be implied in his favour some reservation of the right to have these advertisements retained on the wall. I do not know whether counsel for the landlord intended to put his client's case any higher than a right to retain the advertisements which existed at the date when the lease was entered into, but, if he did, in my view, such a claim must fail. It seems to me that the right must be implied, if at all, from the situation as it existed at the date when the lease was entered into. It is contended that there is an implied reservation in favour of the landlord, the grantor, and, while there is no great difficulty—in fact the implication is supported by the Law of Property Act, 1925, s. 62—in implying a right or easement of this kind in favour of the grantee, it is very difficult to imply reservations in favour of a grantor, whether a landlord or vendor. Generally speaking, such rights have been implied in favour of the vendor, as, indeed, counsel for the landlord admitted, only in the case of easements of necessity when it is impossible to obtain access to the grantor's other property unless such a right is implied in his favour.

The present claim cannot be described as a right of necessity, but, in my view, the landlord may have some right to have the advertisements remain. The nearest case to the present appears to be *Simpson v. Weber* (3). In that case, according to the headnote (133 L.T. 46), two adjoining houses, originally belonging to one person subsequently became vested in the plaintiff and defendant respectively. For some years before the severance of ownership, a creeper had been growing in what was now the defendant's garden with its foliage spreading along the wall of the plaintiff's house. Also, again before the severance of ownership, the post of a gate leading from what was now the defendant's garden had been fastened by plugs and nails into the plaintiff's wall. The growth of the creeper had from time to time reached the plaintiff's gutter and he had been obliged to cut it back. The plaintiff brought an action for trespass in respect of the two above-mentioned acts, and the county court judge found both acts to be trespasses. On appeal, it was held by the Divisional Court that both the growth of the creeper on the plaintiff's wall and the fastening of the gate to the plaintiff's wall would amount to trespasses unless they could be justified by the existence of an easement, the implied reservation of an easement in a grant of property depended on the common intention of the parties and there was no evidence that it was not the intention of the parties to the conveyance that creeper and gatepost should remain, and, therefore, an easement in each case was impliedly reserved. There was, however, it was further held, a duty on the part of the grantee to use care that the grantor's property was not unduly interfered with; the defendant in allowing the creeper to obstruct the plaintiff's

gutter had failed to use necessary care; and as to this part of the case the award as to damages must stand. *SALTER, J.*, said (133 L.T. 47):

"Was the county court judge right in holding that the defendant had no legal right of support against the plaintiff's wall either for the creeper or the gatepost? The case raises the question of the implied reservation of easements in grants of property. I do not think it necessary to refer to more than four cases. These are: *Wheeldon v. Burrows* (4), *Jones v. Pritchard* (5), *Pwllbach Colliery Co., Ltd. v. Woodman* (6), and *Schwann v. Cotton* (7). All these cases lay down a general rule, which ought to guide me here. I have to ask, what was the intention of the parties in the present case as to whether the creeper was to remain and grow against the plaintiff's wall, and as to whether the gatepost was to remain fastened to it. I doubt whether the finding of the county court judge does not involve some question of fact; but, upon the whole, I have come to the conclusion, in the case of an easement so obvious as this, that there was no evidence that it was not the intention of the parties that the creeper and gatepost should stay. The basis of easements is always the same—namely the common intention of the parties, and this is most clearly expressed in the cases of an easement of necessity and continuing easements . . ."

It may be said that this case goes further in favour of an implied reservation than any other case which, so far as I know, appears in the books, and, perhaps, with respect to the learned judge, one may say that he put the matter rather in the reverse way to that in which it has generally been put. I think the proper view is, not that there should be no evidence that it was not the intention, but that one should be able to find that there was an intention that the post and creeper (or, in an appropriate case, an advertisement) should remain in their or its original position. However that may be, that authority does not appear to have been adversely criticised in any subsequent case, though I doubt whether it was cited in cases where it might have been the subject of some discussion.

In *Liddiard v. Waldron* (8), which is usually referred to on the subject of reservation of easement in favour of the grantor, it was said, according to the headnote ([1934] 1 K.B. 435):

"A grantor cannot ordinarily reserve an easement otherwise than by express words for the benefit of land which he retains."

Therefore, it was held that the right of way which was contended for as an easement by reservation to be implied was not sustainable. On the other hand, the Court of Appeal there did recognise that there were exceptions to the rule that an easement will not be implied in favour of the grantor as laid down in *Wheeldon v. Burrows* (4), and *GREER, L.J.*, said ([1934] 1 K.B. 447):

"The courts have been faced with the question whether or not in some cases there are exceptional circumstances which justify departure from that rule."

Then he refers to *Thomas v. Owen* (9) as being an exceptional case. It does seem to me that there may be exceptional circumstances in which it is only common sense to imply some reservation, and that such an implication should be made in the circumstances of the present case. When I see from the photograph which is before me that when the parties entered into their transaction there was an enormous advertisement painted on the wall advertising Webb's for meat, grocery and provisions, and a very large advertisement advertising Brymay Safety Matches, which had been there at least since 1939, and when no evidence is given that anything was said by either of the parties about the removal of those advertisements, it appears to me to be common sense to imply an intention on the part of the parties that they should remain. Therefore, I am prepared to hold that there was in favour of the landlord implied in this lease an easement

until the termination of the lease to keep those two advertisements in the position in which they were, and, by necessary implication, a right to repair them, paint them, and do whatever may be necessary from time to time to preserve them as effective advertisements. I do not, however, think there is any evidence which would justify me in going beyond that, or which would justify the landlord in, for instance, letting out other parts of the wall for advertisements or in removing the Brymay advertisement or his own advertisement and substituting advertisements for somebody else's goods. The only right which can be implied in favour of the landlord is limited to those two advertisements which existed at the date of the lease, and I so hold.

Order accordingly. The tenant to pay the landlord's costs as between party and party.

Solicitors: *F. Duke & Son* (for the tenant); *Neil Maclean & Co.* (for the landlord).

[Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.]

NEWMAN v. LIPMAN.

[KING'S BENCH DIVISION (Lord Goddard, C.J., Byrne and Ormerod, JJ.), October 6, 1950.]

Street Trading—Street photographer—London County Council (General Powers) Act, 1947 (c. xlvi), s. 17 (2).

The respondent, who had no street trading licence, photographed a person who was passing in a street, and received from her a sum of money as a deposit in respect of the price for the completed photograph which was not delivered in the street but was subsequently sent by post.

HELD: the provisions of the London County Council (General Powers) Act, 1947, s. 17 (1), prohibiting street trading without a licence were meant to deal with the case of a person who was offering goods which were actually in the street, and did not apply where an agreement was made by two persons in the street relating to goods which were not then physically present, and, therefore, the respondent was Not Guilty of the offence of street trading from a stationary position in the street without a licence, contrary to s. 17 (2).

[FOR THE LONDON COUNTY COUNCIL (GENERAL POWERS) ACT, 1947, s. 15, s. 17, s. 29 (1) (a), see HALSBURY'S STATUTES, Second Edn., Vol. 15, pp. 1332, 1334, 1343.]

Case referred to:

(1) *McIvor v. Robertson* (unreported).

CASE STATED by a metropolitan magistrate.

On May 18, 1950, at Bow Street magistrate's court, an information was preferred by the appellant against the respondent that he did engage in street trading from a stationary position as a street photographer. For the appellant it was contended that the activity of a street photographer constituted street trading within the meaning of s. 29 (1) (a) of the London County Council (General Powers) Act, 1947, as defined by s. 15 (1) and s. 17 (2) of that Act. The respondent contended that he was not occupying the stationary position contemplated by s. 17 (2) of the Act, and was not selling or exposing or offering for sale any article or thing within the terms of the said section.

Arthian Davies, K.C., and Sebag Shaw for the appellant.

The respondent did not appear.

Wingate-Saul appeared as *amicus curiae*.

LORD GODDARD, C.J.: This is a Case stated by the magistrate sitting at Bow Street magistrate's court before whom the respondent was charged "that he on Apr. 8, 1950, did engage in street trading from a stationary position, contrary to s. 29 of the London County Council (General Powers) Act, 1947." That Act provides for the regulation of street trading, which, in s. 15, is defined in these words:

A " 'Street trading' means the selling or exposing or offering for sale of any article or thing in a street."

Section 17 provides:

B "(1) Subject to the provisions of this Part of this Act it shall be unlawful for any person—(a) to engage in street trading in or from a stationary position in any street within a borough; or (b) to engage in street trading in any designated street whether or not in or from a stationary position; unless that person is authorised to do so by a street trading licence. (2) For the purposes of this Part of this Act a person shall be deemed to engage in street trading on any occasion on which he sells or exposes or offers for sale any article or thing in a street whether or not he regularly carries on the business of street trading and a person shall be deemed to engage in street trading in or from a stationary position in a street if while he is engaged in street trading he or any article or thing exposed or offered for sale by him or any receptacle used by him in connection with the street trading occupies a stationary position in the street."

D This case relates to the activities of street photographers, of whom the respondent is one. No doubt many people regard them as pests and would like to see them removed from the streets, and there may or may not be other statutes which enable that to be done, but the question we have to decide is whether the section which I have read is drafted in such a way as to enable proceedings to be taken against these people who stop one in the street, take what is generally called a snapshot, and then offer to deliver a copy the next day. E The magistrate has found

F "that the respondent on the said day photographed a woman passing in the said street and received from her a sum of money and gave to her a receipt or voucher therefor; that when the respondent photographed the said woman and again when he received the said sum of money from her he was in a stationary position in the said street; that the money so received by the respondent was by way of deposit for and on account of the price of the completed photograph."

The magistrate also found that this was not street trading within the meaning of the definition in the Act

G "in so far as he was not occupying the 'stationary position' contemplated by s. 17 (2) of the said Act and was not selling or exposing or offering for sale any article or thing within the term of the said section."

H Counsel for the appellant has submitted here that if a photographer takes a photograph and offers to supply a copy of the photograph he is selling an article or thing. That may be right. We have not considered the question, sometimes raised in cases under the Sale of Goods Act, 1893, whether the contract is for the delivery of the chattel or whether it is to be considered as one for work and labour. I am assuming for this purpose that there is a contract for the delivery of a chattel, namely, a photograph. Counsel for the appellant relied very strongly on *McIvor v. Robertson* (1), a decision of the Court of Justiciary in Scotland, where on a by-law in very similar terms made by Glasgow Corporation the court upheld the conviction of a man of street trading in the same circumstances as these, that is to say, taking a photograph of a person and telling him that the finished article would be delivered the next day. Counsel for the

appellant pressed that case in aid, because, he said, it shows that there is an offering for sale here within the meaning of s. 17 (2).

On full consideration of this matter I have come to the conclusion that the magistrate was right. Looking at the whole scope of this Act I think that it is meant to deal with the case of a man who is offering goods which are actually in the street, and not to apply to a contract or agreement made by two people in the street who are not at the time dealing with goods there physically present. If the definition of "street trading" is read in this way: "'Street trading' means the selling or exposing or offering any article or thing in the street for sale" the matter becomes reasonably clear. This is an enactment to prevent obstruction, and the whole scheme of the Act shows that it is aimed at the "barrow boys," costermongers, hawkers, or other persons who offer for sale goods which are actually in the street. That becomes more clear by looking at s. 17 (2) which I have read. It seems to me that, though a person or the goods must be stationary, the Act contemplates the sale of goods which are in the street and not a contract which may be entered into in the street, because the consequences might be very far reaching in the latter case. There are various markets in London in which a great deal of business is done in the street. The Stock Exchange is one. It may be that this Act would not apply to the Stock Exchange, because stocks and shares are not articles or things which are subject to the Sale of Goods Act, 1893, but many commodities dealt with in Mincing Lane and elsewhere are goods within the ambit of that Act and I cannot believe that it is intended by the Act of 1947 that, if two business men are standing on the pavement and one agrees to sell the other a hundred tons of corn, or something of that sort, and then they pass on, they are committing an offence. That, however, would be the result if we supported the argument put forward by the appellant. It is all very well to say that no one would think of prosecuting in those circumstances, but when there are two possible constructions to be put on an Act it is right to prefer that which would not lead to anomalies that would follow from the other construction.

It is true that we are differing from the opinion expressed by the court in Scotland, and it is, no doubt, desirable that when an Act applies on both sides of the border the construction placed on it by the courts should be uniform. We are taking a different view from that which the judges of the Court of Justiciary took, but we cannot help that. We have to put on this Act, which we are regarding as a whole, the construction which we think is right, and, in my opinion, I think the magistrate came to a right construction in holding that it dealt with the exposing or offering for sale of goods which were in the street and not merely entering into a contract to sell goods, although that contract might be entered into in the street when two people are standing still. For these reasons I think the appeal must be dismissed.

BYRNE, J.: I am of the same opinion.

ORMEROD, J.: I agree.

Appeal dismissed.

Solicitors: *Allen & Son* (for the appellant); *Treasury Solicitor*.

[*Reported by F. GUTTMAN, ESQ., Barrister-at-Law.*]

PILBURY v. BRAZIER.

[KING'S BENCH DIVISION (Lord Goddard, C.J., Byrne and Ormerod, JJ.),
October 4, 1950.]

Street Traffic—Driving uninsured motor vehicle—Permitting vehicle to be used on road without policy of insurance being in force—Disqualification for holding licence—"Special reason" for refraining from disqualification—Insurers willing to admit liability—Taxi-cab under repair—Insurance cover suspended during overhaul—Renewed user through oversight—Road Traffic Act, 1930 (c. 43), s. 35 (2).

The respondent, the owner of a fleet of taxi-cabs, held a policy of insurance against third party risks under which notice had to be given to the insurers saying which cars were at risk and which were not. On Jan. 6, 1950, one of the vehicles was taken out of service for repair and notice was given to the insurers that it was off risk. On Mar. 12, 1950, it was taken back into service, but, by an oversight of the respondent's manager, the insurers were not notified of the reinstatement of the vehicle, and for some days it was used without there being in force in relation to its user a policy of insurance in respect of third party risks. On Mar. 21, 1950, the respondent produced to the police a letter from the insurers which stated that the underwriters at Lloyds, who held the risk, would have accepted liability under the policy if an accident had occurred on or after Mar. 12. On the prosecution of the respondent for an offence under the Road Traffic Act, 1930, s. 35 (1),

HELD: where authorised insurers stated that in the circumstances of the case they would have regarded themselves as liable and would have been willing to meet any claim, the mischief which the Act was designed to prevent did not arise, and, therefore, in the present case there existed special reasons within s. 35 (2) of the Act for not disqualifying the respondent for holding a licence.

[FOR THE ROAD TRAFFIC ACT, 1930, s. 35, see HALSBURY'S STATUTES, Vol. 23, p. 636.]

CASE STATED by Essex Justices.

On May 4, 1950, at a court of summary jurisdiction sitting at Romford, an information was preferred by the appellant, a police officer, against the respondent for unlawfully permitting the use of a motor vehicle on a road without there being in force in relation to its user a policy of third party insurance, contrary to the Road Traffic Act, 1930, s. 35 (1). The respondent pleaded Guilty and was ordered to pay a fine of £10, but he was not disqualified for holding a licence under s. 35 (2), the justices being of the opinion that, in view of the size of his business, the respondent, who owned thirty-eight taxi-cabs, had to delegate to his manager certain duties, that he acted reasonably in delegating the insurance of these vehicles to the manager, that he had no reason to think that the manager would not carry out his instructions, that he was not aware, nor had he any reason to suspect, that the vehicle was not properly insured, and that the underwriters would have treated the vehicle as covered by insurance had a claim arisen, with the result that they held that there were special reasons why they should not disqualify the respondent for holding a driving licence. On this point the appellant appealed.

A. M. S. Neave for the appellant.

I. H. Jacob for the respondent.

LORD GODDARD, C.J.: This case raises the vexed question what is or what is not a special reason for refraining from disqualifying a motorist who is driving an uninsured car. There is no question whatever—and this court has constantly said so in no uncertain terms—that, ordinarily speaking, driving an uninsured car is a serious offence. It is seldom an answer to say that it was

only driven a little way. Not long ago we had a case where a car was driven for some two hundred yards by somebody who ought not to have driven it because he had no policy of insurance, and in that short distance the driver injured two people and broke a plate glass window. There are, however, cases in which it is found that on a technical and strict construction of the policy the underwriters would not be liable, but that they would regard themselves as liable if an accident happened. The most familiar instance is where a man has forgotten to renew his driving licence. Then, technically, he is not insured, though his policy may have several months to run, but no respectable insurance company would ever take that point if an accident happened in such circumstances, or if the renewal of the policy was out of time for a week, or something of that sort. Only insurers approved by the Ministry of Transport can grant insurances under the Road Traffic Act, 1930, and, if one of the approved insurance companies states that in the circumstances of the case they would have regarded themselves as liable and would have been willing to meet any claim made, it is obvious that the mischief which the Act was designed to prevent does not arise. In those circumstances it cannot be said that there does not exist a special reason for the justices not to order disqualification.

In this case the respondent was a taxi-cab proprietor who had a number of hire cars or taxi-cabs. I do not think the fact that he left it to his manager to see to the insurance of the cabs would have been any excuse if there had been an accident. There was an open cover in the respondent's policy under which notice had to be given saying which cars were at risk and which were not. This particular cab had been taken out of service and off risk, and then it had been put back into service without the insurance company being informed of that fact. The insurance company have stated that, if there had been an accident, they would have regarded themselves as liable, and in those circumstances there was ample ground for the justices to hold that there was a special reason for not ordering disqualification. The only thing on which I differ from them is that, in my view, it was not necessary to impose a fine of £10. They did impose such a fine, and, no doubt, it will be useful in making the respondent more careful in future to see that due notice is given, but it is impossible to say that there were not ample grounds for the justices to refrain from disqualifying him, and, therefore, the appeal is dismissed.

BYRNE, J.: I entirely agree. I think it would have been extremely surprising if the justices had come to any other conclusion than that to which they did come.

ORMEROD, J.: I agree.

Appeal dismissed with costs.

Solicitors: *Sharpe, Pritchard & Co.*, agents for *Arthur Morgan*, Chelmsford (for the appellant); *G. Lebor & Co.* (for the respondent).

[*Reported by F. GUTTMAN, ESQ., Barrister-at-Law.*]

BECKER v. PURCHASE.

[KING'S BENCH DIVISION (Lord Goddard, C.J., Byrne and Ormerod, J.J.), October 5, 1950.]

Quarter Sessions—Costs—Appeal from court of summary jurisdiction—Costs of successful appellant disallowed—Reason for disallowance stated by court—Decision based on conclusion of court on material issue—Appellant's evidence not heard.

A

The appellant appealed to quarter sessions against a conviction by a court of summary jurisdiction for driving a motor vehicle in a manner which was dangerous to the public, contrary to the Road Traffic Act, 1930, s.11 (1), in that he had driven a motor car over the pavement of a London street. It was an essential part of his case that he was obliged to drive over the pavement because the driver of a van was backing the van towards him. After hearing the case for the prosecution, quarter sessions allowed the appeal without calling on the appellant, but refused to make an order as to costs, and they refused to hear counsel for the appellant on the question of costs. The chairman of the court said that they had formed the unanimous view that the driver of the van had stopped the van when the appellant drove over the pavement, and that it had been unnecessary and imprudent for the appellant to cross the pavement, and, therefore, he was not entitled to costs. It was contended by the appellant that the decision of quarter sessions on costs was bad, as it was based on a finding on which his evidence had not been heard.

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C

D

HELD: as the chairman of the justices had given as their reason for refusing to award the appellant his costs their conclusion on a material issue before them on which they had not heard the evidence of the appellant, they had not exercised their discretion judicially, and the case should be remitted to them to hear the appellant's evidence before making a decision as to costs.

E

[AS TO DISCRETION OF QUARTER SESSIONS TO REFUSE TO AWARD COSTS, see HALSBURY, Hailsham Edn., Vol. 21, p. 717, para. 1247; and FOR CASE, see DIGEST, Vol. 33, p. 437, No. 1472.]

CASE STATED by the Appeal Committee of the City of London Quarter Sessions.

F

G

H

The appellant appealed against a conviction at the court at the Mansion House of having, on May 23, 1949, driven a motor vehicle in a manner which was dangerous to the public, contrary to the Road Traffic Act, 1930, s. 11 (1), by driving his motor car over the footpath at the corner of a street. On Jan. 4, 1950, after hearing the case for the prosecution, quarter sessions allowed the appeal without calling on the appellant, but refused to make an order as to costs. The chairman of the court stated that they had reached the unanimous view that the driver of a van, which was involved in the incident, the subject-matter of the appeal, had stopped the van when the appellant drove over the footpath. The appellant's case was that he was forced to mount the footpath because the driver of the van was backing the van towards him. It was contended by the appellant that the decision on costs was bad, as it was based on a finding on a material issue on which his evidence had not been heard. The justices agreed to state a Case for the opinion of the High Court, and a draft Case, which contained the statement of the chairman of the court that they had formed the view that the van was stationary at the time of the incident, was agreed by counsel, but was not accepted by the justices. The Case stated by the justices contained their reason for disallowing costs (*viz.*, that, while they were prepared to accept the appellant's reason for driving over the footpath, as put by counsel on his behalf, as an answer to the charge of dangerous driving, they "were nevertheless of the opinion that it was an unnecessary and imprudent thing to have done amounting to carelessness"), but it omitted any reference to the chairman's statement. At the hearing before the Divisional Court, an affidavit, sworn on behalf of the

appellant by his solicitor and exhibiting the agreed draft Case, was allowed to be read. The facts appear in the judgment of LORD GODDARD, C.J.

Melford Stevenson, K.C., and *Medd* for the appellant.

E. J. P. Cussen for the respondent.

LORD GODDARD, C.J.: This is a Case stated by the appeal committee of the City of London Quarter Sessions and it is of an unusual character. The appellant was convicted at the court at the Mansion House of driving a motor vehicle in a manner which was dangerous to the public, contrary to the Road Traffic Act, 1930, s. 11 (1), in that at a certain place in Tallis Street he drove on to the pavement. He appealed to the City of London Quarter Sessions. Quarter sessions, having heard the evidence adduced for the prosecution and the cross-examination by counsel for the appellant of the driver of a van which was involved in the incident that gave rise to the prosecution and of two pedestrians who were present at the time, were evidently prepared to accept, in general, the case which was being put forward by the appellant. The members of the court conferred on the bench and then said that they would allow the appeal. That clearly showed that they did not think that the prosecution had established a case. If they had merely said: "We allow this appeal, but we shall not give costs," it would have been impossible to ask this court to interfere with the exercise of their discretion as to costs. It is, however, agreed by both parties—although not so stated in the Case which the justices have signed—that the chairman of the court said that they were satisfied that the driver of the van had stopped the van when the appellant drove over the pavement. It may be that the cross-examination had not been thoroughly understood, since the appellant's contention was, apparently, that he was obliged to go on to the pavement because the van was backing towards him. Counsel for the appellant then asked to be heard on the question of costs, but the court said that it would be no use hearing him because they had accepted enough facts to show that the appellant was Not Guilty. They had, therefore, accepted the admissions which had been made in cross-examination in support of the appellant's case, but they had not heard him on the question whether or not the van backed.

If that was a material point in the case, it seems to me that quarter sessions could hardly exercise their discretion in regard to costs without hearing the appellant's evidence on the matter, and, as they had not heard his evidence when the chairman of the justices said that the court were of opinion that the van was stationary when the appellant mounted the pavement, there was not, at the time, sufficient material before them on which they could exercise their discretion whether or not they should give costs. I wish to emphasise, however, that a defendant or a prisoner is not entitled, as of right, to costs whenever a court allows his appeal or dismisses an information against him or if a jury returns a verdict of Not Guilty. Costs are always in the discretion of the court. The court can stop a case and say: "Nevertheless, we are not going to give costs." If, however, a wrong reason is given for not allowing costs, I think the law has always been that a court of appeal can reverse the decision or make some further order.

The difficulty in this case is largely due to the procedure adopted. It would have been more satisfactory if the appellant had applied for a *mandamus*, when we could have had affidavits in full from the members of the court and could have then decided whether or not the case should go back to them, ordering them to give it a further hearing. I think, however, that we can deal with the case satisfactorily as, where a court of quarter sessions states a Case, the court is not *functus officio* until the Case goes back and the court has considered the expression of opinion of this court on the question asked.

The question of law that is put to us is:

"Whether upon the facts stated above the justices exercised a judicial discretion in refusing to award the appellant his costs of the appeal."

The parties had agreed a Case and submitted it to the justices for signature, but it was not adopted by the justices. If parties agree a Case, it is rather a strong thing for justices not to adopt it. The paragraph which was agreed between the parties was this:

- A "The chairman of the said justices then said that the said justices had formed an unanimous view to the effect that the van driver (who was concerned in the incident which was the subject-matter of the appeal) had stopped his van when the appellant drove over the pavement, that it had been unnecessary for the appellant to cross the pavement and that he had been unwise in doing so, and that they, the said justices, were, therefore, not awarding the appellant costs."
- B I think we should answer the question asked by the Case in this way. It appearing to this court from affidavits which it has allowed to be read and by the admission of counsel for the respondent that the chairman of the justices stated that they were satisfied that the van driver concerned in the incident which was the subject-matter of the appeal had stopped, and as the court is satisfied that that question was the issue before the justices, they should not have given a decision on costs without having heard the appellant's evidence on that point.
- C The justices will be asked to hear the appellant's evidence on the point. We are not saying that the justices must give the appellant his costs, nor are we saying that the order which they have made with regard to costs should stand. All we are saying is that, in view of what happened in this case and of the particular reason which the chairman announced, we think that the justices cannot be said to have exercised their discretion on proper material. They ought to have heard more. Therefore, the case must go back to them with that expression of opinion.
- D

- E **BYRNE, J.:** I agree. I only desire to emphasise one observation which LORD GODDARD, C.J., has made, and that is that this case must not be taken as a precedent in regard to the proper procedure in a case in which an appellant is successful before quarter sessions. This case proceeds on its own peculiar circumstances and our decision is based on the fact that the chairman gave a reason for not allowing costs. It should be clearly understood that we are not laying down a general principle that, when a question of costs arises, a defendant who has been successful shall have a right to call evidence.

- F **ORMEROD, J.:** I agree.

Appeal allowed with costs.

Solicitors: *H. B. Nisbet & Co.* (for the appellant); *Comptroller and City Solicitor*, London Corporation (for the respondent).

[*Reported by F. A. AMIES, Esq., Barrister-at-Law.*]

HOLT v. DYSON.

[KING'S BENCH DIVISION (Lord Goddard, C.J., Byrne and Ormerod, JJ.),
October 6, 1950.]

Street Traffic—Dangerous driving—Notice of intended prosecution—Notice sent by registered post to defendant's permanent residence eleven days after commission of the offence—Defendant known to be then seriously ill in hospital—Road Traffic Act, 1930 (c. 43), s. 21 (c).

On Nov. 17, 1949, the respondent was seriously injured in a road accident while driving a motor car in Hove. She was taken, unconscious, to Hove hospital, where she was detained until Jan. 23, 1950. A police officer saw her in the hospital on Nov. 17, Nov. 20 and Nov. 24, and it was known to the police that she was not likely to be discharged from hospital for some time. On Nov. 28 a notice of intended prosecution for an offence against the Road Traffic Act, 1930, s. 11 (1), was sent to her by registered post, addressed to her permanent residence in Worthing. The house being unoccupied at the time, the envelope containing the notice was returned to the police at Hove on Dec. 9, and was served personally on the respondent in the hospital on the same day. On being charged under s. 11 (1) of the Act of 1930 with driving a motor car in a manner which was dangerous to the public, the respondent contended that s. 21 (c) of the Act had not been complied with.

HELD: as the police knew that the respondent was in hospital and would not be returning to her permanent address for some time, their sending the notice of intended prosecution by registered post to her permanent address three days before the period required by s. 21 (c) of the Act of 1930 had expired was not a compliance with the section.

Stanley v. Thomas ([1939] 2 All E.R. 636), distinguished.

[AS TO NOTICE OF INTENDED PROSECUTION, see HALSBURY, Hailsham Edn., Vol. 31, pp. 680, 681, para. 1008; and FOR CASES, see DIGEST Supplement, Street and Aerial Traffic, Nos. 245b-245e.]

Case referred to:

- (1) *Stanley v. Thomas*, [1939] 2 All E.R. 636; [1939] 2 K.B. 462; 160 L.T. 555; 103 J.P. 241; Digest Supp.

CASE STATED by Hove justices.

On Nov. 17, 1949, while driving a motor car on a road in Hove, the respondent was involved in an accident and was seriously injured. She was removed from her car in an unconscious state and taken to the Hove General Hospital, where she was detained until Jan. 23, 1950. She was seen in the hospital three times by a police officer, the third time being on Nov. 24. On Nov. 28 a notice of intended prosecution was sent to her by registered post, addressed to her permanent residence at Worthing. The house was unoccupied at the time, and on Dec. 9 the registered envelope containing the notice was returned to the police station at Hove. On the same day the notice was served personally on the respondent in the Hove General Hospital. On June 1, 1950, at a court of summary jurisdiction sitting at Hove, the respondent was charged, on an information preferred by the appellant, the chief inspector of the Hove Division, East Sussex Constabulary, with driving a motor car in a manner which was dangerous to the public, contrary to the Road Traffic Act, 1930, s. 11 (1). The justices were of opinion (i) that a notice of intended prosecution under s. 21 of the Act had to be served personally or sent by registered post to the place where the addressee actually was or was reasonably believed by the addressor to be, (ii) that the appellant knew that the respondent was at the Hove General Hospital and he, or one of his subordinate officers, also knew that she was not likely to be discharged from hospital for some time, and (iii) that, as the notice was not served on her in the hospital until more than fourteen days after the commission of the offence

s. 21 (c) had not been complied with, and, accordingly, they dismissed the information. From that decision the appellant appealed.

Harold J. Brown for the appellant.

Friend for the respondent.

LORD GODDARD, C.J.: This is a Case stated by justices for the borough of Hove, before whom the respondent was charged under the Road Traffic Act, 1930, s. 11 (1), with driving a motor car in a manner which was dangerous to the public. The point that was taken on her behalf was that no notice of intention to prosecute was given within the period required by s. 21 of the Act, which provides:

“Where a person is prosecuted for an offence . . . relating . . . to . . . dangerous driving, . . . he shall not be convicted unless either—(a) he was warned at the time the offence was committed that the question of prosecuting him for an offence under some one or other of the provisions aforesaid would be taken into consideration; or (b) within fourteen days of the commission of the offence a summons for the offence was served on him; or (c) within the said fourteen days a notice of the intended prosecution specifying the nature of the alleged offence and the time and place where it is alleged to have been committed was served on or sent by registered post to him or the person registered as the owner of the vehicle at the time of the commission of the offence: Provided that—(i) Failure to comply with this requirement shall not be a bar to the conviction of the accused in any case where the court is satisfied that—(1) neither the name and address of the accused nor the name and address of the registered owner of the vehicle, could with reasonable diligence have been ascertained in time for a summons to be served or for a notice to be served or sent as aforesaid . . .”

The accident in this case happened on Nov. 17, 1949, and the respondent was in hospital from Nov. 17 to Jan. 23, 1950, which shows that she received very severe injuries. A police officer saw her in the hospital on Nov. 17, while she was still unconscious. He saw her again in the hospital on Nov. 20, and, although she was conscious, she was confused, as she was still suffering from concussion, and could not recollect the route which she had taken before the accident. He saw her in the hospital for the third time on Nov. 24, when she said that she remembered the route she had followed part of the way, but did not remember the rest. On Nov. 28 the superintendent of police sent a notice of intended prosecution to an address in Worthing which the justices find was the respondent's permanent address. The justices stated in the Case that, in their opinion,

“ . . . the appellant [the chief inspector of police] knew that the respondent was at Hove General Hospital on Nov. 24, 1949, and that it was within his knowledge or the knowledge of one of his subordinate officers that the respondent was not likely to be discharged from hospital for some considerable time . . .”

That being so, I am at a complete loss to understand why the police did not send the notice, either by hand or by post, to the hospital. It would be the ordinary, reasonable and sensible thing to do. They sent it, instead, to an address to which, as they must have known, the respondent would not be returning for some time.

It is contended by the appellant that this point has been decided by *Stanley v. Thomas* (1). In that case, when the police superintendent sent the notice of intended prosecution to the respondent's usual place of residence he knew that the respondent was still in hospital, but the Divisional Court considered that, as the notice was posted nine days before the period required by s. 21 (c) of the Act of 1930 had expired, it was reasonable to suppose that it would, in the ordinary course, reach the respondent before the expiration of the statutory

period. In the case now before us the notice was sent to the respondent's permanent address only three days before the statutory period had expired and while the respondent was in hospital, obviously still very ill. For these reasons, I think that this case is entirely different from *Stanley v. Thomas* (1).

The consequence of acceding to the appellant's contention in this case would be remarkable. If, for example, a person, whose permanent address was in Cornwall, happened to be staying in Northumberland for a month and was involved in a motor accident on the second day of his stay there, the police could send a notice of intended prosecution to his address in Cornwall two days before the expiration of the period required by s. 21 (c) of the Act, although they knew that he was staying in Northumberland. The police must act reasonably in these matters. By s. 21 (c) of the Act, the notice is to be served on the person to be charged, or sent to him by registered post, within fourteen days of the commission of the offence. If the police know where he is staying at the time, they can send the notice to him at that address. They did not do so in this case, and it was entirely their fault that the notice was not received within the fourteen days. For these reasons, I think that the justices came to a perfectly right decision, and the appeal is dismissed.

BYRNE, J.: It is significant that, when the registered envelope containing the statutory notice was returned to the police station on Dec. 9 because there was no one to receive it at the respondent's address, that notice was then served personally on the respondent at the Hove General Hospital on the same day. That indicates, to my mind, that the police knew perfectly well where the respondent was at all material times. It is to be observed that in *Stanley v. Thomas* (1) LORD HEWART, C.J., said that other considerations might apply where the circumstances were of a different kind. The circumstances in this case are entirely different from those in *Stanley v. Thomas* (1), and I agree that this appeal should be dismissed.

ORMEROD, J.: I agree.

Appeal dismissed with costs.

Solicitors: *Sharpe, Pritchard & Co.*, agents for *J. E. Stevens*, town clerk, Hove (for the appellant); *Burton, Yeates & Hart*, agents for *Malcolm, Wilson & Cobby*, Worthing (for the respondent).

[Reported by F. GUTTMAN, ESQ., Barrister-at-Law.]

NOTE.

F. E. HOOKWAY & CO., LTD. v. H. W. HOOPER & CO.

[COURT OF APPEAL (Somervell and Denning, L.J.J.), October 5, 1950.]

Arbitration—Commencement within time fixed by agreement—Extension of time—“Undue hardship”—Delay due to fault of applicants for extension—Loss on sub-contracts—Arbitration Act, 1934 (c. 14), s. 16 (6).

[**EDITORIAL NOTE.** The Arbitration Act, 1934, was repealed by the Arbitration Act, 1950, which came into force on Sept. 1, 1950, and s. 16 (6) of the Act of 1934 is now reproduced in s. 27 of the Act of 1950.]

APPEAL by the buyers from an order of the Divisional Court, dated July 11, 1950, refusing an application under s. 16 (6) of the Arbitration Act, 1934, for an extension of time for claiming arbitration. By s. 16 (6) the court has power to extend the time limited by a contract for claiming arbitration “if it is of opinion that in the circumstances of the case undue hardship would otherwise be caused, and notwithstanding that the time so fixed has expired . . .”

The applicants were buyers of coffee under a contract which contained an arbitration clause requiring any dispute arising out of the contract to be made within fourteen days after the final day of discharge of goods at the port of final destination. The coffee was discharged at Gibraltar, the port of final destination, on Mar. 2, 1950, and the buyers thereupon requested their Gibraltar sub-agents to take samples of the coffee and forward them to London for testing. The sub-agents were unable to do this at once, as the bills of lading, which had been in the buyers' possession since Jan. 25, were still in London. On the receipt of the bills by the sub-agents there was a further delay because the goods had been warehoused and the buyers did not wish to take delivery until Mar. 20. Samples were finally taken on Mar. 24 and forwarded to London where they arrived on Apr. 14. The buyers received the samples on Apr. 17 and on the same day made a claim for arbitration on the question of quality. The umpire found that the buyers' claim was out of time and could not be proceeded with. There was no evidence that the buyers had suffered any loss on sub-sales.

Foster, K.C., and Littman for the buyers.

Stephen Chapman for the sellers.

SOMERVELL, L.J., stated the facts and continued: Counsel for the buyers stresses the wording of s. 16 (6) of the Arbitration Act, 1934, and submits that one has to consider solely the degree of hardship that may be caused. He says rightly that one factor in considering that is whether or not any hardship will fall on the seller. A seller who could say: "After all this time, it will be impossible to prove our case," would have a strong argument against the application being granted. The seller here does not suggest that, but counsel for the buyers goes a stage further than I am prepared to go. He submits that, in considering what is undue hardship, what I may call the negligence of the buyers in failing to take any steps to claim the arbitration as provided for by the agreement is irrelevant. I do not accept that submission. I think the man who can say: "I did everything I could to comply with this provision" would have a case of greater "hardship" than a man who has to say: "I forgot all about this clause, and it is entirely my own fault that I am out of time." It is less hard on him that he should suffer the consequences of his own neglect than it would be on a man who has taken every reasonable step to comply with the provisions of the clause. Therefore, I think this is a relevant circumstance. The inference I draw from the evidence is that the buyers forgot about this clause, and that is a factor which makes it difficult for them to show undue hardship. Dealing with the matter *de novo*, although it is near the line, I think that their application does not come within the section, and the appeal must be dismissed.

DENNING, L.J.: If the delay was no fault of the buyer, it would, no doubt, be an undue hardship on him to hold the clause against him, but, if the delay is his own fault, the hardship may not be undue. It may be a hardship which it is due and proper that he should bear, because he may only have himself to thank for it. The delay is, therefore, a relevant circumstance. Another relevant circumstance is that there is no evidence of any loss on any sub-contracts and no evidence of any claims by sub-buyers or any complaints by them. If there had been, the court might have taken a lenient view of the delay and held that, notwithstanding it, there was undue hardship on the buyer, but in the absence of such evidence, I do not think this is a case where the discretion of the court should be exercised.

Appeal dismissed with costs.

Solicitors: *P. Cromwell* (for the buyers); *William A. Crump & Son* (for the sellers).

C.N.B.

PEARL ASSURANCE CO., LTD. v. WEST MIDLANDS GAS BOARD.

[CHANCERY DIVISION (Wynn-Parry, J.), October 5, 6, 1950.]

Gas — Nationalisation — Compensation — “Securities” — Debenture — Redeemable mortgage debenture — Gas Act, 1948 (c. 67), s. 74 (1).

The Gas Act, 1948, s. 74 provides: “(1) In this Act, except where the context otherwise requires, the following expressions have the meanings hereby respectively assigned to them, that is to say . . . ‘securities,’ in relation to a body corporate, means any shares, stock, debentures and debenture stock of the body corporate, and also includes any mortgages of the body which were quoted in the STOCK EXCHANGE OFFICIAL DAILY LIST (within the meaning of s. 25 of this Act) on all six . . .” of certain specified dates.

The plaintiffs held a document entitled “Redeemable Mortgage Debenture” dated Dec. 19, 1938, issued by the C.D. Gas Co., Ltd., a company incorporated under the Companies Acts. By cl. 1 of the document the company agreed to pay £18,480 to the plaintiffs on Nov. 10, 1963, or on such earlier date as the money would become payable in accordance with the conditions indorsed thereon. By cl. 2 the company agreed to pay interest, and by cl. 3 it charged with such payments the undertaking and all the property of the company present and future. The document constituted a floating charge, and the twelve indorsed conditions were in the form commonly found in debentures issued by companies incorporated under the Companies Acts.

HELD: the document was a “debenture” within the first part of the definition of “securities” in s. 74 (1); while it might be that it could also be described as a mortgage, there was nothing in the later part of the definition to cut down the meaning of the words “debentures and debenture stock” in the earlier part so as to exclude from them a debenture creating a charge on the property of the company; and, therefore, the document was a security in place of which the plaintiffs were to receive compensation under s. 25 of the Act of 1948 by the issue of gas stock.

[FOR THE GAS ACT, 1948, s. 74 (1), see HALSBURY'S STATUTES, Second Edn., Vol. 10, pp. 950-953.]

Case referred to:

- (1) *British India Steam Navigation Co. v. Inland Revenue Comrs.*, (1881), 7 Q.B.D. 165; 50 L.J.Q.B. 517; 44 L.T. 378; 6 Digest 500, 3172.

ADJOURNED SUMMONS to determine whether on the true construction of the Gas Act, 1948, and in the events which had happened (a) the secured debt of £18,480 with interest at the rate of four per cent. per annum payable under or by virtue of and secured by a document dated Dec. 19, 1938, and issued by Cannock District Gas Co., Ltd., to the plaintiffs, which document was called a redeemable mortgage debenture, constituted a liability or obligation of the company within s. 17 of the Act which on the vesting date in the Act vested in and became and remained a liability or obligation of and enforceable against the company, or (b) the document and rights and remedies thereby conferred on the holders thereof (including the right to be paid the debt and interest thereby secured) constituted a security within the meaning of s. 74 (1) of the Act in respect of which the plaintiffs, as holders, were or would be entitled to and bound to accept compensation in accordance with the provisions of s. 25 of the Act.

Lindon, K.C., and *Bonner* for the plaintiffs.

Upjohn, K.C., and *T. D. D. Divine* for the defendants.

WYNN-PARRY, J.: This is a summons which raises a question of construction under the Gas Act, 1948. The plaintiffs, the Pearl Assurance Company,

A Ltd., are the holders of a document described on the face of it as a "redeemable mortgage debenture," dated Dec. 19, 1938, and brought into existence and issued by a company called the Cannock District Gas Co., Ltd., a company incorporated under the relevant Companies Act and an undertaker within the meaning of that term as used in the Gas Act, 1948. By this document, the gas company, by cl. 1, agreed that, on Nov. 10, 1963, or such earlier date as the principal money
B would become payable in accordance with the conditions indorsed thereon, it would pay to the plaintiffs £18,480. By cl. 2 the company agreed in the meantime to pay interest at four per cent. per annum by stated half-yearly payments. By cl. 3 the company charged with such payments the undertaking and all the property of the company present and future, including any capital for the time being uncalled. By cl. 4 it is provided that this mortgage debenture is
C issued subject to and with the benefit of the conditions indorsed thereon which are deemed part of it. Turning to the conditions one finds twelve conditions set out in what may be conveniently and not inaccurately described as a common form usually found in debentures issued by companies incorporated under the Companies Acts with a view to securing money borrowed by them. The charge, it is made clear by condition 1, is a floating charge. Provisions are made for the
D keeping of a register of the debentures; for transfer; as to the two events in which the principal moneys are to become immediately payable; and for the remedies to be open to the holder of the debenture on the happening of either of those events.

D A perusal of the document satisfies me that it is accurately described as a debenture. It is made manifest by the cases which have been cited to me by counsel for the plaintiffs that there does not exist any precise, definite, and universally accepted definition of debenture, but it is equally clear that this document is a debenture. By the Gas Act, 1948, s. 17, it is provided:

E " (1) Subject to the provisions of this Part of this Act [Part II] all property, rights, liabilities and obligations which, immediately before such date as may be appointed by order of the Minister (in this Act referred to as 'the vesting date'), were property, rights, liabilities and obligations of an undertaker to whom this Part of this Act applies, shall on the vesting date vest by virtue of this Act and without further assurance in such area board as may be determined by order of the Minister . . . (6) Notwithstanding anything in this section—(a) there shall not, by reason of the vesting of property, rights, liabilities or obligations of any undertaker to whom this Part of this
F Act applies in any area board or in the Gas Council, be transferred to the board or the council any right, liability or obligation of the undertaker in respect of any securities issued by the undertaker . . . "

G By s. 25, to the language of which I need not refer in detail, it is in substance provided that every holder of securities of any undertaker whose liabilities are taken over is to be compensated by the issue to him of British Gas Stock, and machinery is incorporated in that section to resolve in each particular case how much of British Gas Stock is to be issued by way of compensation.

H Pausing there and looking no further at the Gas Act, 1948, it is plain that the scheme of the Act is to take over gas undertakings carried on by undertakers as defined by the Act, which include not merely companies such as the one concerned in this case, incorporated under the relevant Companies Act, but bodies corporate incorporated under special Acts and bodies corporate to whom the provisions of the Companies Clauses Consolidation Act, 1845, apply. The scheme is that the area board or the Gas Council, in whom the property of the undertaker is vested, shall assume the liabilities and obligations of that undertaker with the exception that, as regards liabilities, whatever falls within the meaning of the word "securities" as used in the Act is not to be kept alive but is to be extinguished, and the person who is the holder immediately before

the appointed day is to receive in place of the extinguished security British Gas Stock.

I pass now to the critical provision in the Act on which the question in this summons arises, *i.e.*, the definition of "securities" in s. 74 (1) of the Act, which so far as is relevant provides:

"(1) In this Act, except where the context otherwise requires, the following expressions have the meanings hereby respectively assigned to them, that is to say . . . 'securities,' in relation to a body corporate, means any shares, stock, debentures and debenture stock of the body corporate, and also includes any mortgages of the body which were quoted in the STOCK EXCHANGE OFFICIAL DAILY LIST (within the meaning of s. 25 of this Act) on all six . . ."

of certain specified dates. The question which is raised on this summons is whether, as the plaintiffs contend, this is a redeemable mortgage debenture, which does not fall within that definition and is, therefore, preserved in existence, or whether, as the defendants, the West Midlands Gas Board (the area board in whom the undertaking of the company is vested), contend, the document falls within the definition of "securities," and, therefore, will be extinguished and the plaintiffs compensated by the issue of an amount of British Gas Stock calculated in accordance with the provisions of s. 25 of the Act.

The point, therefore, is a short point of construction. The opening part of the definition is clearly wide enough to include the document in question, and, indeed, it is conceded on behalf of the plaintiffs that, if the definition of "securities" stopped short before the words "and also includes," the defendants would have no case to answer. Let me repeat the opening words:

"... 'Securities,' in relation to a body corporate, means any shares, stock, debentures and debenture stock of the body corporate . . ."

This document, as I have already said, in my view, is accurately to be described as a debenture and, therefore, *prima facie*, clearly falls within the definition of "securities," but it is argued on behalf of the plaintiffs that this document does not fall within that definition because, having regard to the force of the language contained in the second part of the definition, the words "debentures and debenture stock" in the first part of the definition are confined to debentures and debenture stock which do not create any charge on the property of the body corporate in question. That conclusion is sought to be reached in this way. The definition proceeds by providing that "securities" also include any mortgages of the body which were quoted in the STOCK EXCHANGE OFFICIAL DAILY LIST on six specified days. It is pointed out, with force, that a mortgage which is quoted cannot refer, for instance, to a mortgage of freeholds, and must refer to a mortgage which has the characteristic of marketability, and, therefore, the meaning of the word "mortgage" in the second limb of the definition is mortgage debenture or, on the basis that the two words are interchangeable, debenture mortgage. It is argued from that that, if the word "mortgages" means debenture mortgages or mortgage debentures, and as those mortgages are limited to a particular class, *viz.*, those which are quoted in the STOCK EXCHANGE OFFICIAL DAILY LIST on the days in question, that must of necessity limit the scope of the words "debentures and debenture stock" in the earlier part of the definition, because otherwise no meaning can be given to the second part of the definition, and there could be no sense in its inclusion in the Act unless the words "debentures and debenture stock" in the earlier part are read as being limited to debentures and debenture stock which contain no charge. Such a construction is one which, if the language is sufficiently strong, must have effect, but, in the first place, it is to be observed that it is a construction which, to put it no higher, would defeat what, in my view, as I have already described it, is the scheme and policy of the Act. Further, looking only at the language of the definition of "securities," this construction would run counter to what, at any rate at first

sight, would appear to have been the intention of the draftsman, *viz.*, to incorporate in the Act a definition which, as it progressed, was meant to be of an expanding nature. The definition starts by providing that “ ‘ securities ’ . . . means any shares, stock, debentures and debenture stock of the body corporate, and also includes . . . ” Reliance was placed on the word “ also ” by both counsel on behalf of the plaintiffs, but, in my view, the presence of that word tends strongly against their argument. In my judgment, it indicates that what follows is to be in addition to what has gone before, yet, if the construction for which the plaintiffs contend is the correct construction, the inevitable result will be to cut down what has gone before by the phrase starting with the words “ and also includes.”

Unless, therefore, I find the language of the second part of the definition so strong that I cannot avoid the result, I should not incline to accept the plaintiffs’ construction. I do not find it so strong. I do not find it necessary to make any pronouncement as to the exact scope of the word “ mortgages ” in the second part of the definition, but it is clearly a word which is apt to include those securities issued by statutory companies pursuant to the Companies Clauses Consolidation Act, 1845, s. 38 and s. 41, in the form of sched. C to that Act, where the form is described as a “ Form of mortgage deed ” and contains the word “ Mortgage, number——.” It may well be that the document which I have to consider in this case is not only capable of being described as a debenture, and, therefore, falling under the first part of the definition, but also can be described as a mortgage. It has, on the face of it, the word “ mortgage.” I see no reason, in arriving at a conclusion in this case, to pronounce definitely on that, but, assuming that that was the position, that appears to me not to help the plaintiffs, because it is clear from *British India Steam Navigation Co. v. Inland Revenue Comrs.* (1) that a document which can be described as a debenture may also be described accurately as another type of document, *viz.*, in that case, a promissory note. Nor do I feel constrained to speculate why the mortgages referred to in the second part of the definition are limited to those which were quoted in the STOCK EXCHANGE OFFICIAL DAILY LIST on the six days in question, thus excluding documents falling within the description of mortgages in that definition which were not quoted in the STOCK EXCHANGE OFFICIAL DAILY LIST on those days. That is a matter of policy with which this court cannot be concerned.

It appears to me, therefore, that there is no reason which compels me to cut down the meaning of the words “ debentures and debenture stock ” in the earlier part of the definition, and that there is every reason why I should not do so, having regard both to the policy of the Act and to the language by which the second part of the definition is introduced.

Declaration accordingly. The plaintiffs were ordered to pay the costs.

Solicitors: *Parker, Garrett & Co.* (for the plaintiffs); *Linklaters & Paines* (for the defendants).

[*Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.*]

R. v. BARNET ETC., RENT TRIBUNAL. *Ex parte* REEDS
INVESTMENTS, LTD.,

Applied. WOOLFE v. WEXLER. [1951]
All E.R. 635.

[KING'S BENCH DIVISION (Lord Goddard, C.J., Byrne and Finnemore, JJ.),
July 26, 1950.]

Rent Control—Tribunal—Jurisdiction—"Limitation of rent under any enactment"—*Dwelling-house built under building licence—Maximum rent to be charged on letting stated in application for licence—No condition limiting rent attached to licence—Condition limiting rent and purporting to be condition "attached to a building licence" registered as local land charge under Land Charges Act, 1925 (c. 22), s. 15, pursuant to Building Materials and Housing Act, 1945 (c. 20), s. 8 (1)—Landlord and Tenant (Rent Control) Act, 1949 (c. 40), s. 1 (7) (b).*

An application under the Defence (General) Regulations, 1939, reg. 56A, for a building licence to construct a block of flats contained a statement by the landlord (the builder) that the maximum rent of a flat would be £220 per annum, but the licence, which was issued on Oct. 10, 1945, contained no condition limiting the rent. In a letter, dated Mar. 5, 1946, the local authority informed the landlord that they proposed to register the condition attached to the licence, *viz.*, that the flats should not be let at a rent of more than £220 per annum, as a land charge, under the Land Charges Act, 1925, s. 15, in accordance with s. 8 (1) of the Building Materials and Housing Act, 1945, and a condition limiting the maximum rent to £220 a year and purporting to be a condition "attached to a building licence" was registered as a local land charge. In December, 1947, one of the flats was let to a tenant at a rent of £185 a year. On an application by the tenant to the rent tribunal to determine the reasonable rent of the flat, under the Landlord and Tenant (Rent Control) Act, 1949, s. 1 (1), the landlord contended that, under s. 1 (7) of the Act, the tribunal had no jurisdiction to consider the application because a limitation of the rent was in force, within the meaning of s. 1 (7) (b).

HELD: (i) the application for the licence and the licence could not be read as one document, and, therefore, there was no condition attached to the building licence limiting the maximum rent of the flat.

Jackson Stansfield & Sons v. Butterworth ([1948] 2 All E.R. 558), *applied*.

(ii) the registration under the Land Charges Act, 1925, s. 15, was not a limitation of the rent "imposed by or under any enactment," within the meaning of s. 1 (7) (b) of the Landlord and Tenant (Rent Control) Act, 1949, for the Act of 1925 did not impose the limitation on the rent and the entry in the register merely recorded that a building licence in respect of the premises contained a condition limiting the rent, a statement which was wrong. No condition being attached to the licence, no limitation of the rent was in force within the meaning of s. 1 (7) (b) of the Act of 1949, and, therefore, the rent tribunal had jurisdiction to hear the application, under s. 1 (1).

[FOR THE LANDLORD AND TENANT (RENT CONTROL) ACT, 1949, see HALSBURY'S STATUTES, Second Edn., Vol. 13, p. 1094.]

Case referred to:

(1) *Jackson Stansfield & Sons v. Butterworth*, [1948] 2 All E.R. 558; 112 J.P. 377; 2nd Digest Supp.

MOTION by the landlords for a writ of prohibition to restrain a rent tribunal from proceeding to hear an application by the tenant, under the Landlord and Tenant (Rent Control) Act, 1949, s. 1 (1), to determine the reasonable rent of a dwelling-house, a flat, No. 140, Beaufort Park, Falloden Way, in the county of Middlesex.

The flat, which was built subject to a building licence, dated Oct. 10, 1945, and issued under the Defence (General) Regulations, 1939, reg. 56A, was let to the tenant in December, 1947, at a rent of £185 a year. The application for the building licence contained a statement that the maximum rental would be £220 a year, but no condition limiting the rent appeared on the licence. In 1946 a condition limiting the rent, and purporting to be a condition attached to the building licence, was registered by the local authority as a local land charge, under the Land Charges Act, 1925, s. 15. The landlords contended that, under s. 1 (7) of the Act of 1949, the tribunal had no jurisdiction to hear and determine the application because (*inter alia*) (a) the licence must be read together with the application which limited the rent, and, therefore, there was a limitation of the rent in force, imposed under reg. 56A of the regulations of 1939, within the meaning of s. 1 (7) (b), and (b) the registering of the condition under the Land Charges Act, 1925, constituted a limitation of rent imposed under a statute, within s. 1 (7) (b).

Heathcote-Williams, K.C., and *Stranger-Jones* for the landlords.
J. P. Ashworth for the rent tribunal.

LORD GODDARD, C.J.: Counsel for the landlords moves for a writ of prohibition to restrain the rent tribunal for Barnet, etc., from proceeding to hear a reference under the Landlord and Tenant (Rent Control) Act, 1949, on the ground that they had no jurisdiction to do so. He relies on s. 1 (7) of the Act which provides:

“No application shall be made under this section in respect of any house—(a) while it is under the management of a housing association within the meaning of the Housing Act, 1936 (including a development corporation established under the New Towns Act, 1946), or (b) while any limitation of the rent is in force, being a limitation imposed by or under any enactment not contained in the [Rent Restrictions] Acts or this Act.”

Counsel for the plaintiffs contends that a limitation is in force and that it is imposed by the Land Charges Act, 1925.

In July, 1945, the landlords applied for a building licence to construct a block of flats at Beaufort Park, in the north of London. The following particulars had to be completed on the application form:

“(1) If the house is to be occupied by the applicant, state (a) contract price of house . . . (3) If the house is to be let, state proposed rent of the house . . .”

The landlords stated that the contract price of the building was to be £22,000 and that each flat was “to be let at rentals varying according to type of flat, from £185 to £220 per annum.” Application for a licence has to be made under the terms of the Defence (General) Regulations, 1939, reg. 56A, which is still in force by virtue of the Supplies and Services (Transitional Powers) Act, 1945. Regulation 56A (7) provides:

“An authorisation or licence granted for the purposes of this regulation may be granted subject to conditions or limitations . . .”

That gives power to the licensing authority to impose any conditions which they may see fit to impose. The licence, which was granted to the landlords on Oct. 10, 1945, is in these terms:

“Subject to the conditions hereafter set out licence is hereby granted for the construction of twenty-seven self-contained flats at 139-165, Beaufort Park, N.W.11, at a total cost not exceeding £815 per flat . . . Conditions. Special conditions or limitations: The work to be carried out by Messrs. George Reed & Sons, Ltd., of Estate Office, Beaufort Drive, N.W.11, and no other contractor may be employed without special permission.”

No other conditions are imposed (except some printed conditions, at the back of the licence, which do not affect this point), and there is no reference to any rent or price, other than that the cost is not to exceed £815 per flat.

The Building Materials and Housing Act, 1945, had not been passed when that licence was granted. It was not passed until December, 1945. If it had been passed, the licensing authority would, no doubt, have thought it necessary to limit the rent at which the flats could be let, as s. 7 of that Act deals with the limitation of rent of houses constructed under building licences, and s. 8 (1) provides:

"Where a building licence has been granted, whether before or after the passing of this Act, subject to any condition limiting the price for which a house may be sold or the rent at which it may be let, s. 15 of the Land Charges Act, 1925, as amended by the Law of Property (Amendment) Act, 1926, shall have effect as if the condition were a local land charge acquired by the local authority in the area of which the house is situated, and it shall be the duty of the proper officer of the local authority to register the condition accordingly."

By a letter, dated Mar. 5, 1946, the town clerk informed the landlords that he proposed to register the condition attached to the licence, viz., that the flats should not be let at a rent of more than £220 per annum, as a land charge under the Land Charges Act, 1925, in accordance with s. 8 of the Act of 1945, and the following entry was made in the register of local land charges:

"Conditions attached to a building licence issued on Oct. 19, 1945, in accordance with Defence (General) Regulations which, under s. 8 of the Building Materials and Housing Act, 1945, are required to be registered as a land charge whereby the maximum rent permitted to be charged in respect of this property was fixed at £220 per annum."

No such condition had, however, been attached to the licence. Counsel for the plaintiffs contends that we have to read the application for the licence and the licence as one document. I find it very difficult to give effect to that contention, because, according to the decision of the Court of Appeal in *Jackson Stansfield & Sons v. Butterworth* (1), with which, if I may say so, I whole-heartedly agree, a licence granted for the purposes of reg. 56A of the Defence (General) Regulations, 1939, must be contained in a document. Supposing there had been a prosecution for a breach of this condition of the licence, the summons would have had to be dismissed as soon as the licence was examined, because there is no condition attached to it. It is true that the application for the licence contains a statement by the landlords that they intend to erect a building which is to include flats to be let at rents varying from £185 to £220. The local authority could have put some condition in the licence with regard to the maximum rent that could be charged, but they did not do so, and, therefore, there was no condition attached to the building of these flats, except the condition that a certain firm of builders, and no others, should be employed, and the printed conditions on the back of the licence, which are not relevant.

Counsel for the landlords contends, however, that the registration under the Land Charges Act, 1925, limits the rent, but I think that counsel for the tribunal provided a complete answer to that contention. Section 1 (7) of the Landlord and Tenant (Rent Control) Act, 1949, provides:

"No application shall be made under this section in respect of any house . . . (b) while any limitation of the rent is in force, being a limitation imposed by or under any enactment not contained in the [Rent Restrictions] Acts or this Act."

No limitation has been imposed in this case under the Defence (General) Regulations, 1939, reg. 56A, or under the Building Materials and Housing Act, 1945. The Land Charges Act, 1925, is simply an Act under which charges, or other

matters which are for the purpose of that Act considered as charges, are entered in a register, so that intending purchasers, among whom intending tenants are included, may know what provisions, conditions or restrictions affect the land. It is a beneficial Act enabling prospective purchasers of land to which there is a registered title to inspect the title and find in the register any charges, be they mortgages or restrictive covenants, which affect the land. Anyone who had inspected this register would have seen that it contained a statement that there was a limitation imposed, not by the Land Charges Act, but by the building licence, but that statement is wrong, and steps may have to be taken to have this entry vacated. It is not the Land Charges Act, however, which imposes the limitation on the rent, and the entry does not purport to be imposing a limitation on the rent. It purports to record that there is in existence a building licence which contains these conditions. For these reasons, I am of opinion that the tribunal have jurisdiction to entertain this reference. They considered that they had jurisdiction because, when they looked at the building licence, they saw that there was no condition attached, and I think that that is the right view. The Land Charges Act, 1925, does not attach a condition. It merely records a condition.

BYRNE, J.: I agree.

FINNEMORE, J.: I agree. I think the whole point is whether the licence contains any restriction. It is plain that it does not, but counsel for the landlords has argued that we ought to read the application for the licence as though it was part of the licence. That seems to be quite wrong because, if proceedings had been taken against the landlords for charging a rent higher than that stated in the condition to their licence, they would merely have produced their licence and said: "There is no condition about the rents." It could not have been said: "You suggested in your application that you would limit the rent to £220." The landlords would be entitled to reply: "There was no limitation or condition in my licence, whether by inadvertence or design, matters not." There was no limitation here, and I agree that the application fails.

Motion refused.

Solicitors: *Chandler & Creeke* (for the landlords); *The Solicitor, Ministry of Health* (for the rent tribunal).

[*Reported by F. GUTTMAN, Esq., Barrister-at-Law.*]

Re OAKES (deceased). PUBLIC TRUSTEE v. INLAND REVENUE COMMISSIONERS.

[CHANCERY DIVISION (Romer, J.), October 12, 1950.]

Estate Duty—Property deemed to pass—Money received under policy of assurance—“Effected” by deceased—“Wholly kept up . . . for . . . a donee”—Payment of initial premiums by third party—Commutation of premiums—Policy for the benefit of donee and the deceased—Customs and Inland Revenue Act, 1889 (c. 7), s. 11 (1)—Finance Act, 1894 (c. 30), s. 2 (1) (c).

In 1904 the deceased took out three policies of assurance on his life, expressed to be for the benefit of his wife under the Married Women's Property Act, 1882, s. 11, in the event of his wife's surviving him, but for his own benefit if his wife did not survive him. The first two premiums on the policies were paid, not by the deceased, but by his wife's father. Thereafter, the deceased paid the annual premiums until 1919, when

he paid a lump sum in lieu of future annual premiums, thus converting the policies into fully paid policies. In 1920 the deceased and his wife, who were between them entitled to the whole beneficial interest in the policies, settled them by a voluntary settlement for the benefit of their issue. In 1948 the deceased died, leaving his wife him surviving, and the Crown claimed estate duty in respect of the proportion of the policy moneys equivalent to the proportion of the premiums paid by the deceased, under the Finance Act, 1894, s. 2 (1) (c), which incorporates the Customs and Inland Revenue Act, 1881, s. 38, as amended by the Customs and Inland Revenue Act, 1889, s. 11 (1). By s. 11 (1) of the Act of 1889 the charge imposed by s. 38 (2) of the Act of 1881 was extended to "... money received under a policy of assurance effected by any person ... on his life, where the policy is wholly kept up by him for the benefit of a donee, whether nominee or assignee, or a part of such money in proportion to the premiums paid by him, where the policy is partially kept up by him for such benefit."

HELD: (i) the policies were "effected" within s. 11 (1) of the Act of 1889 by the deceased and not by the wife's father.

(ii) the policies were "kept up" notwithstanding that no premium was paid after 1919, because those words required only that moneys, whenever payable, should be paid for the purpose of keeping the policies on foot, and the final payment made in 1919, as a composition for all future premiums, was the payment of a premium for the purposes of s. 11 (1).

(iii) although the deceased was beneficially interested in the policies as well as his wife, they were "wholly kept up" by the deceased "for the benefit of a donee" within the meaning of s. 11 (1), the word "wholly" relating solely to the payment of the premiums and not to the beneficial interest of the donee.

[AS TO POLICIES KEPT UP FOR A DONEE, see HALSBURY, Hailsham Edn., Vol. 13, pp. 241, 242, para. 232; and FOR CASES, see DIGEST Supp.]

Cases referred to:

- (1) *Barclays Bank, Ltd. v. A.-G.*, [1944] 2 All E. R. 208; [1944] A.C. 372; 113 L.J.K.B. 465; 171 L.T. 366; 2nd Digest Supp.
- (2) *A.-G. v. Meech*, (1931), 15 Annotated Tax Cases 619.
- (3) *Lord Advocate v. Inzievar Estates*, [1938] 2 All E.R. 424; [1938] A.C. 402; 107 L.J.P.C. 65; 159 L.T. 97; Digest Supp.

ADJOURNED SUMMONS under the Administration of Justice (Miscellaneous Provisions) Act, 1933, s. 3, to determine the liability to estate duty of moneys payable under policies of life assurance effected on the deceased's life. The claim was made by the Crown both under s. 2 (1) (c) and under s. 2 (1) (d) of the Finance Act, 1894, but the claim under the latter paragraph was abandoned. The Crown also made a claim for succession duty, but that claim was settled by agreement between the parties.

Jackson Wolfe for the plaintiff, the trustee of the voluntary settlement of the policies.

J. H. Stamp for the Crown.

ROMER, J.: This is an application the object of which is to obtain the decision of the court on the liability, and the extent of the liability, of the estate of Montagu Percy Rowland Oakes to estate duty on certain policy moneys which became payable by reason of his death, which took place on Sept. 2, 1948. The summons also raised the question as to liability to succession duty, but, as I understand it, since the summons was issued the Crown have taken up an attitude on that matter which is acceptable to the plaintiff, and, accordingly, it has ceased to be relevant for discussion.

A Mr. Oakes, whom I will hereafter refer to as "the deceased", effected three separate policies of assurance with the Law Life Assurance Society, each dated Dec. 10, 1904, on his life, for the sums of £2,000, £2,000 and £3,100 respectively, with profits, in consideration of twenty-five annual payments of £74, £74 and £114 14s. respectively, under the Married Women's Property Act, 1882, s. 11, for the benefit of Ellen Winifred Louise Oakes, née Cawston, his wife, in the event, and in the event only, of her surviving him. In the event of her not surviving him, the benefit of the policies would be vested in the deceased himself. The policies then contained certain privileges to which I need not refer, including the right in certain events to convert the policies into fully paid up policies. On Feb. 27, 1919, the policies for £2,000 were converted into fully paid up policies and declared to be exempt from payment of any future premiums, in consideration of the payment of £558 8s. 11d. in respect of each policy, and B in consideration of £860 18s. 10d. paid on the same date the policy for £3,100 was similarly converted into a fully paid up policy. Those payments were made by the deceased. The first two annual premiums on each of the three policies had, however, been paid by the wife's father. There was, apparently, some uncertainty as to who paid the premiums which became payable from C 1906 to 1908 inclusive, but the Crown are prepared to approach the matter on the footing that they were not paid by the deceased. The wife's father, in so far as it is material, died on Dec. 27, 1918.

The policies having been converted into fully paid up policies, the deceased and his wife executed a voluntary settlement on July 21, 1920, and, "as D beneficial owners according to their respective interests," they assigned to the trustee the said three several policies of assurance on certain trusts for the benefit of their daughters and their daughters' issue. The wife survived the deceased, and she is, so far as I am aware, still living. The sum of £20,830 was paid on the death of the deceased in respect of the sums assured by the said three policies, including bonuses. The estimated rate of estate duty payable on the property forming the estate of the deceased and property in which he E had a life interest, and also in respect of the said policy moneys or the limited interests therein so far as liable thereto, is approximately forty per cent., so that the amount involved in this question of estate duty is of some importance to the estate of the deceased. The wife's father was, until some years before his death, possessed of considerable wealth and would normally be described as a wealthy man, but at a date subsequent to 1909 he got into financial F difficulties. The deceased was an officer of comparatively junior rank in His Majesty's Army, and was at first entitled only to his military pay, without being possessed of any other income, but at some time after 1908 he became entitled in possession to additional income or property.

G The Crown say that estate duty is payable in respect of a proportion of the policy moneys which is equivalent to the proportion of the total premiums paid in keeping up the policies which was paid by the deceased. The claim is founded on the latter part of s. 11 (1) of the Customs and Inland Revenue Act, 1889, which, among other things, amends the Customs and Inland Revenue Act, 1881, s. 38 (2). The words in s. 11 (1) on which the question depends are:

H "The charge under the said section shall extend to money received under a policy of assurance effected by any person dying on or after June 1, 1889, on his life, where the policy is wholly kept up by him for the benefit of a donee, whether nominee or assignee, or a part of such money in proportion to the premiums paid by him, where the policy is partially kept up by him for such benefit."

The argument on behalf of the plaintiff, representing the estate, is that that taxing provision does not apply to the present case. In the first place, it is said that, having regard to the fact that the wife's father paid the first two premiums, it cannot be said of the deceased that he was the person who

"effected" the policy of assurance. It is said that, although it was the deceased who applied for the policy and presumably filled up the necessary form for obtaining it, nevertheless the payment of the first premium was an essential ingredient to the obtaining of the policy, and, accordingly, the policy was "effected" at least as much by the father-in-law as it was effected by the deceased, and so it is said that, *in limine*, the provision is not applicable to the facts of this case. I am unable to accept that view of the matter. It seems to me that the mere fact that the father-in-law in this case, who was a wealthy man and whose daughter was marrying a comparatively impecunious officer in the army, promised to pay, and did pay, the first two premiums on this policy, which, after all, had been taken out for the benefit of his daughter, does not come within a long way of resulting in his "effecting" the policy. The policy was, to my mind, undoubtedly "effected" by the husband, *viz.*, the deceased, and the fact that his father-in-law was generous enough, or thought it proper, to pay the first two premiums is an irrelevant factor for consideration. In my judgment, it is clear that these policies were effected by the deceased. A B

On that view of the matter, one has to consider the further language of this taxing provision. Counsel for the plaintiff said that the policy was not "kept up" between 1919 and 1948 by the deceased at all, first, since one cannot "keep up" a policy which no longer requires to be kept up because it is a fully paid up policy, and, secondly, because, if it was kept up by anybody, it was kept up, not by the deceased but by the deceased and his wife, who executed a settlement of these policies and dedicated them to a certain trust. Counsel agrees that in 1919 the deceased made a payment to convert these policies into fully paid up policies, but he says that that did not amount to a keeping up, which involves the payment of annual or periodical premiums. I do not think that matter is of any significance, and, indeed, I do not understand the argument except on the footing that, unless you can say of a policy that the premiums are payable for the purpose of keeping it up until the policy matures and the time arrives for payment, such a policy is outside the provisions. That is putting a construction on those words which I do not think they bear. There is nothing in the words about keeping up down to the date of maturity, but the reference is to moneys which, whenever payable, are paid for the purpose of keeping the policy on foot. Therefore, I do not think that any weight can be attached to that argument. C D E

Counsel for the trustee further said that the wife was not a "donee" for whose benefit the policy was kept up. He said, and said rightly, that the wife, although a beneficiary, was a contingent beneficiary only, and that, in so far as the policy was kept up at all at the instance of the deceased, it was kept up just as much for his own benefit as for hers, because he would be entitled to the policy moneys if he survived his wife, and, accordingly, although the wife was a donee within the meaning of the words as used in this provision, which expressly include in that meaning nominees or assignees, nevertheless the policy was not wholly kept up by the deceased for her benefit. I think it forms a necessary part of the argument which was addressed to me by counsel for the plaintiff on that point that you have got to read this section as though it said: "Where the policy is wholly kept up by him *wholly* for the benefit of the donee." Indeed, I think counsel would be inclined to read these words as though "wholly" was transferred from the position which it in fact occupies to a position a few words later on, so that it would control, not only the payments of premiums, but also the beneficial interest, and, of course, that is not so. The word "wholly" is related solely to the payment of the premiums, and not to the beneficial interest of the donee. F G H

However, it is a fact that the husband was at all material times until the settlement in possession of a contingent beneficiary interest, and, accordingly, it remains open to the argument that the payments were made, not exclusively for the benefit of the wife, but for the benefit of them both.

A In my view of the matter, the wife, who was, undoubtedly, a donee for the purpose of this provision, was a person for whose benefit the policy was kept up. It seems to me that where you find a wife who is a nominee of a policy taken out under the Married Women's Property Act, 1882, and moneys are then paid by the husband to keep the policy on foot, she is, undoubtedly, a donee for whose benefit the policy is kept up. It may be that the proper date for inquiring who is the donee may be, for the purpose of the provision, the date when the policy moneys became payable, and, if one applies that test, it is clear that at the date when the policy moneys became payable, if it had not been for the settlement, the wife would have been the person who would have been the donee, because she had survived the husband. Accordingly, I do not think that the mere fact that the husband himself had a contingent beneficial interest in these policies between 1904 and 1920 prevents, or displaces, the view that the wife, for whose benefit primarily these policies were taken out, is to be regarded as a donee for the purpose of this section, and, therefore, I hold that she was, and that payments were made for her benefit, although not exclusively for her benefit.

B There is a further point, and this is an alternative way of putting the case on behalf of the estate—that, in any case, assuming that the taxing provisions applied before, the sums which were paid to convert the policies into fully paid policies in 1919 are not “premiums” for the purposes of the section. It is said that the only premiums which can come within the purview and scope of the provision are annual or other periodical payments which have to be made to keep the policy alive, and that that cannot be said of these payments, which were made, as it is said, not to keep the policy alive, but to establish it once and for all.

D I was referred to one passage in the speech of LORD WRIGHT in *Barclays Bank, Ltd. v. A.-G.* (1). That case was a totally different case from the present matter because there a settlor assigned two policies of assurance which he had effected on his own life to trustees for the benefit of his son and others together with certain investments. He also assigned certain investments to the trustees, and it was the income of those investments that the trustees were directed to use in order to pay the premiums on the policies. On the settlor's death the Crown claimed estate duty on the amount of the policy moneys which had been paid to the trustees of the settlements, it being contended that the policies had been “wholly kept up” by the settlor, “for the benefit of a donee” within the meaning of the Customs and Inland Revenue Act, 1889, s. 11 (1). The House of Lords held that the policies were not “wholly kept up” by the settlor after the date of the settlements within the meaning of that sub-section, and that, therefore, estate duty was not payable. In the course of his speech, LORD WRIGHT said ([1944] A.C. 379):

E “I think that ‘keeping up’ a policy according to the ordinary use of language connotes payment of the premiums, which is the normal method of keeping up a policy. This generally involves periodical payments, and, though a single premium policy is not unknown, that would have the effect not so much of keeping up a policy as establishing its operation once and for all. The Act did not, apparently, contemplate this contingency, but, however that may be, the insertion of the words ‘in proportion to the premiums paid by him’ is necessary to deal with the case where the deceased did not himself wholly keep up the policy but only did so partially.”

H Counsel for the plaintiff relied, I think, on that part of the speech of LORD WRIGHT in support of the view that nothing can be regarded as a premium for the purpose of this provision of the Act of 1889 unless it is an ordinary annual or other periodically recurring payment made for the purpose of keeping the policy on foot. I think that that argument overlooks the true nature and effect of what was done in 1919. These policies required annual premiums over a period of twenty-five years, and a certain number of those years still remained outstanding

when this transaction was effected, but in fact all that it amounted to was that the deceased paid these lump sums in composition of those future outstanding annual premiums. It seems to me to be a remarkable conclusion if, notwithstanding that that was the effect of the payments, and notwithstanding that, if the premiums themselves had continued to be paid by the deceased until his death, the section would have been attracted, nevertheless it is not attracted because the premiums were paid in advance by one lump sum. Counsel for the Crown pointed to the fallacy of the plaintiff's argument on this point by illustrating the case of a policy which provides for payment of a comparatively small annual premium for a period of fifteen years, and then for the payment of a very much larger and final premium in the sixteenth year, and he said that it could hardly be suggested that the payment of the fifteen small sums was to be regarded as the payment of premiums, but that the larger payment, the final payment, was not a payment of premium. I think that clearly, in that case, the final payment would be a payment of a premium, just as much as the earlier ones.

So, in the present case, I come to the conclusion without any great hesitation that the payments made in 1919, which were merely pre-payments of future premiums, are to be regarded on the same lines as the payment of the annual premiums had they been paid. Therefore, it seems to me that all the points on which the objection to the payment of estate duty is founded fail, and that, accordingly, liability to estate duty is attracted under the provisions of this part of the section that I have read. There is no difficulty in applying the result of the conclusions which I have reached, because the position was stated by ROWLATT, J., in *A.-G. v. Meech* (2), and commented on favourably by LORD MACMILLAN in *Lord Advocate v. Inzievar Estates* (3). There LORD MACMILLAN, in dealing with the case then before the House, said ([1938] A.C. 413):

"Of the eleven premiums paid during that period in the present case the deceased paid four and the donees paid seven—that is to say, the deceased paid four elevenths and the respondents paid seven elevenths of the premiums falling due during that period. It follows, in my opinion, that the part of the proceeds of the policy which is proportionate to the premiums paid by the deceased within the meaning of the statute is four elevenths. I am fortified in this reading of the sub-section by the fact that it also commended itself to ROWLATT, J., who in the case of *A.-G. v. Meech* (2), said of the sub-section: 'I think it simply means that, where after the assignment what has kept up the policies has been provided partly by the assignor and partly by the assignee, the policy moneys are to be subject to and escape duty in the same proportion'."

That is the principle which I think should be applied in the present case.

Declaration accordingly. The defendant's costs as between party and party and the plaintiff's costs as between solicitor and client to be taxed and paid out of the policy moneys.

Solicitors: *Stanley Attenborough & Co.* (for the plaintiff); *Solicitor of Inland Revenue.*

[Reported by C. N. BEATTIE, ESQ., Barrister-at-Law.]

NOTE.

CRYSTAL PALACE TRUSTEES v. MINISTER OF TOWN AND COUNTRY PLANNING.

[CHANCERY DIVISION (Danckwerts, J.), October 5, 6, 1950.]

A *Charity—Town and country planning—Benefit to community—Promotion of industry, commerce and art.*

ADJOURNED SUMMONS for a declaration that the Crystal Palace and Park were and are held, by virtue of the Crystal Palace Act, 1914, on charitable trusts or for other charitable purposes within the Town and Country Planning Act, 1947, s. 85 (1). The Crystal Palace Trustees were a body constituted by the Crystal Palace Act, 1914, s. 4, to acquire the Crystal Palace and grounds, and to hold and manage the same as a place of public resort and recreation and for other purposes including education and “the promotion of industry, commerce and art.” The councils of certain counties and other local authorities were empowered, by s. 19 of the Act, to contribute “towards the purposes of this Act,” and sched. I contained a list of local authorities and private individuals who had contributed.

C The trustees constituted by the Act were, to a large extent, representatives of contributing public authorities. The rents and income from investments received by the trustees had been admitted by the Inland Revenue Commissioners to be exempt from income tax under the Income Tax Act, 1918, s. 37, as being vested in trustees for, and only applied to, charitable purposes, but the Minister of Town and Country Planning decided that the land owned by the trustees was

D not land “an interest in which is held on charitable trusts or for ecclesiastical or other charitable purposes of any description” within the meaning of the Town and Country Planning Act, 1947, s. 85 (1), on the ground that the promotion of industry, commerce and art were not charitable purposes.

Cases referred to:

- E (1) *Re Ogden*, (1909), 25 T.L.R. 382; 8 Digest 297, 738.
- (2) *Royal Choral Society v. Inland Revenue Comrs.*, [1943] 2 All E.R. 101; 112 L.J.K.B. 648; 169 L.T. 100; 25 Tax Cas. 263; 2nd Digest Supp.
- (3) *Inland Revenue Comrs. v. Yorkshire Agricultural Society*, [1928] 1 K.B. 611; 97 L.J.K.B. 100; 138 L.T. 192; 13 Tax Cas. 58; Digest Supp.
- (4) *Oxford Group v. Inland Revenue Comrs.*, [1949] 2 All E.R. 537; 2nd Digest Supp.
- F (5) *Farley v. Westminster Bank, Ltd.*, [1939] 3 All E.R. 491; [1939] A.C. 430; 108 L.J.Ch. 307; 161 L.T. 103; Digest Supp.
- (6) *Income Tax Special Purposes Comrs. v. Pemsel*, [1891] A.C. 531; 61 L.J.Q.B. 265; 65 L.T. 621; 55 J.P. 805; 3 Tax Cas. 53; 8 Digest 241, 1.

Russell, K.C., and *Wilfrid Hunt* for the Crystal Palace Trustees.

G *Denys B. Buckley* for the Minister of Town and Country Planning.

DANCKWERTS, J., having recited the facts and referred to the relevant provisions of the Crystal Palace Act, 1914, continued: Counsel for the Minister placed reliance on *Re Ogden* (1), in which a bequest in a will of a fund to be used “... to encourage artistic pursuits or assist needy students in art” was held not to be a charitable gift. Counsel argued that the promotion of art meant the promotion of the interests or activities of artists rather than the benefit of the public at large. This does not seem to me to be the true meaning of the phrase. *Re Ogden* (1) is very inadequately reported, and it is impossible to ascertain properly the reasons which induced the Court of Appeal to reach the conclusion to which they came in that case. The decision was not favourably regarded by the Court of Appeal in *Royal Choral Society v. Inland Revenue Comrs.* (2), and though the Court of Appeal in the latter case based their decision, to some extent, on the educational effect of the society’s activities, it appears that the Court of

Appeal regarded the promotion of the arts as a purpose which was for the benefit of the public at large and of a charitable nature. I do not find any real difficulty in reaching the conclusion that, so far as the objects of the trustees in the present case involve the promotion of art, they are not other than charitable. Some assistance is, I think, to be obtained from the apparent recognition by the legislature in the Mortmain and Charitable Uses Act, 1888, s. 7, that the promotion of art is charitable, but it is not, in my view, necessary to rely only on that factor.

As regards the promotion of industry and commerce, the position is more uncertain, and I do not think that the Minister was unreasonable if he felt difficulty in finding such purposes to be charitable. Counsel for the trustees relied strongly on *Inland Revenue Comrs. v. Yorkshire Agricultural Society* (3). This society's objects were the holding of an annual agricultural show and the promotion of agriculture. The claim of the society to exemption from income tax was resisted mainly on the ground that, by reason of certain privileges which the members of the society possessed, the objects of the society were for the benefit of the members rather than the public welfare by the improvement of agriculture. The society was held to be entitled to exemption, and I think it is clear that the Court of Appeal regarded the improvement of agriculture, or the promotion or advancement of the industry of agriculture, as a charitable purpose. Counsel for the trustees claimed that this was, therefore, a decision that the promotion of a particular industry was a charitable purpose, and that, accordingly, the promotion of industry or commerce at large must be a charitable purpose. Counsel for the Minister argued, however, that the promotion of industry or commerce amounted to no more than the promotion of the interests of those engaged in the manufacture and sale of their particular products and was not in any way concerned with any benefit to the public at large, and so could not be charitable. He argued, further, that the ambit of the objects of the trustees in the present case, as expressed in s. 14 of their Act, was so wide that they would be entitled to expend money or effort in the promotion or advancement of political theories or purposes, which would be quite outside the limits of charitable activities. He relied, in particular, on the extensive nature of the powers contained in s. 14, and especially sub-s. (8), which, he contended, enabled the trustees to do whatever they thought fit, according to their judgment or opinion. In support of this proposition, he relied on the observations of COHEN, L.J., in *Oxford Group v. Inland Revenue Comrs.* (4).

As regards this last argument, it appears to me that the position in the *Oxford Group* case (4) was very different from that with which I have to deal, as the powers in that case were held to be independent objects, and, in my view, the powers conferred by the sub-sections of s. 14 in the present case are not objects in themselves, but are simply powers which are ancillary to and for the purpose of carrying out the objects expressed in the opening provision of the section. As regards the construction which counsel for the Minister sought to put on the words "the promotion of industry and commerce," in my view, such a construction is contrary to the whole purpose of the Act and the creation of the statutory corporation represented by the trustees. I am entitled, where the terms of the trusts are not clear, to have regard to the surrounding circumstances, including the nature of the trustees: see *Farley v. Westminster Bank, Ltd.* (5) [1938] Ch. 494, 495. I find, on perusing the provisions of the Crystal Palace Act, 1914, that the body of trustees constituted by the Act are, to a large extent, trustees representative of the public authorities who contributed to the moneys required for the acquisition of the property to be administered by the trustees as a concern which would not distribute any profits, and in the title and preamble of, and throughout, the Act, the note which is stressed is the provision of benefits to the public.

In those circumstances it seems to me that the intention of the Act in including in the objects the promotion of industry, commerce and art, is the benefit of

the public, that is, the community, and is not the furtherance by the trustees of the interests of individuals engaging in trade or industry. It appears to me that the promotion of industry or commerce in general in such circumstances is a public purpose of a charitable nature within the fourth class in the enumeration of charitable purposes contained in *Income Tax Special Purposes Comrs. v. Pemsel* (6) ([1891] A.C. 583). Therefore, while I appreciate the doubts which the Minister has felt as to the wholly charitable nature of the trustees, I think that he came to the wrong conclusion, and that the Inland Revenue Commissioners came to the right conclusion.

Declaration accordingly. The Minister to pay the costs of the trustees as between party and party.

Solicitors: *John Holmes, Son & Patterson* (for the trustees); *Treasury Solicitor*.
R.D.H.O.

Reversed on question of damages.
C.A. [1951] 2 All E.R. 191.

BIGGIN AND CO., LTD. AND ANOTHER v. PERMANITE, LTD ; BERRY WIGGINS & CO., LTD., THIRD PARTIES.

[KING'S BENCH DIVISION (Devlin, J.), June 12, 13, 14, 15, 16, 19, 20, 21, 22, 23, 26, 27, 28, 29, 30, July 3, 4, 5, 28, 1950.]

D Damages—Measure of damages—Foreseeable consequence of breach of contract—Series of contracts—Plaintiffs compromising claim by ultimate purchaser—Liability of original vendor to plaintiffs—Warranties added to succeeding contracts.

In February, 1945, the Royal Netherlands government asked the plaintiffs to supply an adhesive for use with certain roofing felt. The plaintiffs passed the inquiry to the defendants, who ordered the material from the third parties. Deliveries of the material, which was called Permasec, began in April, 1945, and in the winter of 1945 substantial amounts were applied by contractors to whom it was supplied by the Dutch government. In April, 1946, the Permasec which had been applied began to drip and run, or "creep," and claims were made on the government. The government asked the plaintiffs and the defendants to take back 1,400 tons of Permasec which had not been used, but they refused. Subsequently, the government having withheld payment of £55,000 due to the plaintiffs, it was arranged to refer to arbitration the question of the plaintiffs' liability to the government, but, on the first day of the hearing, the plaintiffs settled the dispute by accepting liability to the extent of £43,000 and costs. The plaintiffs claimed those amounts from the defendants, together with the plaintiffs' own costs of the arbitration, and the defendants made similar claims against the third parties. The court found that the defendants were in breach of one or more of the conditions of their contract with the plaintiffs under the Sale of Goods Act, 1893, s. 13 and s. 14, and that the third parties were in breach of their contract with the defendants in that there was a substantial defect in the Permasec so that it did not conform to the description by which it was sold. On the question of damages,

HELD: (i) the compromise arranged between the plaintiffs and the government was not a foreseeable consequence of a breach of their contract by the defendants or a consequence thereof in the legal sense, but it flowed from the voluntary act of the plaintiffs, and, therefore, it was irrelevant to the issue of damages between the plaintiffs and the defendants, and evidence relating to the compromise was inadmissible.

(ii) in the absence of argument to the contrary, the plaintiffs were entitled to recover the amount of the Dutch government's costs of the arbitration payable by the plaintiffs and that of the plaintiffs' own costs of the arbitration as between solicitor and client.

(iii) it being admitted that the plaintiffs' liability to the Dutch government was the proper basis for the assessment of damages, the plaintiffs were liable to the Dutch government in damages in respect of the 1,400 tons of Permasec which were not used and in respect of the cost to the Dutch government of the repairs necessitated by the defects in the Permasec, but

(a) in so far as the claims were based on sub-sales by the government, in order to sustain them it was necessary that the contracts throughout the series of sales from the defendants or third parties to the ultimate purchaser should be the same, and if the variation to a description were such that it was impossible to say whether the injury which ultimately resulted would have flowed from the breach of the original warranty, the parties must be presumed to have put the liability for the injury outside their contemplation as a measure of compensation. The materiality of any variation in the present case would depend on the nature of the damage suffered.

Observation of SCRUTTON, L.J., in Dexters, Ltd. v. Hill Crest Oil Co. (Bradford) ([1926] 1 K.B. 359), applied.

(b) if, by reason of a material variation in the ultimate contract, the physical damage suffered was excluded as a measure of liability, the position was as if the government's transactions with contractors (by way of sub-sales) were excluded, and the plaintiffs would be entitled to adopt as the measure of damages the difference in value of the Permasec due to its defects; where the government had sold the Permasec after the government had acquired knowledge of its defects, the criterion of liability remained the amount of the physical damage suffered by the use of the Permasec, subject to the limitation that the government was under a duty so far as possible to mitigate the damage.

(iv) it could not be accepted that only nominal damages could be recovered where the notional value of the unsound Permasec was relevant and precise evidence thereof could not be produced, but the court must attempt an assessment on the basis of whatever evidence was available.

Dictum of VAUGHAN WILLIAMS, L.J., in Chaplin v. Hicks ([1911] 2 K.B. 792), applied.

[AS TO MEASURE OF DAMAGES, see HALSBURY, Hailsham Edn., Vol. 10, pp. 126-129, paras. 160-164; and FOR CASES, see DIGEST, Vol. 17, pp. 103-106, Nos. 173-194, Vol. 39, pp. 683, 684, Nos. 2695-2702.]

Cases referred to:

- (1) *Finlay (James) & Co. v. N. V. Kwik Hoo Tong H.M.*, [1929] 1 K.B. 400; 98 L.J.K.B. 251; 140 L.T. 389; Digest Supp.
- (2) *Hammond & Co. v. Bussey*, (1887), 20 Q.B.D. 79; 57 L.J.Q.B. 58; 17 Digest 110, 214.
- (3) *Williams Bros. v. Ed. T. Agius, Ltd.*, [1914] A.C. 510; 83 L.J.K.B. 715; 110 L.T. 865; 39 Digest 670, 2571.
- (4) *British Westinghouse Electric & Manufacturing Co., Ltd. v. Underground Electric Rys. Co. of London, Ltd.*, [1912] A.C. 673; 81 L.J.K.B. 1132; 107 L.T. 325; 17 Digest 126, 343.
- (5) *Fisher v. Val de Travers Asphalte Co.*, (1876), 1 C.P.D. 511; 45 L.J.Q.B. 479; 35 L.T. 366; 17 Digest 113, 233.
- (6) *Kasler & Cohen v. Slavovski*, [1928] 1 K.B. 78; 96 L.J.K.B. 850; 137 L.T. 641; 39 Digest 443, 724.
- (7) *Dexters, Ltd. v. Hill Crest Oil Co. (Bradford)*, [1926] 1 K.B. 348; 95 L.J.K.B. 386; 134 L.T. 494; 39 Digest 684, 2702.

- (8) *British Oil & Cake Co., Ltd. v. Burstall & Co., Burstall & Co. v. Rayner & Co., Rayner & Co. v. Bowring & Co., Ltd.*, (1923), 39 T.L.R. 406; 39 Digest 684, 2701.
- (9) *Dobell (G. C.) & Co., Ltd. v. Barber & Garratt*, [1931] 1 K.B. 219; 100 L.J.K.B. 65; 144 L.T. 266; Digest Supp.
- (10) *Hadley v. Baxendale*, (1854), 9 Exch. 341; 23 L.J.Ex. 179; 23 L.T.O.S. 69; 156 E.R. 145; 17 Digest 93, 101.
- (11) *Victoria Laundry (Windsor), Ltd. v. Newman Industries, Ltd.*, [1949] 1 All E.R. 997; [1949] 2 K.B. 528; 2nd Digest Supp.
- (12) *Wagstaff v. Short-Horn Dairy Co.*, (1884), Cab. & El. 324; 39 Digest 480, 1022.
- (13) *Chaplin v. Hicks*, [1911] 2 K.B. 786; 80 L.J.K.B. 1292; 105 L.T. 285; 17 Digest 92, 98.

B ACTION for damages for breach of contract.

The plaintiffs, Biggin & Co., Ltd., and Archibald Bathgate (Building Materials) Ltd., two associated firms, in 1945 were asked to supply the Royal Netherlands government with large quantities of an adhesive for use with roofing felt. The plaintiffs passed the inquiry to the defendants, for whom the third parties manufactured the required material. The Royal Netherlands government re-sold the adhesive to various contractors, who, when it was found to be unsatisfactory, made claims for compensation on the government. The government in turn claimed against the plaintiffs, who settled the claim against them by the payment of £43,000 and certain costs and now claimed damages against the defendants. The defendants claimed to be indemnified by the third parties. The facts appear in the judgment.

Beufus, K.C., and *Stenham* for the plaintiffs.

Sir Walter Monckton, K.C., *Karmel, K.C.*, and *Beddington* for the defendants.

Diplock, K.C., *J. C. Leonard* and *Vick* for the third parties.

Barrowclough watched the proceedings on behalf of the Royal Netherlands government.

Cur. adv. vult.

July 28. **DEVLIN, J.**, read the following judgment. This case concerns 2,500 tons of Permasec, a material intended for use as an adhesive in the laying of felt roofs. In 1944 the Royal Netherlands government (I shall shorten the title by calling it the Dutch government) had to face the prospect of repairing war damage in Holland and providing emergency housing. Through a department in London, called N.O.R.R. and in charge of a Mr. Kraayvanger, they bought considerable quantities of roofing felt from the plaintiffs, who are two associated companies describing themselves as manufacturers and specialists in roofing materials. They acted in this case through Mr. Robinson, a director, and Mr. Trinder, a sales representative. The plaintiffs had bought a good deal of the felt supplied to the Dutch government from the defendants, who describe themselves as roofing contractors and roofing felt manufacturers. Mr. Turney is their general manager. In February, 1945, the Dutch government asked the plaintiffs to supply an adhesive for use with the felt. In ordinary times this would have been a bituminous adhesive, but in 1945 bitumen was scarce, so that it had to be made of fluxed pitch. The Dutch government also wanted it to be an adhesive which could be applied cold because of the shortage of fuel in Holland. The plaintiffs passed the inquiry on to the defendants, and the defendants ordered the material from the third parties, who are manufacturers of specialised products from bitumen and other similar substances. Mr. Church, the sales manager of the third parties' compound department, arranged the sale, and Mr. Licence, their chief technical adviser, was responsible for the preparation of the compound which he called Tensulac No. 5211, but whose name the defendants, who posed as its manufacturers, changed to Permasec. Deliveries began in April, 1945, f.a.s. Miller's Wharf on the Thames. The

Dutch government transported the material to Holland and re-sold it to numerous Dutch roofing contractors. The results of the application of Permasec were in many cases unsatisfactory. Most of it was applied in the winter of 1945, and in the warm spring of April, 1946, it began to drip and run—"creep" is the term used in the trade. Outside the buildings it dripped down from the eaves, and it found its way through the roofs and dripped inside the buildings too. The roofs had to be repaired or renewed, and claims were made on the Dutch government. In May, 1946, the government asked the plaintiffs and the defendants to take back 1,400 tons of the stuff which was unused, but they would not. The government withheld £55,000 which they owed the plaintiffs for roofing felt. The government would not allow themselves to be sued in the English courts, but they agreed to arbitrate in England. In January, 1949, on the day the hearing of the arbitration began, the plaintiffs, on the advice of their counsel, settled the dispute by allowing the government approximately £43,000 for their claim and paying their costs. The plaintiffs now claim from the defendants these sums, together with their own costs of the arbitration, as damages for breach of contract, and the defendants make similar claims against the third parties.

There is no doubt that the Permasec "crept" seriously. In the course of the trial numerous reasons for the "creeping" have been suggested, and they can be grouped under three heads. The first head covers alleged defects in the composition of the material which made it inherently unsuitable for its purpose. The second and third heads cover alleged misuse of the material, that is to say, its use for a purpose or in a manner for which it was not designed. I have divided the second from the third head according to whether the misuse was innocent or culpable. Under the second head it occurred because the Dutch contractors had not been told, and were not to know, of the peculiarities and limitations of the material. The main question there is to assign the responsibility for the failure to instruct the contractors properly. The third head covers matters of improper workmanship and breaches of the instructions which were given to the contractors. [HIS LORDSHIP considered the evidence and found that when Permasec was used as a top dressing the cause of the "creeping" was that it was not fit for the purpose, for which it was not designed. When it was used as an adhesive, the cause of the "creeping" was threefold—the low temperature at which the compound softened, its incompatibility with bituminous felt, and the insufficient time allowed for drying before application of the felt, none of the Dutch contractors having allowed the prescribed drying time of thirty to sixty minutes. As regards the contract between the plaintiffs and the defendants, HIS LORDSHIP found that it was a term thereof that the adhesive should be suitable for use with pitch felt and bituminous felt. The Permasec did not correspond with its description, and, having regard to the impracticability of the long drying time in Holland, the adhesive could probably not be described as an efficient adhesive, and it was certainly not fit for the purpose for which it was required. As between the plaintiffs and the defendants, one or other of the conditions under the Sale of Goods Act, 1893, s. 13 and s. 14, had not been fulfilled. As between the defendants and the third parties, there was a sale by description, and HIS LORDSHIP was satisfied that the material did not comply with the description, and that the defect in the compound was substantial, which was enough to constitute a breach of contract. HIS LORDSHIP continued:—] It is not suggested that the third parties have any responsibility for the incompatibility with bitumen felt, and so the sum of the matter is that neither the defendants nor the third parties are responsible for the failure of Permasec as a top dressing; that in respect of its use as an adhesive the defendants broke their contract with the plaintiffs in respect of all the three factors which contributed to "creeping"; and that the third parties broke their contract with the defendants in respect of one only of the three factors.

I arrive now at the issue of damages, and the first point I have to consider

is whether, as between the plaintiffs and the defendants, at any rate, it can be disposed of simply by saying that it is the sum of £43,000 odd which the plaintiffs, on the advice of counsel, paid to the Dutch government. In my judgment, the general rule is that a defendant who is required to indemnify a plaintiff against his liability to a third party is entitled to have the existence and precise extent of that liability proved against him in proceedings to which he is a party.

A That does not mean that a plaintiff may not compromise with his adversary save at the risk of losing his indemnity or at the cost of offering the defendant a choice between the compromise or the proof. A plaintiff acts in such a matter at his own risk and for his own benefit. If he compromises erroneously where there is no liability, he cannot make the defendant pay for his error. If he compromises successfully, he will be that much in pocket. It is true that if the B defendant pays him more than the compromise, the plaintiff will be paid more than he has lost. But that is a thing which is bound to happen whenever the nature of the indemnity is precisely defined, and the area of its operation consequently circumscribed, and an event takes place outside that area. One need only take the present case a step further back. If the plaintiffs' sub-sale to the Dutch government was not a matter within the contemplation of the C parties, any profit or loss the plaintiffs made on it would be their own.

"... unless the seller contemplates the possibility of a sub-contract under which a claim may be made on the buyer, the sub-contract must be disregarded for the purpose either of increasing or diminishing the damages. This was one of the many instances in English law where the measure of damage did not give the real loss suffered by the party":

D see *Finlay (James) & Co. v. N. V. Kwik Hoo Tong H.M.* (1), per SCRUTTON, L.J., ([1929] 1 K.B. 411), where also the earlier authorities are cited.

Of course, an indemnity can be what the parties choose to make it, and any general rule is subject to that. A policy of insurance often indemnifies a man against sums he may be adjudged liable to pay, and sometimes against those E which he may pay on the advice of competent counsel. (Incidentally, the latter indemnity is usually only to be found in special circumstances where an assured's reputation might suffer from litigation, and then it is expressly stated. It would be curious if an assured without the aid of express words could arrive at the same result by saying that he was entitled to compromise on the advice of counsel anyway.)

F To determine the matter in principle, it is, therefore, necessary to consider the extent of the indemnity which the law grants by way of damages for breach of contract. The indemnity covers all those matters which the defendant as a reasonable man ought to have foreseen might well result from the breach. It is not disputed that the defendant ought to have foreseen a claim by the Dutch government, but the claim, when it comes within the area of the indemnity, G does not bring with it as a matter of course all that may appertain to the handling of it. Thus, in *Hammond & Co. v. Bussey* (2) it was not disputed that the plaintiff could recover from the defendant the damages he had paid to a third party, and the question was whether he could recover the costs he had incurred in the unsuccessful defence of the action brought by the third party. The H Court of Appeal had to consider whether the probability of such costs having to be incurred was a matter which must have been within the contemplation of the parties, and they held that on the facts of the case it must. I, therefore, have to determine whether the defendants should have regarded it as a serious possibility that one of the consequences of their breach would be that the plaintiffs would compromise the claim. Was the compromise a foreseeable consequence of the making of the claim? In my judgment, it was not a consequence in the legal sense at all. It flowed from the voluntary act of the plaintiffs.

When a claim is made, the respondent to it is bound to choose between admitting and disputing it. If his choice to dispute it is reasonable, the costs of so doing necessarily flow from the making of the claim. But, having chosen to dispute it, he is not bound to make a further choice between compromising and litigating. It is argued that the plaintiffs were under a duty to mitigate their damages, and were, therefore, not at liberty to reject a reasonable opportunity of compromise. If, it is said, they had continued to fight and more than the £43,000 had been awarded against them, they could not have recovered the excess from the defendants. This is putting the same point in another way, for the test of its validity is the same, namely, whether the compromise was a consequence of the breach. In *Williams Bros. v. Ed. T. Agius, Ltd.* (3) VISCOUNT HALDANE, L.C., referred ([1914] A.C. 520) to *British Westinghouse Electric & Manufacturing Co., Ltd. v. Underground Electric Rys. Co. of London, Ltd.* (4) as showing

"... that a subsequent transaction, if it is to be taken into account in mitigating damages, must be one which arises out of transactions naturally attributable to the consequence of the breach, and must not be of an independent character."

Apart from this, there is not, in my judgment, any duty to mitigate in the manner suggested. A man always has the right to have any liability alleged against him, the existence or extent of which is doubtful, determined according to law, and he cannot be under any duty which impairs that right. Certainly, he can be under no duty to compromise a claim before all the relevant facts have been ascertained. Counsel for the plaintiffs conceded that, if an award had been made by the arbitrator after complete investigation of the whole issue, it would be no more than *prima facie* evidence of the amount recoverable by the plaintiffs. If this is right (and I need not decide whether it is even *prima facie* evidence), it is hard to see why the opinion of a counsel whom the defendant has not retained, given before the claim has even been precisely formulated, should be conclusive evidence of the amount which the plaintiffs can recover.

For these reasons, I hold as a matter of principle that the making of a compromise between the plaintiffs and the Dutch government is irrelevant to the issue of damages between the plaintiffs and the defendants, and I do not feel that I need do more than canvass quite generally a number of practical considerations which were discussed in the course of the argument, and which I think would defeat the working of any rule based on the plaintiffs' submission.

It is conceded that counsel's views on the facts and law on which the existence of liability is based are irrelevant, and that that is a matter for the court. Why as a matter of logic are his views on the facts and the law relating to the extent of liability any different? What happens if the court thinks that nominal damages only have been proved? Is it permissible to investigate the chain of counsel's reasoning to see if it contains any error? Would an incorrect appreciation of the facts be a fatal error, or must it be an error of law? If in the case of a large number of items counsel has erroneously included one, does that invalidate altogether a settlement for a global sum? And so on. The point is not, I think, improved by the alternative submission that the settlement made must be reasonable. If this means that the sum paid must be the reasonable value of the claim when all the material facts are taken into consideration, it can only be that which the court would itself have awarded, and the inquiry is neither shortened nor affected by the advice of counsel. Therefore, it is contended that reasonableness must be judged as at the time of the settlement and on the information then available. This means that instead of weighing the true facts the court would have to weigh only those, however incomplete and erroneous, which were known to counsel. What standard of reasonableness can be applied to that? Whether to snatch boldly at a tempting offer which may not be repeated when all the facts are known

or to insist more cautiously on fuller information, whether to fight or to compromise, these are matters governed more by temperament than by reason. The man who buys shares on the stock exchange in the belief that they will go up is acting quite as reasonably as the man who sells the same shares in the belief that they will go down. Moreover, as counsel for the defendants pointed out, counsel might have given weight to a number of matters which it would be highly inconvenient to discuss. He might have been influenced by the opinion he had formed of the reliability of witnesses; or, as is likely in the present case, by admissions made in without-prejudice discussions or by other inadmissible matters.

The plaintiffs relied on *Fisher v. Val de Travers Asphalte Co.* (5), in which it appears that DENMAN, J., left it to the jury to determine whether a compromise was reasonable or not. The decision is not binding on me, and, as there was no discussion of the point I have to decide (it does not appear that the relevance of the question was contested), I have not obtained any guidance from it. Accordingly, I rule that the plaintiffs cannot prove their damages by reference to the settlement which they made with the Dutch government and that evidence relating to such a settlement is irrelevant and inadmissible. I must make it clear that no criticism has been made of the counsel and solicitors who unanimously advised the settlement, nor of the wisdom of their advice. At the time the settlement was made, the immediate subject of the arbitration was the question of liability, and the claim for damages had not been formulated. The plaintiffs' counsel thought, rightly if this judgment is correct, that on the issue of liability they would fail. The advantage to their client of seeking to reach a settlement of the whole dispute before liability was admitted or determined is obvious. The advantage of settling for a sum arrived at on a broad estimate rather than by means of the more exact calculation which the law necessarily requires is also from the business point of view obvious and may become even more apparent when I have expressed my views on the way in which in default of agreement the damages must be assessed. I am, however, concerned, not with the wisdom of the settlement, but only with whether, wise or foolish, it determines the extent of the defendants' liability, and, in my opinion, it does not. So the claim for £43,000 as a lump sum fails.

The statement of claim contains a claim for the costs of the arbitration, both those payable to the Dutch government, which were admitted to be £2,911 and the plaintiffs' own costs of the arbitration as between solicitor and client, which were proved at £3,284 18s. 1d. No argument was addressed to me in opposition to these claims, and, in my judgment, they should be allowed.

I have next to consider a measure of damages alternative to the £43,000 which is raised by an amendment to the statement of claim which I permitted at the trial. Under this alternative the plaintiffs claim that they were liable to pay to the Dutch government damages in respect of breach of contract under two heads. The first head, quantified at £49,300, relates to the loss sustained by the Dutch government in respect of 1,400 tons which were not used. The second head, quantified at £52,270, covers the cost of repairs necessitated by the defects in the Permasec. In case it is not quite clear from the form of pleading, I should say that the plaintiffs do not claim more than the £43,000 odd which they paid to the Dutch government. The figures which I have given are designed to show that the plaintiffs' liability was not less than that sum. It has not been contended that this measure of damages is totally incorrect. The defendants were aware that the plaintiffs proposed to supply the material to the Dutch government under the same description as the defendants were supplying it to the plaintiffs. It is, therefore, admitted that the plaintiffs' liability to the Dutch government is the proper basis for the assessment of damages. This covers the first head in principle, but there is considerable dispute on *quantum*. The second head is disputed both in law and in fact.

[On the question of *quantum* under the first head, HIS LORDSHIP considered the evidence and assessed the damages at £5 a ton for 1,350 tons, remarking that he had disregarded the possibility that the price of Permasec ultimately obtainable by the Dutch government might have been affected by the action of the Dutch government itself in its control of the market. Dealing with the dispute on the facts under the second head, HIS LORDSHIP said that the plaintiffs were not in a position to prove the terms of the sales by the Dutch government to contractors, whose claims constituted the major part of the damage suffered. If necessary there must be an inquiry. HIS LORDSHIP found, however, that the Dutch government ought to have known by Sept. 30, 1945, that Permasec was impracticable for ordinary use. Allowing time for the notification of contractors, the use of Permasec with insufficient drying time after Oct. 31, 1945, was attributable to the failure of the Dutch government to take the necessary action. HIS LORDSHIP continued :—] I have said that the second head of the Dutch claim is challenged in law as well as in fact. Some of the points of law arise not only between the plaintiffs and defendants, but also between the defendants and third parties. So in this section of my judgment I shall include where convenient reference to the case against the third parties.

The defendants begin with a submission that this head of damage is on the face of it too remote. I cannot accept that. I think that the defendants must be taken to have known that, if the compound were defective, the Dutch government would sustain damage, for which they would hold the plaintiffs responsible, and that such damage might fall under three heads. The government might use this material on their own property; they might use it through their own contracting departments or through agents on other people's property and so be liable to pay them compensation; they might sell or distribute it to independent contractors and so become liable to claims from them. It was contended by the defendants that the chain leading from them to the Dutch contractors, particularly since it involved the intervention of a Bathgate-Biggins contract, was too long. I do not think that the application of the principle is to be determined by the number of links in the chain. If what happened at the end was within the contemplation of the parties, I do not think it matters how long the chain is. I respectfully adopt what was said on this point by BRANSON, J., in *Kasler & Cohen v. Slavovski* (6) ([1928] 1 K.B. 85).

I think, therefore, that the plaintiffs can now recover from the defendants that which the government could under these heads properly have recovered from them. I shall call damage under these heads physical damage to distinguish it from the market loss or difference in value which is the ordinary measure. There must be further inquiry into the extent of the physical damage and the nature and amount of the claims which the Dutch government could have made. In order to limit as far as possible the collection by the parties of unnecessary material for the inquiry, I shall express my views on certain points of principle that are likely to arise and on which I have heard argument. I shall not, in matters which cannot be determined until after further inquiry, attempt to lay down the law finally as in a declaratory judgment. That is always difficult to do, and especially in this branch of the law where so much depends on the facts of each case. What I say may, therefore, require modification when the facts are known.

The defendants submit that there are two qualifications to the application of the principle I have adopted. The first is that in claims based on sub-sales by the Dutch government, the description of the compound and any warranties of quality must be substantially the same in all the contracts in the chain. It is not disputed that the necessary similarity exists in the contracts between the defendants and the plaintiffs, and the plaintiffs and the government respectively. Whether it exists in the contracts between the government and the Dutch contractors cannot be determined until the contracts are produced and,

if necessary, the relevant principles of Dutch law ascertained, but it is desirable that I should indicate whether I think the qualification sound, and if so, in what manner it should be applied. The second qualification is that claims arising after the government knew or ought to have known of the defects in the compound should be excluded. On this point I have already found the facts.

A The first qualification depends on the views expressed by BANKES, WARRINGTON and SCRUTTON, L.JJ., in *Dexters, Ltd. v. Hill Crest Oil Co. (Bradford)* (7). They were all *obiter dicta* and SCRUTTON, L.J., reserved his final opinion, but a unanimous expression of opinion by three lords justices carries great weight, and in particular the following passage from the judgment of SCRUTTON, L.J. ([1926] 1 K.B. 359) is often cited:

B “Those cases where there has been a chain of sales and sub-sales often present complications and difficulties, but one point I have always understood as clear—namely, that in order to make a sum recovered for breach of the last contract in the chain the measure of damages for a similar breach of a contract higher up in the chain, it is essential that the contracts along the chain connecting them should be the same. Where, as here, the earlier contracts are for the sale of goods under one description, and that not an
C ordinary trade description, and at some link in the chain the description varies, and becomes a well known trade description, I find it difficult to hold that the amount recovered for a breach of the last contract in the chain can be made the measure of damages for a breach of the first.”

I respectfully adopt this principle, but I have still to determine how it should
D be applied in this case, and also what degree of variation in description breaks the chain. SCRUTTON, L.J., was dealing with a chain of contracts between merchants wherein one might expect the same specification to be used, but a claim for physical damage may be initiated by a person who is not a party to a contract of sale, or, perhaps, to any contract at all—a householder, for example, whose property has been damaged by Permasec. It is not to be expected that
E a builder, when making a contract for repair work, will recite to the householder and incorporate therein all the specifications and warranties which he may receive from his suppliers in respect of all the different materials which he may use on the job. To understand the application of the principle it is necessary to understand its basis. Like every principle in this branch of the law, it stems from the broad rule that the damage is to be measured by those consequences of the
F breach which the parties as reasonable men would, if they had thought about it, have foreseen and accepted as natural and probable. If the variation to a description is such that it is impossible to say whether the injury that ultimately results would have flowed from the breach of the original warranty, the parties must as reasonable men be presumed to have put the liability for the injury outside their contemplation as a measure of compensation. If this is, as I believe,
G the nature of the principle, it must be applied very differently according to whether the injury for which the defendant is being asked to pay is a market loss or physical damage. In the former case (which I think is what the lords justices were considering in *Dexter v. Hill Crest* (7)) any variation that is more than a matter of words is likely to be fatal, because there is no way of telling its effect on the market value. In the latter case the nature of the physical
H damage will show whether the variation was material or not. I may illustrate this by a hypothesis taken from the facts of this case. Suppose that all the Dutch government did in their sub-sales was to add to the original warranties given them by the plaintiffs a guarantee that the compound could be used at any time within two years, whereas in fact it was usable only for one year after manufacture. Looked at generally, that is a material addition, but if, in fact, it had been used within one year with injurious results, the additional warranty ought not, I apprehend, to bar the claim. If, however, it were sold with all

faults, it would generally be impossible to prove what part of the market loss was due to its known tendency to "creep" and other breaches of the original warranties and what part to its shorter life in breach of the hypothetical warranty. It seems improbable that the Dutch government will in every case have passed on to the Dutch contractors the specification in the same form as received and even more improbable that any implied condition as to quality that there may be in Dutch law will correspond exactly with the statutory conditions in the Sale of Goods Act, 1893. I do not think that is necessarily fatal. When the terms of each Dutch contract and the nature of the physical damage is known, I think that the test will be whether the Dutch government could show that the whole of its liabilities to the contractors arose from the failure of the compound to behave as warranted by the plaintiffs.

That is as much as I can say on the point as it affects the plaintiffs and the defendants. The third parties' case on the same point is clear. I think that they can successfully invoke the principle. The third parties in effect warrant the material to be good, except for slight "creepage". The defendants, in effect, pass on the warranty without the exception, and add to it a warranty that the material can be used with bitumen felt and that it needs no unusual or impracticable drying-time. The injury that arises is in two categories—first, repairs have to be done in Holland; secondly, the Dutch government has to dispose of the unused material at a loss. No one can say how far the deficiency in the Permasec which necessitates the repairs is due to the original defect or to the curtailment of the drying-time, or, perhaps, to its incompatibility with bitumen felt. Similarly, even if the difference in value could be ascertained by an actual sale at market price, the lower price would be for the material with all its disadvantages. I hold that the damage sustained by the defendants cannot be measured by their liability to the plaintiffs.

I turn now to the second qualification. It is, I think, clear that in this sort of case a plaintiff cannot pass on his liability to an outside party for bad quality if, before the sale to the outside party, he had notice of the defect in quality: see *British Oil & Cake Co., Ltd. v. Burstall & Co.* (8), per ROWLATT, J. (39 T.L.R. 407), and *Dobell (G. C.) & Co., Ltd. v. Barber & Garratt* (9), per LAWRENCE, L.J. ([1931] 1 K.B. 238). It is not so clear whether and in what circumstances a plaintiff ought to examine the goods himself to ascertain if they are defective, but I need not concern myself with that, for the Dutch government had all the data which, had it been properly assembled, would have shown that the compound required an impracticable drying-time. It would not be in accordance with a plaintiff's duty to mitigate his damage that he should in such circumstances sell without qualification. Similarly, if the knowledge of the defects comes to the plaintiff after the sale to the outside party, and if, by passing on that knowledge to the outside party, he can diminish his liability to that party, he is bound to do so. The result is that on the facts that I have found there may be cases in which the plaintiffs cannot set up as the measure of damage the sum payable to the Dutch contractors. Counsel for the plaintiffs contends that in such cases he can recover as damages the difference in value between the contract price and the figure of £6 a ton (at which 1,350 tons were ultimately sold by the Dutch government to a distillery). In other words, he seeks to substitute the ordinary measure of depreciation in value. I presume that he would make a similar contention in respect of the compound (if any) sold under a different warranty if the Dutch claims are excluded under the principle in *Dexter v. Hill Crest* (7). A question of principle thus arises whether the ordinary measure remains available, and on that I shall express a view.

Damages which arise under the so-called "second rule" in *Hadley v. Baxendale* (10) are sometimes referred to as if they were an increased sum which the plaintiff could obtain if he could show "special circumstances", or as if the rule embodied a measure of damage specially beneficial to the plaintiff which

he could invoke if he fulfilled the necessary conditions. It is, no doubt, true that it generally operates in favour of a plaintiff rather than against him, but I think that it is capable of doing either. I feel, with deference, that the division into two rules of what is in *Hadley v. Baxendale* (10) a statement of principle in a single sentence has sometimes proved misleading. The re-statement of the relevant principles in *Victoria Laundry (Windsor), Ltd. v. Newman Industries,*

A *Ltd.* (11) makes it clear that there is only one area of indemnity to be explored, and that is what is within the prevision of the defendant as a reasonable man in the light of the knowledge, actual or imputed, which he has at the time of the contract. It has often been held—I have already referred to the authorities—that the profit actually made on a sub-sale which is outside the contemplation of the parties cannot be used to reduce the damages measured by a notional
B loss in market value. If, however, a sub-sale is within the contemplation of the parties, I think that the damages must be assessed by reference to it, whether the plaintiff likes it or not. Suppose that the only fault in the compound was its incompatibility with bitumen felt, the chance that it might produce bad results would certainly reduce its market value before use. But if it is the plaintiff's liability to the ultimate user that is contemplated as the measure of damage and
C if in fact it is used without injurious results so that no such liability arises, the plaintiff could not claim the difference in market value and say that the sub-sale must be disregarded.

I say this so as to make it clear that, although I have come to the conclusion that, if the plaintiffs' basic claim fails, they can to some extent rely on the alternative of difference in market value, it is not because I think the plaintiffs
D have an option in the matter. The result is brought about in another way. First, if physical damage is excluded as a measure of liability on the principle of *Dexter v. Hill Crest* (7) the position is the same as if the whole of the government's transactions with outside parties was excluded. The plaintiffs are, therefore, entitled, and, indeed, compelled, to prove their damage by some other measure, which would ordinarily be difference in value. In the second class of
E case where the government ought not to have made the sub-sale, the position is, I think, this. Liability for physical damage remains the criterion of loss. All the parties are to be taken as having accepted it as such, and the government cannot by their unilateral act displace it. The plaintiffs cannot claim any relief in respect of any quantity of compound which has not caused physical damage,
F and in cases where physical damage has been caused they must meet the criticism that the government ought to have mitigated it. The course they ought to have taken was to sell the compound with all faults for what it would fetch, and the damage would have been the pecuniary loss they would have suffered, *i.e.*, the difference in value. The plaintiffs cannot, therefore, claim more than that: see *Wagstaff v. Short-Horn Dairy Co.* (12). But they cannot claim that, if it exceeds
G the physical damage. It is relevant only as matter of mitigation, and if it is shown that the loss that would have occurred, had the government sold with all faults, would have exceeded the claim for physical damage, they have an answer to the criticism that they should have mitigated, but no more. The liability for physical damage remains the primary measure of liability contemplated by the parties. The result is that in respect of compound sold after
H Sept. 30 from whose use no physical damage resulted, the plaintiffs can claim nothing. In the case of any quantity from whose use physical damage has resulted, the plaintiffs may obtain (subject to the next point) the cost of making good, etc., or the difference in market value, whichever is the less. The third class of case covers sales made before Sept. 30 where the government after Oct. 31 allowed the continuing use of the compound without warning. The basic measure here is physical damage, but if it can be shown that under Dutch law the claim which the contractor would have had against the government

would have been less if the government had given warning, the claim of the government and of the plaintiffs must be diminished accordingly.

The last point of principle to be considered concerns the assessment of the notional value of the unsound Permasec. As between the third parties and the defendants, there is very little to go on. The material was specially compounded for the job, it was passed on by the defendants to the plaintiffs and was never given a fair commercial trial. It is, therefore, very difficult to say what it would have been worth in the defendants' hands if they had known of its inherent defect. Counsel for the third parties has submitted that unless the defendants can offer some reasonably precise evidence of the value of the unsound material, they cannot discharge the burden of proving any substantial damage and so must fail to recover anything more than nominal damages. He submits that there is no such evidence in this case. The same point arises between the defendants and the plaintiffs if I reject, as I do, the submission of counsel for the plaintiffs that the unsound value in 1945 can be taken as the figure which the material fetched on the sale by tender in October, 1946.

It seems to me that one can very rarely arrive at an accurate figure of unsound value. Where the breach is non-delivery, there is often a market price which can be quoted, or evidence can be given of the price at which at the relevant date similar goods were changing hands, but there is rarely any market price for damaged goods, since their value depends on the extent of the damage. If the actual damaged goods are sold with all faults, good evidence can be obtained of the difference in value, but such a sale is not always possible, and a claim for substantial damages cannot be limited to goods which have been sold. Moreover, damage may arise from two sources. Suppose that goods are delivered which are inherently defective in breach of the contract of sale and that they are further damaged by negligent handling in breach of the contract of carriage, and that in their damaged condition they fetch seventy per cent. of their sound value. Is the plaintiff to recover nominal damages only because he cannot prove against either defendant what part of the depreciation in value was due to his acts? It is one thing to say, as I have said, that this is the sort of situation which parties in contemplating the measure of damage would be glad to avoid, and it is another thing to say that it is one which must necessarily result in an injured plaintiff obtaining no satisfaction. I think that in such a situation the court is bound to do the best that it can. It is no more difficult to estimate a plaintiff's loss in such circumstances than it is to estimate the loss of earning power caused by physical disablement. The third parties submit that the latter case is entirely different. I do not think the fundamental principle on which damages are awarded for breach of warranty of quality, namely, that it "is the estimated loss directly and naturally resulting in the ordinary course of events from the breach of warranty" is any different in principle. It is only that where precise evidence is obtainable, the court naturally expects to have it. Where it is not, the court must do the best it can. In *Chaplin v. Hicks* (13) VAUGHAN WILLIAMS, L.J., said ([1911] 2 K.B. 792):

"In the case of a breach of a contract for the delivery of goods the damages are usually supplied by the fact of there being a market in which similar goods can be immediately bought, and the difference between the contract price and the price given for the substituted goods in the open market is the measure of damages; that rule has been always recognised. Sometimes, however, there is no market for the particular class of goods; but no one has ever suggested that, because there is no market, there are no damages. In such a case the jury must do the best they can, and it may be that the amount of their verdict will really be a matter of guesswork. But the fact that damages cannot be assessed with certainty does not relieve the wrong-doer of the necessity of paying damages for his breach of contract."

FLETCHER MOULTON, L.J., said much the same thing (*ibid.*, 795, 796).

A I do not think it would have assisted me much in this case if hypothetical buyers had been found to say what they might have paid in 1945 for a compound which they never saw and of whose defects they have learnt only at second hand. It is a common practice in the commercial world to deal with this type of case by way of a price allowance, and claims for damaged goods are constantly met to the satisfaction of both parties by the fixing of an allowance by an adjuster or some person skilled in the trade. I think that that is a method which can legitimately be followed by the court where no more precise method of calculation presents itself, and, indeed, I should be sorry to think that in the commercial court it was thought preferable to award nominal damages rather than to have resort to it.

B I have to consider in the first place, therefore, what I think the value of the goods would have been—that is, what they would have fetched in Holland if they had been sold in 1945 with all faults. I do not, as I have already indicated, accept the view that no more than £6 per ton would have been obtained. That was the figure paid in October, 1946, when supplies of the Dutch product were much more plentiful and when, I dare say, the urgency for repairs was not so great as in 1945. The compound's main fault was, I think, the length of drying-time or drying-out time required, but that was a matter which, if known, might well have been taken as part of the bargain. Mr. Kramer, the contractor who did most of the work in Holland, although he was aware to some extent of the defects of the material, was willing to give it a trial and in fact bought a large quantity. The tendency to "creep", if known, might have been guarded against by guttering or by taping. The material, if not suitable for the better type of building, might well have been used on outhouses or in temporary repairs where dripping outside was not of the first importance, or it might be used, as it was in fact, mixed with other adhesives. Similarly, its use might be restricted to non-bituminous felt. I dare say that in normal times these defects would render it unmarketable as an adhesive, but these were very abnormal times. Having regard to the very high price which was paid for what was supposed to be sound material, I am satisfied that it would have commanded a respectable price even if sold with its known defects. There were doubtless cases where it was used without any damage, as is shown by the evidence for the defence. The difference in price between its purchase as a sound material by someone who believed in it in October, 1946, and its purchase for distillery use was about fifty per cent.

F I do not take this as more than a very rough guide, but it accords with my view of the sort of discount which the contractors would have demanded and which would have had to be conceded had the true facts been known. I think they might well have paid about half its sound value. I take its sound value to be the average price which it was fetching in the autumn of 1945, namely, £40 a ton, and I assess the depreciation at £20 per ton. This produces, of course, a very different figure from the similar assessment of depreciation in October, 1946.

G It may be that the depreciation should be calculated on the contract quantity as a whole and at the date of delivery. As I have said, this point has not been taken, and, in any event, I think that what may seem to be a rather arbitrary division into two parcels does produce a just result. If I had assessed the depreciation as at the time of delivery, I could not have put the market price as high as £40 per ton. I should have had to have regard to the fact that that price was obtainable for only a limited quantity and that the total quantity of 2,500 tons was more than the market would have absorbed.

H

I think that I have now said all that I can usefully say on the quantum of damage between the plaintiffs and the defendants until there has been further inquiry into the Dutch claims. The case between the defendants and the third parties is simpler. For reasons which I have already made clear, I think that the right measure of damages is such sum as I consider in all the circumstances to

represent the depreciation in the value of the material by reason of its tendency to "creep" in high temperatures. I assess this at fifteen per cent. of the purchase price, and for the sum so calculated there will, therefore, be judgment for the defendants against the third parties.

Order accordingly. No order for costs as between the defendants and the third parties. The plaintiffs were awarded costs against the defendants, apart from the cost of preparing certain bundles of correspondence incurred by the defendants which was ordered to be borne by the plaintiffs. Liberty to apply.

Solicitors: *Carpenters* (for the plaintiffs); *Allen & Overy* (for the defendants); *Cripps, Harris, Hall & Co.* (for the third parties); *Lovell, White & King* (for the Royal Netherlands Government).

[Reported by F. A. AMIES, Esq., Barrister-at-Law.]

BEADSLEY AND OTHERS v. UNITED STEEL COMPANIES, LTD.

[COURT OF APPEAL (Bucknill, Singleton and Birkett, L.JJ.), October 11, 12, 1950.]

Factory—Lifting tackle—Tackle of good construction, etc., supplied by employers, but used for wrong purpose by servant—Fellow-servant killed—Liability of employers—Factories Act, 1937 (c. 67), s. 23 (1) (a).

The workman died from injuries received when a heavy mould, while being lifted to be moved to another part of the factory in which he was employed, came adrift from its fastenings and fell on him. The proper lifting tackle for the moving of moulds was provided by the defendants, the plaintiff's employers, but on the day of the accident the slinger, one E., did not use it, but made use of other gear with the result that the mould was improperly secured and fell out of its fastening when the overhead crane was put into operation. The plaintiffs, the wife and children of the workman, claimed damages on the ground that the defendants were in breach of their statutory duty under the Factories Act, 1937, s. 23, which provides: "(1) The following provisions shall be complied with as respects every chain, rope or lifting tackle used for the purpose of raising or lowering persons, goods or materials:—(a) no chain, rope or lifting tackle shall be used unless it is of good construction, sound material, adequate strength and free from patent defect . . ."

HELD: that the defendants were not in breach of their duty under s. 23 (1) (a) because that paragraph only required that they should provide tackle of good construction, sound material, adequate strength, and free from patent defect (which they had done), and it was wrong to read into the section words which would make them liable for an accident if a workman used tackle for an unsuitable purpose.

[AS TO MASTER'S COMMON LAW DUTY TO SERVANT, see HALSBURY, Hailsham Edn., Vol. 22, pp. 187-194, paras. 313-328; and FOR CASES, see DIGEST, Vol. 34, pp. 194-210, Nos. 1580-1729, Digest Supp., and 2nd Digest Supp.]

FOR THE FACTORIES ACT, 1937, s. 23, see HALSBURY'S STATUTES, Second Edn., Vol. 9, p. 1015.]

Cases referred to:

- (1) *Wilsons & Clyde Coal Co., Ltd. v. English*, [1937] 3 All E.R. 628; [1938] A.C. 57; 106 L.J.P.C. 117; 157 L.T. 406; 2nd Digest Supp.

- (2) *Smith v. Baker*, [1891] A.C. 325; 60 L.J.Q.B. 683; 65 L.T. 467; 55 J.P. 660; 34 Digest 202, 1657.
- (3) *Wilson v. Merry*, (1868), L.R. 1 Sc. & Div. 326; 19 L.T. 30; 32 J.P. 675; 34 Digest 211, 1747.
- (4) *London & North Eastern Ry. Co. v. Berriman*, [1946] 1 All E.R. 255; [1946] A.C. 278; 115 L.J.K.B. 124; 174 L.T. 151; 38 B.W.C.C. 109; 2nd Digest Supp.
- A (5) *Tuck & Sons v. Priester*, (1887), 19 Q.B.D. 629; 56 L.J.Q.B. 553; 52 J.P. 213; 42 Digest 729, 1516.
- (6) *Dyke v. Elliott, The Gauntlet*, (1872), L.R. 4 P.C. 184; 41 L.J.Adm. 65; 26 L.T. 45; 17 E.R. 373; 42 Digest 730, 1526.
- (7) *Winter v. Cardiff Rural District Council*, [1950] 1 All E.R. 819.
- B (8) *Rees v. Cambrian Wagon Works, Ltd.*, (1946), 175 L.T. 220; 2nd Digest Supp.
- (9) *Reilly v. Beardmore & Co.*, 1947 S.C. 275; 2nd Digest Supp.

APPEAL by the defendants from a judgment of ORMEROD, J., delivered at Leeds Assizes on May 4, 1950, awarding damages to the plaintiffs, the widow and children of George Beadsley, a workman employed by the defendants at their factory at Rotherham, Yorkshire, on the ground that the accident causing his death was due to the defendants' breach of their statutory duty under the Factories Act, 1937, s. 23 (1) (a). A further claim by the plaintiffs that the defendants were also in breach of their common law duty and that this caused the accident was rejected by ORMEROD, J., and the plaintiffs cross-appealed against that finding. The facts are sufficiently set out in the headnote.

- D *Nelson, K.C.*, and *G. N. Black* for the defendants.
Beney, K.C., and *Denny* for the plaintiffs.

SINGLETON, L.J., stated the facts and continued: The cause of this accident was that the wrong lifting tackle was used, though the evidence showed that the proper lifting tackle of two chains fitted with stirrups was immediately available to the slinger, Ellis, if he had thought it right to use it. Ellis, however, decided to take the risk and used something which he ought not to have used for the purpose of lifting the mould. Section 23 of the Factories Act, 1937, has the marginal note, "Chains, ropes and lifting tackle," and it provides:

- F "(1) The following provisions shall be complied with as respects every chain, rope or lifting tackle used for the purpose of raising or lowering persons, goods or materials:—(a) no chain, rope or lifting tackle shall be used unless it is of good construction, sound material, adequate strength and free from patent defect . . ."

G The submission on behalf of the plaintiffs was that the lifting tackle which was used was not of good construction because the chain with the hooks at the end was not suitable for carrying a mould. Junior counsel for the plaintiffs drew the attention of the court to the words "adequate strength," and he said that, though the question of the marking of chains, hoists and the like is laid down in para. (b) and certain offences are created by that paragraph, it is no answer, in a case in which a chain breaks, to say that it complied with sub-s. (1) (b) if, in fact, the chain was inadequate for the work to which it was put. That may or may not be right. I am inclined to take the view that s. 23 provides something in the nature of a code, and where it places a duty on the employers it is an absolute duty. It is sufficient to consider the first line and a half: "No chain, rope or lifting tackle shall be used unless it is of good construction . . ."

H ORMEROD, J., said:

"The meaning of those words must be that if lifting tackle is used for any particular purpose, whether the man who is using it is an employee who

has made a mistake and used the wrong tackle or not, there must be a breach of the section."

Earlier he had said:

"I am satisfied that what the section does mean is that it should be of good construction for the purpose for which the tackle is being used, which means that it must be constructed in such a way that it can properly be used for the particular purpose."

Counsel for the defendants submitted that the meaning given by the learned judge to that part of the section meant reading into the section something which was not there. He pointed out that this section creates penal offences and that nothing ought to be read into it which is not there unless it is necessary so to do in order to give effect to the section.

In my view, it is not necessary to read anything into the section. The words "no . . . lifting tackle shall be used unless it is of good construction" are capable of an ordinary, natural meaning, and the question arises: Was the lifting tackle in the present case of good construction? Junior counsel for the defendants asked us to consider whether it was necessary to read into the section the word "suitable" which the plaintiffs wished to read into it. He referred the court to other places in the Act in which the word "suitable" appeared. One was s. 30 where the word "suitable" appears several times. Counsel put this further argument before the court which impressed me. He said that the court had to consider whether the chain, rope or lifting tackle was of good construction, and, if the plaintiffs were right, the result would be that that same chain, rope, or lifting tackle one day would be of good construction and the next day of bad construction, and, perhaps, the next hour of good construction again, according to the use to which it was put. I cannot think that the section was intended to cover anything like that.

No attack has been made on this lifting tackle in regard to its actual construction, and I have reached the conclusion that the learned judge was wrong in his decision that the appellants were in breach of s. 23 (1) (a) of the Factories Act, 1937. This sub-section puts a heavy burden on the employers. The duty laid on the employers is absolute and a breach of it may entail a criminal prosecution; but it does not make the employers responsible for everything that a workman does. Though the last Act went very much beyond the earlier Factories Acts and regulations, it recognised that, however good employers may be and whatever efforts they may make to comply with their statutory obligations, accidents may still happen through the carelessness of a workman. If the legislature had intended to make the occupiers of a factory responsible because a chain or lifting tackle which was not suitable was used, it would have been quite easy to say: "No chain, rope or lifting tackle shall be used unless it is of good construction, sound material, adequate strength, free from patent defect and suitable for the purpose for which it is used." Those last words do not appear in the sub-section. It seems to me that some such words as those must be read into sub-s. (1) (a) if it is to be held that, on the facts of this case, there was a breach of the statutory duty on the part of the employers. Accordingly, I take the view that ORMEROD, J., was wrong in the decision at which he arrived.

[Turning to the allegation that the defendants were in breach of their common law duty to provide a proper system of working His LORDSHIP reviewed the evidence and said that he agreed with ORMEROD, J., that the evidence did not show that there was any lack of supervision or failure to provide a proper system of work, and added:] In my judgment, this appeal ought to be allowed.

BIRKETT, L.J.: I agree with the judgment which has just been delivered by SINGLETON, L.J. Counsel for the defendants argued that the construction put on the Factories Act, 1937, s. 23 (1) (a), by ORMEROD, J., was wrong. The second question was the liability, if any, of the defendants at common law.

It is important to notice that the words of this section are common to many other sections of the Act. The words "good construction, sound material, adequate strength and free from patent defect," are to be found in several sections in this statute. The only words with which this court is really concerned are the words "good construction." The point can be stated in this way. ORMEROD, J., has said that those words "good construction," must not be looked at as simple English words, but something must be imported into them.

A In his judgment he said:

"The question that has to be decided here is: Was this lifting tackle of good construction? Was it free from patent defect? Was it of good construction generally for the purpose for which it was intended? If construction imports suitable design for the purpose for which it is being used, does the fact that a negligent employee using tackle for a purpose for which it is not designed when suitable tackle is available still render the employer liable for a breach of the section? I have come to the conclusion in this case, that the wording 'no chain . . . shall be used unless it is of good construction,' must mean that the tackle which is used for the particular piece of work which is being done must be of good construction for that purpose. I am asked to say that 'good construction' cannot mean 'good design'—that a chain may be of good construction, and, therefore, comply with the section and still be in every way as this was, unsuitable for the work which had to be done."

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C

It is plain from that passage that what ORMEROD, J., has done is to import into the section the element of suitability or fitness for a particular purpose, but on the face of it the section requires no such thing.

D

The first matter that occurred to me when the argument was presented was that, if it had been intended that the element of suitability should be imported, I cannot see, with these very full details set out in the statute, why that element was not also mentioned. I think that, if it had been intended that this section should read in the way the learned judge interpreted it, Parliament would have inserted in it the plain words which would have been necessary. This is, I think, very strongly supported by the argument of junior counsel for the defendants. He referred, not merely to s. 23, but also to s. 30 (1) of the Act, a section which deals with steam receivers and steam containers, and reads:

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" . . . shall be fitted with—(a) a suitable reducing valve or other suitable automatic appliance . . . (b) a suitable safety valve so adjusted as to permit the steam to escape . . . (d) a suitable stop valve . . . ",

F

introducing the very element of fitness for the purpose or suitability. The argument at once comes to the mind: If suitability is referred to in s. 30, and it was intended that s. 23 should enact the same obligation, why not also refer to it there? Section 30 has in sub-s. (3) the words:

G

"Every part of every steam receiver shall be of good construction, sound material, adequate strength, and free from patent defect,"

the very words of s. 23. I can quite see that when dealing with matters like steam receivers it may be more feasible to state particulars in which fitness or suitability shall be laid down in the Act of Parliament itself, but it is important to notice that s. 30 (3) uses the very same words as s. 23 (1) (a). I observe also that s. 31, which deals with air receivers, requires the fitting of a suitable safety valve, a suitable appliance for draining the receiver, a suitable manhole, handhold and so on, elements of fitness and suitability again. In sub-s. (3) it says:

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"Every air receiver and its fittings shall be of sound construction and properly maintained."

Those considerations lead me to the view that these words "sound construction" really mean "well made," and that no ground exists for importing,

as ORMEROD, J., has done, this element of fitness or suitability into the construction of s. 23 (1) (a). I am also influenced by the fact that this is a penal section. We were referred to *London & North Eastern Ry. Co. v. Berriman* (4) where the court was dealing with rules affecting a railway company. LORD SIMONDS said ([1946] 1 All E.R. 270):

"... it is enacted by s. 11 (1) of the Act under consideration that, if any railway company acts in contravention of or fails to comply with any rule made under the Act, it shall be liable for each offence on conviction under the Summary Jurisdiction Acts to a fine not exceeding £50. I think that the same rule of construction must apply whether the duty and the penalty are imposed by the same section of an Act, or by different sections of an Act, or the one by a rule made under the Act and the other by the Act itself. That rule of construction is very well settled; though not always easy of application. I will state it by three familiar citations. In *Tuck & Sons v. Priester* (5) LORD ESHER, M.R., said (19 Q.B.D. 638): 'We must be very careful in construing that section, because it imposes a penalty. If there is a reasonable interpretation which will avoid the penalty in any particular case we must adopt that construction. If there are two reasonable constructions we must give the more lenient one. That is the settled rule for the construction of penal sections.' LINDLEY, L.J., in the same case said (*ibid.*, 645): '... the well settled rule that the court will not hold that a penalty has been incurred, unless the language of the clause which is said to impose it is so clear that the case must necessarily be within it ...' Finally I will cite the words of JAMES, L.J., delivering the judgment of the Privy Council in *Dyke v. Elliott* (6) (L.R. 4 P.C. 191): '... Where the thing is brought within the words and within the spirit, there a penal enactment is to be construed, like any other instrument, according to the fair common sense meaning of the language used, and the court is not to find or make any doubt or ambiguity in the language of a penal statute, where such doubt or ambiguity would clearly not be found or made in the same language in any other instrument ...'

That is a very important matter to be considered in construing this section.

The main facts of this case have never really been in dispute, certainly not the fact that the defendants provided equipment that was of good construction and sound material. The trouble arose because a workman did not use the proper appliance. The only matter that is found is that it was unsuitable for the particular job for which Ellis used it. It would be rather a strange thing if it could be said: You have provided a proper appliance. It is of sound construction, adequate strength and so on, but because a workman mistakenly has used something else you have failed in your statutory duty. ORMEROD, J., said:

"So far as concerns the argument that it is sufficient for the employer to provide suitable tackle and that then, if the wrong tackle is used by one of the workmen for doing some particular work, the responsibility is no longer on the employer, that argument I think must fall to the ground from the very words of the section. The section does not say that 'chains, ropes and lifting tackle shall be provided of good construction and sound material,' and so on. It says, 'no chain, rope or lifting tackle shall be used.' It seems to me that the meaning of those words must be that, if lifting tackle is used for any particular purpose, whether the man who is using it is an employee who has made a mistake and used the wrong tackle or not, there must be a breach of the section. It is presumably put in those words to provide for that particular happening; and it may be unfortunate from the point of view of the employer that he should be held responsible for the carelessness of one of his workmen in using the wrong tackle. But that is a matter for the legislature and, if they have used the words 'no chain ... shall be used

unless it is of good construction,' then it does seem to me that the employer cannot cease to be liable merely because, although it has been used, it has been used because one of his employees has made a mistake."

A With great respect to the learned judge I think there is a fallacy underlying all that. Nobody doubts that the obligation laid on the employer by s. 23 (1) (a) is in its nature absolute, but what ORMEROD, J., is there saying is that the statutory obligation, which is absolute, is that tackle which is not suitable for the purpose shall not be used. In my view, if s. 23 (1) (a) is examined, good construction, sound material, adequate strength and freedom from patent defect are general matters and have no reference to any particular purpose, and those words cannot be considered as meaning good construction for some particular purpose. Therefore, I think that on this first matter ORMEROD, J., came to a wrong conclusion.

B [HIS LORDSHIP reviewed the evidence on the second point and said that he agreed that ORMEROD, J., had come to a proper conclusion.]

C BUCKNILL, L.J.: I also agree that the appeal of the defendants should be allowed. It is an important case, and there does not seem to be any direct authority on the first point. There is only one case that I would refer to, *Reilly v. Beardmore & Co.* (9), where the Court of Session had to consider the interpretation of s. 23 of the Factories Act, 1937. In that case an employee in a factory, injured owing to the parting of the cable of a crane, brought an action for damages against his employers on the ground that the cable had not complied with the conditions required by s. 23 (1) (a). The sheriff-substitute found in favour of the plaintiff, apparently, on the ground that, if a cable broke while it was being used, the Act had not been complied with. On appeal to the Court of Session the plaintiff held her judgment, but I would just refer to what the Lord President (LORD COOPER) said on the question of the meaning of the section (1947 S.C. 278):

E "In two passages in his note, which were subjected to criticism, the learned sheriff-substitute has, in my view, stated too highly the obligation upon the factory occupier under this section. He says 'if a cable breaks down while it is being "used," which is what this cable did here, I am of opinion that the Act has not been complied with'; and a little later he adds, 'I consider that the obligation which it [the statute] imposes is absolute, and that, if a cable breaks in use, a liability for the consequence is imposed on the users.' So to put the matter is, in my view, to overstate the absolute character of the obligation imposed by the statute and to make liability an automatic and inevitable consequence of the bare fact that a rope broke in use."

G If a rope breaks in use it obviously is not of adequate strength for the work for which it is being used, but if the argument which has been put forward here on behalf of the plaintiffs is sound, I think that the inadequacy of the rope, whatever the task was, would *ipso facto* have entitled the plaintiff in *Reilly v. Beardmore & Co.* (9) to judgment. I do not see any difference between the interpretation to be placed on "adequate strength" and "good construction." I agree entirely with the judgments which have been delivered and have nothing useful to add to them.

H *Appeal allowed. Cross appeal dismissed. No order for costs.*
Solicitors: *Jackson & Jackson*, agents for *J. W. Fenoughty, Ashton & Co.*, Sheffield (for the plaintiffs); *Bell, Brodrick & Gray*, agents for *Harold Jackson & Co.*, Sheffield (for the defendants).

[Reported by J. D. PENNINGTON, Esq., Barrister-at-Law.]

directing the payment of his debts, there appears in print the formula: "I give and bequeath unto . . ." Then the testator, in his own handwriting, firm and clear notwithstanding his eighty-six years, enumerated ten objects of bounty, numbered consecutively. The first is to Caroline Mary Gertrude Jameson and the gift is £3,000. The next seven are of the same kind, *i.e.*, they are gifts of sums of money to named persons. It is, perhaps, significant, though I do not wish to attach very much importance to it, that with one exception the gifts are in a regular descending scale. The testator began with the largest and ended with the smallest. The fifth gift must be mentioned because it is in these terms: "Unto my executor [the plaintiff] £500." It is on No. 9 that the argument turns:

"Further I leave in addition to the bequest given him above to my executor Norman Francis Edward Knapp my books furniture and other personal belongings whether at New Court, Temple, or elsewhere."

The final provision is No. 10, in which the testator says:

"And I surrender to the committee of the club my shares in the University of London Club, Ltd."

Before I deal with the language of No. 9, there are certain surrounding circumstances which should be stated. In the first place, the testator was a man of education. He was for many years in the service of the Board of Customs and Excise, and for a very large period of his long life he was a member of the Bar, practising as such, and the reference to New Court, Temple, is a reference to his chambers in the Temple. He was, I think, never married, and for many years he lived with some friends of the name of Jameson. The first gift which I have read is to a member of that family. We were told that he was born in Eire and that no relatives of his are known to live in England. It is, indeed, conceded that they are either in the United States of America or in Eire and that he himself was wholly out of touch with his relations. Certainly there is no suggestion in the will of any intention or desire to benefit any of them.

With those matters in mind I return to the will. In deciding a question of this sort I think it is clear that, in addition to the surrounding circumstances properly to be regarded, the court has to look, not only at the actual words, but also at the context, and, particularly, the character, of the clause in which they appear. Counsel for the plaintiff has cited a number of authorities. I think they are of assistance because they show that, whatever might be thought to be the dictionary meaning properly to be given to the word "belongings," the court has construed the word as meaning "that which belonged to the giver"—certainly all property of a personal character which belonged to the giver. *Re Bradfield* (1) before EVE, J., and *Re Mills' Will Trusts* (2), before BENNETT, J. (where the phrase was "personal belongings") are instances showing that the court went quite a long way in giving to those words a very wide connotation so as to cover in effect the whole of the personal estate of the testator. The wills in those cases were, however, very different from the will in this case, and the circumstances also are different. I have referred to the fact that the testator was an educated man, whereas in the case of *Re Mills* (2) the testatrix was unable to read and write, and I find a further distinction in the two cases I have cited. It is plain when you look at the wills therein that in their brief compass the testator or testatrix was really purporting to deal with his or her whole estate. I think the cases show further (if authority is necessary) that where you get general words such as "belongings" or "effects" they must not be cut down by applying the *ejusdem generis* rule in circumstances in which so to do would be to deprive a residuary gift of full effect and leave some of the residue undisposed of. There are, moreover, instances which show that the position in which the gift in question appears in the will is by no means conclusive. For example, *Fleming v. Burrows* (3) showed that where a residuary gift was followed by particular legacies the effect would not be to cut down the residuary gift because it was followed, and not preceded, by the particular legacies.

I have tried to keep these things in mind, but, coming back to this will, I must conclude, if I can, what this paragraph 9 has expressed. Neither in its position nor in its expression does it look to me at all like a residuary gift. After all, we are not simply concerned with the formula "personal belongings." This is an additional gift to a legatee who has been given £500, and the testator says: "Further to that £500 I wish this beneficiary to have my books furniture and other personal belongings whether at New Court, Temple, or elsewhere."

A If it was intended that this gentleman should be made residuary legatee it seems strange that the testator should first give him £500 and then make this addition when other means were so simple. It is, however, the whole phrase, the reference to "books and furniture," and the reference to "New Court, Temple, or elsewhere," which leaves on my mind clearly the impression that this is not a residuary gift but one of a series of particular gifts, and I think the other features in the will to which I have already made some allusion bear that out. If that view is right, I think counsel for the plaintiff conceded that there would be no case for giving this phrase "personal belongings" a meaning which would make it a residuary gift.

B I should, perhaps, have said that the property of the testator amounted to some £12,000 odd in value and that the particular gifts in value amounted to C £8,200, so that there was, excluding debts and duties, about a third of the whole undisposed of by the particular clauses. The property consisted of stocks and shares and appreciable sums of cash in the Westminster Bank and the Post Office Savings Bank. Like ROXBURGH, J., I have to bear in mind also the warning (as he described it) of VISCOUNT SIMON, L.C., in *Perrin v. Morgan* (4) ([1943] 1 All E.R. 190). Although I think that cases are valuable as guides and indications of how the court approaches this difficult task, it is in the last resort, as D I have said more than once, a question of deciding, looking fairly at this literate man's language and applying the ordinary canons of construction, what it is that he has expressed to the reader. I answer that question in the same way as ROXBURGH, J., did. I appreciate that the result is that this testator has not succeeded in disposing of all of his property and as to part died intestate. E Counsel for the plaintiff has reminded us that the court, as has been said, inclines against intestacies, particularly (as I follow the cases) where the intestacy would result from a narrow construction of what is a residuary gift. Like ROMER, J., in *Re Price* (5), however, I bear in mind that SIR ROBERT ROMER some little time before pointed out that it may be an error to suppose that testators never deliberately contemplate intestacy. For these reasons I think that this appeal F fails.

ASQUITH, L.J.: I agree.

JENKINS, L.J.: I also agree.

* *Appeal dismissed; no order as to costs save that the defendant's costs as between solicitor and client should come out of the residue of the estate.*

G Solicitors: *Simpson, Palmer & Winder* (for the plaintiff); *W. R. Millar & Sons* (for the defendant).

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

directing the payment of his debts, there appears in print the formula: "I give and bequeath unto . . ." Then the testator, in his own handwriting, firm and clear notwithstanding his eighty-six years, enumerated ten objects of bounty, numbered consecutively. The first is to Caroline Mary Gertrude Jameson and the gift is £3,000. The next seven are of the same kind, *i.e.*, they are gifts of sums of money to named persons. It is, perhaps, significant, though I do not wish to attach very much importance to it, that with one exception the gifts are in a regular descending scale. The testator began with the largest and ended with the smallest. The fifth gift must be mentioned because it is in these terms: "Unto my executor [the plaintiff] £500." It is on No. 9 that the argument turns:

"Further I leave in addition to the bequest given him above to my executor Norman Francis Edward Knapp my books furniture and other personal belongings whether at New Court, Temple, or elsewhere."

The final provision is No. 10, in which the testator says:

"And I surrender to the committee of the club my shares in the University of London Club, Ltd."

Before I deal with the language of No. 9, there are certain surrounding circumstances which should be stated. In the first place, the testator was a man of education. He was for many years in the service of the Board of Customs and Excise, and for a very large period of his long life he was a member of the Bar, practising as such, and the reference to New Court, Temple, is a reference to his chambers in the Temple. He was, I think, never married, and for many years he lived with some friends of the name of Jameson. The first gift which I have read is to a member of that family. We were told that he was born in Eire and that no relatives of his are known to live in England. It is, indeed, conceded that they are either in the United States of America or in Eire and that he himself was wholly out of touch with his relations. Certainly there is no suggestion in the will of any intention or desire to benefit any of them.

With those matters in mind I return to the will. In deciding a question of this sort I think it is clear that, in addition to the surrounding circumstances properly to be regarded, the court has to look, not only at the actual words, but also at the context, and, particularly, the character, of the clause in which they appear. Counsel for the plaintiff has cited a number of authorities. I think they are of assistance because they show that, whatever might be thought to be the dictionary meaning properly to be given to the word "belongings," the court has construed the word as meaning "that which belonged to the giver"—certainly all property of a personal character which belonged to the giver. *Re Bradfield* (1) before EVE, J., and *Re Mills' Will Trusts* (2), before BENNETT, J. (where the phrase was "personal belongings") are instances showing that the court went quite a long way in giving to those words a very wide connotation so as to cover in effect the whole of the personal estate of the testator. The wills in those cases were, however, very different from the will in this case, and the circumstances also are different. I have referred to the fact that the testator was an educated man, whereas in the case of *Re Mills* (2) the testatrix was unable to read and write, and I find a further distinction in the two cases I have cited. It is plain when you look at the wills therein that in their brief compass the testator or testatrix was really purporting to deal with his or her whole estate. I think the cases show further (if authority is necessary) that where you get general words such as "belongings" or "effects" they must not be cut down by applying the *ejusdem generis* rule in circumstances in which so to do would be to deprive a residuary gift of full effect and leave some of the residue undisposed of. There are, moreover, instances which show that the position in which the gift in question appears in the will is by no means conclusive. For example, *Fleming v. Burrows* (3) showed that where a residuary gift was followed by particular legacies the effect would not be to cut down the residuary gift because it was followed, and not preceded, by the particular legacies.

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ASQUITH, L.J.: I agree.

JENKINS, L.J.: I also agree.

* *Appeal dismissed; no order as to costs save that the defendant's costs as between solicitor and client should come out of the residue of the estate.*

G Solicitors: *Simpson, Palmer & Winder* (for the plaintiff); *W. R. Millar & Sons* (for the defendant).

[Reported by F. GUTTMAN, ESQ., Barrister-at-Law.]

CUNNINGHAM-HOWIE v. F. W. DIMBLEBY & SONS, LTD.

[COURT OF APPEAL (Somervell, Cohen and Denning, L.JJ.), October 6, 1950.]

Libel—Particulars—Fair comment—General plea—Particulars of facts on which plea based.

In an action for libel the plaintiff is entitled to particulars of the facts on which the comment alleged to be fair is based, not only where the defence of fair comment is pleaded in the form known as the "rolled-up plea," to which R.S.C., Ord. 19, r. 22A, applies, but also where the general plea of fair comment is pleaded.

[AS TO FAIR COMMENT, see HALSBURY, Hailsham Edn., Vol. 20, pp. 486-499, paras. 593-611; and FOR CASES, see DIGEST, Vol. 32, pp. 141-143, Nos. 1730-1742.]

Cases referred to:

- (1) *Aga Khan v. Times Publishing Co., Dawson v. Same*, [1924] 1 K.B. 675; 93 L.J.K.B. 361; 130 L.T. 746; 32 Digest 153, 1847.
- (2) *Hobbs v. People Newspaper Publishing Co., Ltd.*, (1926), *The Times*, Mar. 30.
- (3) *Tudor-Hart v. British Union for the Abolition of Vivisection*, [1937] 4 All E.R. 475; [1938] 2 K.B. 329; 107 L.J.K.B. 501; 158 L.T. 162; Digest Supp.

INTERLOCUTORY APPEAL by the defendants in an action for libel from an order of PARKER, J., made in chambers and dated July 26, 1950, confirming an order of the master that the defendants should give particulars of the facts on which their plea of fair comment was based. The plea was in the following form: "The said words are a fair comment made in good faith on matters of public interest." The defendants contended that, as the defence was a general plea of fair comment, and not the plea commonly known as the "rolled-up plea" to which R.S.C., Ord. 19, r. 22A now applied, the plaintiff was not entitled to the order.

Hawser for the defendants.

Milmo for the plaintiff.

SOMERVELL, L.J.: I will ask DENNING, L.J., to deliver the first judgment.

DENNING, L.J.: For many years before 1949 it was the practice of the Bar, in an action for libel, to plead the defence of fair comment in the form commonly known as the "rolled-up plea," because it gave to the pleader the benefit of not being ordered to give particulars of the facts on which he relied. That benefit was conferred by *Aga Khan v. Times Publishing Co., Dawson v. Same* (1) and many other cases, but several judges, including ATKIN, L.J., in *Hobbs v. People Newspaper Publishing Co., Ltd.* (2), and SCRUTTON, L.J., in the *Aga Khan* case (1), expressed their strong disapproval of it, and in 1949 the practice was altered. By R.S.C., Ord. 19, r. 22A, it is laid down that, where the defence of fair comment is pleaded in the form known as the "rolled-up plea," the defendant

"... shall give particulars stating which of the words complained of he alleges are statements of fact and of the facts and matters he relies on in support of the allegation that the words are true."

That new rule does away with an anomaly of the law.

This case is really an attempt to bring that anomaly back again. It is said that, if the defendant does not plead the rolled-up plea, but only pleads the general plea of fair comment, the plaintiff is not entitled to particulars of the facts on which the comment is based. Let us just see what the plea of fair comment entails. An essential part of it, and the proper preamble to it, is for the defendant to allege that the facts on which he comments are true. If that is expressly alleged, the plaintiff is clearly entitled to particulars of the facts. Even if it is not expressly

alleged, it is still implicit in the plea, and, if the plaintiff is to know the case he has to meet, he must be given particulars of the facts which are relied on in support of the plea. Take the instance which I put in the course of argument (taken from a similar illustration given by ATKIN, L.J., in *Hobbs v. People Newspaper Publishing Co., Ltd.* (2), and quoted in the judgment of the court, delivered by GREER, L.J. ([1937] 4 All E.R. 477), in *Tudor-Hart v. British Union for the Abolition of Vivisection* (3). Suppose it is said of a man that "he is a thief and, therefore, unfit to be a councillor," then, if the rolled-up plea were pleaded, in the old days the plaintiff could not get any particulars of the charge that he was a thief. As ATKIN, L.J., said in *Hobbs'* case (2), that was a monstrous state of affairs, and it has been rectified by R.S.C., Ord. 19, r. 22A. Suppose now, in such a case, that the general plea is put in—"The said words are fair comment made in good faith on a matter of public interest"—surely particulars should be given. That was the practice before the new rule. Indeed, in the *Aga Khan* case (1), SCRUTTON, L.J., expressly stated ([1924] 1 K.B. 682), in reference to the general plea, that

"... unless it set out the facts upon which the comments alleged to be fair were based, the defendant might be ordered to give particulars of those facts."

That practice should, I think, be retained, and no new anomaly introduced. It is not sufficient for the defendant to specify merely the matter of public interest. That would be done, in the illustration which I have given, by simply saying that it was the plaintiff's fitness to be a councillor. The defendant must go further and give particulars of the facts on which the comment is based, *i.e.*, the facts which go to the pith and substance of the matter. He must know what they are, because he intends to prove them at the trial, and it is no hardship for him to give particulars of them. For the reasons which I have stated, the plaintiff is entitled to particulars of the facts on which the comment alleged to be fair is based, not only in the cases to which R.S.C., Ord. 19, r. 22A, applies, *viz.*, cases where the defence of fair comment is pleaded in the form known as the "rolled-up plea," but also where the plea of fair comment has been pleaded generally, and, therefore, I think that this appeal should be dismissed.

SOMERVELL, L.J.: I agree.

COHEN, L.J.: I also agree.

Appeal dismissed with costs.

Solicitors: *Calvert-Smith & Sutcliffe*, Richmond, Surrey (for the defendants); *Cozens & Moxon*, Hampton (for the plaintiff).

[Reported by C. N. BEATTIE, Esq., Barrister-at-Law.]

CLAYSON *v.* ROLLS ROYCE, LTD. AND ANOTHER.

[COURT OF APPEAL (Somervell and Denning, L.JJ.), October 16, 1950.]

Discovery—Interrogatories—“Opposite parties”—Joint tortfeasors—Administration of interrogatories by one tortfeasor to another—Necessity of notice—R.S.C., Ord. 31, r. 1.

By R.S.C., Ord. 31, r. 1 “In any cause or matter the plaintiff or defendant by leave of the court or a judge may deliver interrogatories in writing for the examination of the opposite parties, or any one or more of such parties . . .” In an action by the plaintiff against two alleged tortfeasors, the second defendants sought to administer interrogatories to the first defendants. No notice under R.S.C., Ord. 16A, r. 12, claiming contribution or relief connected with the subject-matter of the action, had been served on the first defendants by the second defendants.

HELD: in ordinary cases where the issues were plain, a defendant could claim contribution from a co-defendant under s. 6 (2) of the Law Reform (Married Women and Tortfeasors) Act, 1935, without delivering a notice under R.S.C., Ord. 16A, r. 12; but where a defendant desired to obtain discovery from, or administer interrogatories to, a co-defendant, he must serve a notice claiming contribution and apply for directions, so that the court might know what issues he sought to raise.

[AS TO INTERROGATORIES GENERALLY, see HALSBURY, Hailsham Edn., Vol. 10, pp. 407-414, paras. 492-500; and FOR CASES, see DIGEST, Vol. 18, pp. 178-200, Nos. 1314-1481.]

Cases referred to:

- (1) *Croston v. Vaughan*, [1937] 4 All E.R. 249; [1938] 1 K.B. 540; 107 L.J.K.B. 182; 158 L.T. 221; 102 J.P. 11; Digest Supp.
- (2) *Shaw v. Smith*, (1886), 18 Q.B.D. 193; 56 L.J.Q.B. 174; 56 L.T. 40; 18 Digest 58, 152.

APPEAL by the second defendants from an order of PARKER, J., dated July 26, 1950, affirming a decision of MASTER BAKER, whereby he refused leave to the second defendants to administer interrogatories to the first defendants on the ground that they were not “opposite parties” within the meaning of R.S.C., Ord. 31, r. 1.

It was contended for the second defendants that, in view of the decision in *Croston v. Vaughan* (1), a defendant seeking to recover contribution from another defendant under the Law Reform (Married Women and Tortfeasors) Act, 1935, s. 6, was not required to serve a third party notice on the other defendant in accordance with R.S.C., Ord. 16A, r. 12, and was entitled to administer interrogatories in spite of the absence of such notice. The facts appear in the judgment of SOMERVELL, L.J.

Nelson, K.C., and *R. H. Forrest* for the second defendants.

Humphrey Edmunds for the first defendants.

C. H. Duveen for the plaintiff.

SOMERVELL, L.J.: This is an appeal from a decision of PARKER, J., affirming a decision of MASTER BAKER, refusing leave to the second defendants in the action to administer interrogatories to the first defendants on the ground that they were not opposite parties. R.S.C., Ord. 31, r. 1, provides:

“In any cause or matter the plaintiff or defendant by leave of the court or a judge may deliver interrogatories in writing for the examination of the opposite parties, or any one or more of such parties . . .”

A note to this rule in the ANNUAL PRACTICE, 1949, vol. I, p. 524, under the heading “Opposite Parties” says:

“... a party not on the other side of the record is an opposite party within the meaning of these rules if between him and the applicant there is

some right to be adjusted in the action, which in Chancery actions might often be the case between two plaintiffs or two defendants . . . ”

The authority for that phraseology in principle is *Shaw v. Smith* (2).

The present claim is by an infant. She was employed in the works of the first defendants, Rolls Royce, Ltd., and claims damages

A “for personal injuries and loss and damage caused by a defective lift at the first defendants’ premises owing to the breach of statutory duty and/or the negligence of the first defendants or their agents and/or owing to the negligence of the second defendants.”

B The claim against the first defendants is founded on breach of statutory duty and also on negligence. The second defendants were joined in the action because of the defence of the first defendants who say that the injuries were caused by the negligence of the second defendants. They allege a contract between themselves and the second defendants under which the second defendants agreed, *inter alia*, to examine the lift by a competent mechanic and to report from time to time on anything which could by an external examination be determined as being in need of further attention, and they say that they will refer to the contract at the trial. Then they say that the second defendants knew of these defects and failed to give notice, and they rely on that in answer to the plaintiff’s claim. They have not so far taken the procedure to claim an indemnity from the second defendants by virtue of the contract between them in the event of their being held liable to the plaintiff. The second defendants admit the contract, but deny the negligence.

D Counsel for the second defendants says that the learned judge was wrong because of s. 6 of the Law Reform (Married Women and Tortfeasors) Act, 1935, which provides:

“(1) Where damage is suffered by any person as a result of a tort . . . (a) judgment recovered against any tortfeasor liable in respect of that damage shall not be a bar to an action against any other person . . . ”

E The section goes on to provide that any tortfeasor liable for the whole of the damage may recover contribution from any other tortfeasor, and the amount of that contribution shall be such as may be found by the court to be just and equitable having regard to the extent of that person’s responsibility for the damage. Counsel also referred, and it was a necessary part of his submission, to the procedure which has grown up after being declared to be valid and proper by this court in *Croston v. Vaughan* (1). That was an action concerned with motor-cars. The plaintiff in that case was claiming that two defendants had been negligent and that the accident was caused either by the negligence of one or the other or both. Immediately after judgment had been delivered, an application was made to the judge to apportion the blame between the two defendants in accordance with the provisions of the Act of 1935. The judge apportioned the blame two-thirds to one defendant and one-third to the other. On appeal it was held that the judge had jurisdiction to make that apportionment, that it was a matter of discretion for the judge, and that it could not be disturbed by the Court of Appeal. We were told that that practice has been followed, and that in that class of case it is unusual to follow the procedure of a notice under Ord. 16A, r. 12. Sometimes a letter is written, but sometimes no communication is given beforehand, it being recognised, perhaps, that in that class of case an application on those lines will be made if both defendants are held to be to blame.

H I am going to confine my decision to the facts of the present case in which one defendant is seeking to administer interrogatories to another defendant. I wish to say nothing which can throw doubt on, or might impede, any practice such as is referred to in *Croston’s* case (1), where there is no question of interrogatories or discovery. It was not disputed before us that Ord. 16A, r. 12, which deals with the position if one defendant seeks contribution or indemnity

from another, would cover the case of an ordinary claim in a running down action against two defendants such as was dealt with by an application after judgment in *Croston's* case (1). The rule provides:

"(1) Where a defendant claims against another defendant (a) that he is entitled to contribution or indemnity, or (b) that he is entitled to any relief or remedy relating to or connected with the original subject-matter of the action and substantially the same as some relief or remedy claimed by the plaintiff . . . the defendant making the claim may without any leave issue and serve on such other defendant a notice making such claim or specifying such question or issue. (2) No appearance to such notice shall be necessary and the same procedure shall be adopted for the determination of such claim, question or issue between the defendants as would be appropriate under this order if he were a third party."

That, of course, means an order for directions. In my opinion, where one defendant as against another defendant is alleging a right to discovery, as he is in the present case, by seeking to deliver interrogatories, and a contest arises, it is right that he should deliver a notice under Ord. 16A, r. 12, and that the procedure under the rules should be invoked. The present case is a very good example of the importance of defining what is the right to be adjusted as between the two defendants. I had to ask counsel for the second defendants during the course of the argument how the question of a contribution would arise, and what form it might take. There also is a contract between the first and the second defendants which on the face of it might be relevant if a court was asked to decide as to any liability as between one defendant and the other. I think where issues as to discovery arise the procedure which was perfectly satisfactory in *Croston's* case (1) is not satisfactory and that the party seeking discovery should serve his notice so that the court, when it comes to deal with his claim, can have a record of what issues he seeks to raise. In the present case it may be that neither side is relying on the contract, but it may be that, if the issue of the liability of the first defendant to the second defendant is raised by a notice, one or other side may rely on that. For those reasons I think the appeal fails and must be dismissed.

DENNING, L.J.: In ordinary cases where a defendant claims contribution from a co-defendant under s. 6 (2) of the Act of 1935, it is not necessary for the full third party procedure to be followed, and since *Croston v. Vaughan* (1) it never has been. It is, I think, desirable that notice should be given by letter that a claim for contribution will be made, but even this is not essential in ordinary collision cases where the issues between two defendants are plain and do not need further definition. Exceptional cases may, however, arise, like the present one, in which one of the defendants desires to obtain particulars, or discovery of documents, or interrogatories, from his co-defendant. Then it is essential for him to serve a notice claiming contribution and to apply for directions so that the issues may be clearly defined, but this expense should not be incurred unless it is necessary for fairly disposing of the matter, and the master should, I think, refuse to direct pleadings as between the two defendants or to give other directions except where he is satisfied they are necessary. In the present case, as a necessary foundation for the application to administer interrogatories, I think it was essential that a notice claiming contribution should be served. As it was not served before the application was heard by the master or the judge, I agree that this appeal should be dismissed.

Appeal dismissed with costs.

Solicitors: *Carpenters*, agents for *Laces & Co.*, Liverpool (for the second defendants); *Hewitt, Woollacott & Chown* (for the first defendants); *George A. Herbert*, agent for *T. Moore*, Birkenhead (for the plaintiffs).

[Reported by C. N. BEATTIE, ESQ., Barrister-at-Law.]

TAYLOR AND ANOTHER v. SAYCELL.

[KING'S BENCH DIVISION (Lord Goddard, C.J., Byrne and Ormerod, JJ.),
October 5, 16, 1950.]

Street Traffic—Driving uninsured motor vehicle—Avoidance of disqualification—No “special reasons” found—Conditional discharge—Exercise of discretion—Road Traffic Act, 1930 (c. 43), s. 35 (2)—Criminal Justice Act, 1948 (c. 58), s. 7 (1), s. 12 (2).

A By a policy of insurance in respect of third-party risks held by one of two partners who carried on business as haulage contractors in relation to the user of a lorry belonging to the partnership it was provided that the policy should be effective, while the vehicle was being used for carrying goods for hire or reward, only when it was driven by the policy holder himself or by a person employed by him, and only when used for the carriage of goods on behalf of a named company. On the material date the lorry was driven by the partner other than the policy holder (he not being employed by the policy holder), not to deliver goods on behalf of the named company, but to deliver goods for reward on behalf of the partnership. Both partners were convicted by justices of using a motor vehicle on the highway without there being in force in relation to the user a policy of insurance as required by s. 35 (1) of the Road Traffic Act, 1930. They were fined, and, under s. 35 (2), were disqualified for holding or obtaining a licence under Part I of the Act for a period of twelve months. On appeal against sentence to quarter sessions, the recorder, taking the view that the offence was not serious, substituted for the decision of the justices an order conditionally discharging the partners under s. 7 (1) of the Criminal Justice Act, 1948.

D HELD: while in such a case quarter sessions had jurisdiction to make an order of conditional discharge with its attendant avoidance of disqualification, such an order should only be made in most exceptional circumstances; such circumstances did not exist in the present case; and the Divisional Court had power to remit the case to quarter sessions with an expression of their opinion to that effect.

E [AS TO COMPULSORY INSURANCE OF MOTOR VEHICLES, see HALSBURY, Hailsham Edn., Vol. 18, pp. 560-563, paras. 907-912; and FOR CASES, see Digest Supp., and Second Digest Supp.]

F FOR THE ROAD TRAFFIC ACT, 1930, s. 35, see HALSBURY'S STATUTES, Vol. 23, p. 636; and FOR THE CRIMINAL JUSTICE ACT, 1948, s. 7 and s. 12 (2), see *ibid.*, Second Edn., 1948, Continuation vol., p. 160 and p. 167, respectively.]

Cases referred to:

(1) *Gardner v. James*, [1948] 2 All E.R. 1069; 113 J.P. 62; 2nd Digest Supp.

(2) *Quelch v. Collett*, [1948] 1 All E.R. 252; [1948] 1 K.B. 478; [1948] L.J.R. 956; 112 J.P. 166; 2nd Digest Supp.

(3) *Pilbury v. Brazier*, *ante*, p. 835.

G CASE STATED by the recorder of Sheffield.

H At a court of summary jurisdiction for the city of Sheffield sitting on Mar. 15, 1950, the defendants were convicted of having, on Dec. 16, 1949, unlawfully used a motor vehicle on a road in the city, there not being in force in relation to such user such a policy of insurance or such a security in respect of third-party risks as complied with the requirements of Part II of the Road Traffic Act, 1930, contrary to s. 35 (1). The justices fined the defendants and disqualified them for holding or obtaining a driving licence for a period of twelve months from the date of their conviction. The defendants appealed to quarter sessions against their convictions and sentences. The appeals were heard on Apr. 21, 1950, when the defendants abandoned the appeals against the convictions. On the question of sentence it was submitted on behalf of the defendants that the case was a

proper one to be dealt with under the Criminal Justice Act, 1948, s. 7 (1). For the prosecutor it was submitted that, in determining whether to make an order under s. 7 (1), the court should follow the principles laid down with reference to the Probation of Offenders Act, 1907, s. 1, in *Gardner v. James* (1). The recorder held that the power of the court to make an order for conditional discharge under s. 7 (1) of the Act of 1948 was wider than the power formally conferred by s. 1 of the Act of 1907 and that he was not bound by the principles applicable to the former provision in exercising his discretion under s. 7 (1). Having regard to the smallness of the fines imposed by the magistrates he was satisfied that the offence was not a serious one, allowed the appeals against sentence, and ordered each of the defendants to be discharged subject to the condition that he committed no offence for twelve months from the date of the order. By reason of that order and by virtue of the Criminal Justice Act, 1948, s. 12 (1) and (2), the defendants were not disqualified for holding or obtaining a licence under Part I of the Road Traffic Act, 1930, and the court had no power to impose such a disqualification. The prosecutor appealed.

Forrester-Paton for the prosecutor.

Drabble for the defendants.

Cur. adv. vult.

Oct. 16. **LORD GODDARD, C.J.**, read the following judgment of the court. This is a Special Case stated by the recorder of Sheffield to whom the defendants appealed against two convictions by the city justices, the first for unlawfully failing to comply with the conditions subject to which an "A" contract licence had been granted, contrary to s. 9 (1) of the Road and Rail Traffic Act, 1933, and, secondly, for unlawfully using a motor vehicle on the highway without there being in force a policy of insurance as required by s. 35 of the Road Traffic Act, 1930. The magistrates had imposed fines in respect of each of these offences and had also disqualified the defendants for holding a licence under Part I of the Road Traffic Act, 1930, for twelve months. On the hearing the defendants abandoned the appeals against conviction and appealed only against sentence. We are not concerned with the first of these offences and the Case stated by the recorder in fact relates only to the second, namely, with regard to using an uninsured vehicle. The recorder set aside the sentence imposed by the justices and substituted for it an order of conditional discharge under the Criminal Justice Act, 1948, s. 7 (1) and also, rightly, held that the effect of granting a conditional discharge was, by reason of the provisions of s. 12 (2) of the Act, to remove the disqualification imposed. On the application of the prosecutor he stated a Case and the question he puts to the court is whether there was any evidence on which he could properly exercise his discretion to make an order for conditional discharge, thereby removing the disqualification imposed on the defendants as a result of their conviction.

The material facts are that the defendants carried on business in partnership as haulage contractors. The offence consisted in the defendant Taylor driving a lorry belonging to the partnership for the purpose of delivering coal at miners' homes although the policy of insurance then in force provided that the policy was effective while the vehicle was being used for carrying goods for hire or reward only when it was being driven by the policy-holder or any person employed by him under a contract of service who was driving on his order or with his permission or while it was being used for the carriage of goods on behalf of a named company and for social, domestic and pleasure purposes of passengers other than for hire or reward. The policy had not been issued to the partners. The policy-holder was the defendant Marriott, and on the occasion in question Taylor was not driving under a contract of service with Marriott. Furthermore, the coal was being delivered, not on behalf of the company specified in the policy, but on behalf of the partnership. Clearly, therefore, on the journey the subject of the charge the lorry was not insured, and, had an accident occurred,

A the insurers could not have been required to indemnify the defendants had they been liable for the consequences of the accident. The recorder has not found any special reasons for refraining from upholding the disqualification imposed by the magistrates, but he has said that he was satisfied that the offence against s. 35 was not serious, and, consequently, that he was warranted in making an order for the conditional discharge of each of the defendants which, by virtue of s. 12 (2) of the Criminal Justice Act, 1948, would avoid disqualification. His only reason for holding that the offence was not serious appears to be that the justices only inflicted a small fine, but this overlooks the fact that in addition they imposed disqualification, which of itself is a very serious punishment.

B This court is unable to share the view of the recorder that the offence of driving an uninsured lorry, more especially in a city, is not an offence of a serious character. The object of the legislature in providing for compulsory insurance is well known. It is that if persons are injured through no fault of their own by a motor vehicle they shall be enabled to recover the damages awarded to them, although the driver or owner of the vehicle causing the damage may not be in a position himself to satisfy the claim. There have, no doubt, been cases where facts have been proved which justify a court holding that there were special reasons within the meaning of the statute enabling them to refrain from ordering disqualification, but no special reasons were found by the recorder, nor could he have found them as no evidence was given by the defendants. He has, however, granted a conditional discharge, and by that means, owing to the provisions of s. 12, has avoided disqualification. This court can only regard the offence of driving uninsured vehicles as serious, and, I think I may fairly say, generally as very serious. An accident may happen immediately the vehicle starts on its journey or at any time on its journey, and if persons take out a policy to which are attached conditions limiting the persons entitled to drive or the use to which the vehicle may be put, they do so for the purpose of paying a smaller premium than they would have to pay if full cover was granted. It is, therefore, the bounden duty of the assured to see that there is no breach of the conditions of the policy which would entitle the insurers to decline liability. If the assured deliberately use the vehicle without regard to the conditions they are committing a serious offence. There was no suggestion here that the defendants were in any way misled or did not understand the conditions of the policy and this court has more than once laid down that it is the duty of the assured to make themselves acquainted with and abide by such conditions.

F The recorder does not ask whether he had jurisdiction to make use of s. 7, which has now taken the place of the Probation of Offenders Act, 1907, formerly in force, and we are in no way throwing any doubt on *Quelch v. Collett* (2), in which the court held, on facts very different from the present, that, although justices might not find special reasons for refraining from disqualifying, they nevertheless might discharge the offender under s. 1 (1) of the Probation of Offenders Act, 1907. Considering also that s. 12 (2) of the Act of 1948 provides G that the conviction of an offender who is discharged absolutely or conditionally shall in any event be disregarded for the purposes of any enactment which imposes any disqualification or disability upon convicted persons, or authorises or requires the imposition of any such disqualification or disability, and that no reference is made to the Road Traffic Act, 1930, so that convictions under that Act are in no way excluded from the provisions of s. 12 (2), there can be no doubt H that there is jurisdiction in the court to discharge conditionally and thereby to avoid the necessity of disqualification. Because, however, it is within the jurisdiction of a court to make that order it by no means follows that they should do so, unless in most exceptional circumstances. In *Gardner v. James* (1) in delivering the judgment of the court I said:

“ It is very difficult indeed to see how justices can be justified in acting under the Probation of Offenders Act on reasons which would not constitute

special reasons entitling them to refuse, on conviction, to suspend the licence."

It would have been more accurate if I had said "to disqualify for holding a licence." It was not suggested in this case that there was anything that could have been called a special reason, and I am unable to see how it can be said that the offence was not a serious offence. Moreover, when the previous motoring history of the two defendants is examined we find that the defendant Taylor has ten previous convictions for motoring offences, including one of driving without reasonable consideration, another for dangerous driving, and four for using a vehicle, no doubt a lorry, with inefficient brakes. Marriott's record is not so bad, but he has three convictions for using a vehicle with inefficient brakes and two for exceeding the speed limit, which may, however, for this purpose be disregarded.

This court has always held that where a court has refrained from imposing sentences or penalties under the provisions of various statutes they have power in a proper case to interfere. There are many cases in which, in former days, magistrates refrained under s. 16 of the Summary Jurisdiction Act, 1879, from passing any sentence and dismissed the information on the ground that the offence was trivial, but this court said that the course taken by the magistrates was wrong and remitted the case to them with directions to convict and impose a penalty. When the provisions of the Probation of Offenders Act, 1907, took the place of s. 16 the court also interfered on occasion in the same way. Exactly the same considerations apply where absolute or conditional discharges are granted under the Criminal Justice Act, 1948. This court will never readily interfere with the exercise of the discretion if it is exercised judicially and the facts are such that they can see there was justification for the court taking the action which it has. As BIRKETT, J., put it in *Quelch v. Collett* (2) ([1948] 1 All E.R. 284):

"That discretion must be judicially exercised by the justices and this court will be vigilant to see that it is so exercised. Where, however, materials exist on which the justices may properly exercise that judicial discretion and they have exercised it, this court will be equally vigilant to see that their considered view is made effective."

We can see no grounds here on which it can be said that it was proper to grant an order of conditional discharge for the purpose of avoiding disqualification, and I repeat with emphasis the words that I quoted above from *Gardner v. James* (1). Everyone recognises that the penalty of disqualification is severe. It often causes great hardship, and, accordingly, it may be distasteful to a court to impose it, but it is a penalty which Parliament has imposed and has said is *prima facie* to be imposed in every case of this character and a court is only to refrain from imposing it if it can find special reasons for so refraining. It must, therefore, be very seldom that a court is justified in granting an absolute or conditional discharge so as to avoid doing that which s. 35 (2) says shall be done, and ought certainly not to do so where no excuse has been put forward by an accused for his breach of the law. As we pointed out in *Pilbury v. Brazier* (3), there may be cases in which a technical objection could be taken on the terms of the policy, such, for instance, as that the driver at the time when he was stopped was not the holder of a licence because he had forgotten to renew it and generally policies only indemnify licensed drivers. That is a point which no reputable insurance company takes, and if, as in *Pilbury v. Brazier* (3), the insurance company inform the court that they would have regarded themselves liable to indemnify had an accident occurred, that may well be a special reason or a reason for a conditional discharge. No suggestion was made in this case that the insurance company would have taken up any such attitude. The case must go back to the recorder with the opinion of the court that there was no

evidence on which he could properly exercise his discretion to make an order of conditional discharge.

Before parting with this case, I desire to add that this is a good illustration of what I cannot help thinking is an unintentional *lacuna* in the Act. The disqualification can only be imposed from the date of the conviction, which was in March of this year. It ran, apparently, until the recorder removed it in April. The case comes before this court in October and the effect of our judgment is that the disqualification is restored, but it will be for twelve months from last March. It is to be hoped that some day an alteration in the law will be made so that where a court of appeal imposes a penalty of disqualification the disqualification will run from the date of the decision of the appeal and not from the date of conviction. The court will order that the disqualification be re-imposed as from today and the Master of the Crown Office will so inform the clerk of the peace and the prosecutor, and the superintendent or the inspector of police.

Appeal allowed with costs.

Solicitors: *Sharpe, Pritchard & Co.*, agents for *John Heys*, town clerk, Sheffield (for the prosecutor); *Bell, Brodrick & Gray*, agents for *Keeble, Hawson, Fennell & Arnold*, Sheffield (for the defendants).

[*Reported by F. A. AMIES, ESQ., Barrister-at-Law.*]

Re VESTEY'S SETTLEMENT. LLOYDS BANK, LTD. AND OTHERS v. O'MEARA AND OTHERS.

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Asquith and Jenkins, L.JJ.),
October 9, 10, 11, 1950.]

Settlement—Trust—Discretionary trust—Trustees directed “to pay or apply” income of trust fund during specified period to or for “the support or benefit of all or any one or more” of a named class of persons—Corpus to be divided at end of specified period—Beneficiaries of discretionary trust having only contingent interest in corpus—Exercise of trust—Allocations of income in favour of infant beneficiaries—Resolution of trustees that sums “shall belong” to or be divided among each of the infant beneficiaries—Sums allocated to infants not being required for their maintenance, resolution to accumulate—Trustee Act, 1925 (c. 19), s. 31 (2).

By cl. 7 of a settlement, made in 1935, the settlor directed that, during a specified period, the trustees “shall pay or apply the income” of the trust fund “unto or in any manner for the support or benefit of all or any one or more” of a named class of persons, “such payment or application” to be made in such shares, in such manner, and on such terms, as the trustees should in their discretion think fit. The objects of the discretionary trusts were members of the settlor's family and consisted, at all material times, of a number of adults and infants. At the end of the specified period, the corpus of the trust fund was to be divided among a named class. None of the beneficiaries of the discretionary trust had a vested interest in corpus, but the infant beneficiaries had contingent reversionary interests therein, such interests being contingent on their surviving the end of the specified period. By a resolution, made on Feb. 2, 1949, and purporting to be in exercise of their discretionary power under cl. 7, the trustees decided that, after the payment of certain sums to the adult beneficiaries, the balance of the income which they decided to make available for immediate distribution in each half year “shall belong” in specified shares to each of the infant

beneficiaries, and they then proceeded to allocate the shares for the half year ending Sept. 30, 1948. They then resolved that, as none of the income falling in that half year to the infant beneficiaries under the first part of their resolution was required for the maintenance of the infants, "that income should be accumulated in accordance with s. 31 of the Trustee Act, 1925." By a resolution dated Apr. 29, 1949, the trustees resolved "to divide" the balance of the income of the half year ending Mar. 31, 1949, among the infant beneficiaries, and, for the same reasons as before, that the income should be accumulated.

HELD: (i) as the effect of the trustees' resolutions was to give to each infant a specific portion of the income, and, without those resolutions the infant was entitled to no part of it, the first part of the resolutions amounted, if not to payments, to applications of the moneys for the benefit of the infants, and, therefore, the allocations were within the power of the trustees under cl. 7 of the settlement.

Re Peel ([1936] Ch. 161), distinguished.

Per JENKINS, L.J.: "Words such as 'payment' must be construed in their context, and, inasmuch as this is a discretionary trust in favour of a class of persons which, *ex necessitate*, includes infant beneficiaries, I would be disposed, if it were necessary to do so, to put a wider interpretation on the expression 'pay,' and include in it the transaction consisting of the allocation of a share of any year's income to an infant absolutely, although, owing to his infancy, no receipt is possible."

(ii) as the infants had merely contingent reversionary interests in the corpus of the fund and the reversionary interests in corpus did not carry the intermediate income and were thus excluded from the application of s. 31 of the Trustee Act, 1925, by sub-s. (3), sums received by an infant by an exercise of the trustees' discretion under cl. 7 of the settlement were not received by virtue of his contingent interest in corpus, nor were such sums received by him by reason of something analogous to a life or other limited interest in income, as, under the terms of the discretionary trust, no infant had any share or interest in the income unless and until the trustees, in the exercise of their discretion, decided to pay or apply to or for the support or benefit of that infant some part of the income from time to time in hand, but, on a sum of income being allocated to him under the trustees' discretion, the infant became absolutely entitled to it, and, therefore, s. 31 of the Trustee Act, 1925, did not apply to that sum.

(iii) as the effect of the first part of the resolutions was a disposition of part of the income of the trust fund in such a way as to appropriate particular shares absolutely to each of the infants, the fact that the trustees wrongly thought that the sums then became subject to the trusts imposed by s. 31 of the Trustee Act, 1925, did not make the allocations invalid.

[AS TO TRUSTEES' DUTY TO ACCUMULATE, see HALSBURY, Hailsham Edn., Vol. 29, pp. 775, 776, para. 1082.]

Cases referred to:

- (1) *Tench v. Cheese*, (1855), 6 De G.M. & G. 453; 24 L.J.Ch. 716; 25 L.T.O.S. 261; 43 E.R. 1309; 23 Digest 501, 5675.
- (2) *Re Peel*, [1936] Ch. 161; 105 L.J.Ch. 65; 154 L.T. 373; Digest Supp.
- (3) *Re Banbury*, [1950] 2 All E.R. 250.
- (4) *Re Salaman*, [1907] 2 Ch. 46; 76 L.J.Ch. 419; 96 L.T. 809; *on appeal*, [1908] 1 Ch. 4; 77 L.J.Ch. 60; 98 L.T. 255; 23 Digest 447, 5179.

APPEAL by the infant beneficiaries from an order of HARMAN, J., dated May 2, 1950.

Clause 7 of a settlement, made on Nov. 15, 1935, by Baron Vestey and Sir Edmund Vestey, contained a discretionary trust in regard to the payment to,

or application for the support or benefit of, all or any one or more of the beneficiaries, during a specified period, of the income of the fund settled by Sir Edmund Vestey. By resolutions made on Feb. 2, 1949, Apr. 29, 1949, and Nov. 28, 1949, Edmund's trustees, purporting to exercise the discretionary trust contained in cl. 7, allocated certain shares of the income then in hand to each of the infant beneficiaries who were among the objects of the trust. Being under the impression that s. 31 of the Trustee Act, 1925, applied to these allocations, the trustees on each occasion directed that, as the sums allocated were not required for the maintenance of the infants, they should be accumulated in accordance with the provisions of the section. On a summons taken out by the trustees, the court was asked to determine: "(1) Whether on the true construction of the . . . deed of settlement . . . the trustees . . . of Edmund's fund . . . are, in the execution or exercise of the discretionary trust and powers [contained in cl. 7 thereof] (a) at liberty to allocate to any one or more of the objects who is or are an infant or infants such part or parts of the income of Edmund's fund . . . as the . . . trustees . . . may think fit, notwithstanding that no present or immediate application thereof for his, her or their maintenance is contemplated or required, or (b) are bound in every year to execute or exercise the aforesaid discretionary trust and powers so as and in such manner that the whole of the income of Edmund's fund . . . for that year is actually paid or applied to or for the support or benefit of all or some one or more of the objects. (2) If the answer to question (1) hereof shall be in accordance with alternative (a), whether any of the income of Edmund's fund . . . which is so allocated as aforesaid to any one or more of the objects who is or are an infant or infants is during his, her or their infancy respectively income of property held by the . . . trustees . . . in trust for such object or objects within the meaning of s. 31 of the Trustee Act, 1925, and, accordingly, the statutory powers of maintenance and accumulation conferred on trustees by that section are during the infancy of any such object exercisable by the . . . trustees . . . in relation to the income so allocated as aforesaid to him or her." HARMAN, J., held that the allocations were outside the ambit of the discretionary trust, being neither payments to the infants nor applications for their benefit within cl. 7 of the settlement, and, therefore, the operations were wholly ineffective, and the second question did not arise. The facts and the relevant provisions of the settlement appear in the judgment of SIR RAYMOND EVERSLED, M.R.

Sir Andrew Clark, K.C., and *E. I. Goulding* for the infant beneficiaries.

Dunbar for the adult beneficiaries.

H. A. Rose for the trustees.

SIR RAYMOND EVERSLED, M.R.: This appeal has raised points which I have found of considerable difficulty. The question, briefly, is whether, in respect of certain half-years, the trustees of a settlement made on Nov. 15, 1935, effectually exercised certain discretionary trusts which were imposed on them by the settlement, and, if so, with what result.

The settlement is an elaborate one. Indeed, counsel for the adult beneficiaries applied to it the adjective "sophisticated," which I think might, perhaps, also not inappropriately be applied to some of the argument which has ranged round the question. There were two settlors, Lord Vestey and Sir Edmund Vestey, but the present problem relates only to such trusts as apply to the funds settled by Sir Edmund Vestey. I can state the material part of those trusts, I think, briefly. The scheme provided for the disposal of the income of Sir Edmund Vestey's funds (which were substantially augmented in 1942 by another deed of covenant, to which I need not further refer) for a considerable period, called "the specified period," the specified period being defined as being the period from the date of the deed until the death of the last survivor of the issue actually born before that date of Lord Vestey, Sir Edmund Vestey and his late Majesty, King Edward VII, or until Jan. 1, 2011, whichever date should first arise. During

that period, the income of the funds, by virtue of cl. 7, was to be disposed of as follows: "Edmund's trustees shall"—it is to be noted that that word is imperative:

"... pay or apply the income of Edmund's fund . . . unto or in any manner for the support or benefit of all or any one or more of the following persons for the time being in existence (whether now living or hereafter to be born) . . ."

Then follows the necessary definition of the class which, for the moment, I pass over. Clause 7 continues:

"... such payment or application to be made at or for such times in such shares in such manner and upon any such terms and conditions whatsoever as Edmund's trustees in their discretion shall from time to time think proper, and so that the same shall in no case give any right of continued or future receipt or enjoyment of any income or the benefit thereof."

There was then a series of provisos, one of which enabled, for certain limited periods, an accumulation of the income during this specified period. We have been informed, and I accept it, that at the moment the only possible and legitimate period of accumulation would be the settlor's, Sir Edmund Vestey's, own life. He is now a man somewhat heavy with years, and, therefore, the period of accumulation permitted would be necessarily, or very probably, short. Apart from that proviso permitting limited accumulation, the direction in cl. 7 is a trust imposing a duty, as I read it, on the trustees to pay or apply the income in the manner indicated. The objects of the discretionary trust were members of the family, and at the present time they consist of eight adults and seven infants. All persons at present interested as objects of the discretion have been represented before the court. At the end of the specified period, the corpus will be divided among a class to be derived, again, from the family. I need not take time by specifying it. Suffice it to say that these infants and some, but not all, I think, of the adults, should they survive that period, would be qualified to come in at the final distribution of corpus, but, should they not survive, then other persons would take their place. In other words, none of these persons now before the court has a vested interest in corpus, but each of the seven infants has a contingent interest, contingent on surviving the expiration of the specified period.

That, I think, is a sufficient statement of the facts, so far as the settlement is concerned, and the obligations imposed thereby on the trustees. The plaintiffs in the action consist of Lloyds Bank, Ltd., which corporation is a custodian trustee, and four other persons, who are the managing trustees. It falls, therefore, on the last four plaintiffs to exercise, on the appropriate occasions, the discretion imposed by cl. 7. The method which they have adopted is made to appear from three exhibits to the affidavit filed in the case by the fourth plaintiff, Mr. Brown, one of the managing trustees. The deed imposes—in my limited experience it is a novel provision—on the trustees the positive duty of keeping minutes recording resolutions passed in the exercise of these discretions, and provides—though this is irrelevant for the present purposes—that a majority vote should prevail, but so that any dissent should be recorded. On the first occasion on which the discretion was exercised in the way which has given rise to this question a meeting was held on Feb. 2, 1949, for dealing with the income which had come to the hands of the trustees for the half-year ended Sept. 30, 1948, and the way in which the matter was dealt with was this, as appears from the minutes:

"The trustees considered the question of distribution of income, and it was noted that there was a total sum of £63,375 in hand [which was made up partly of income of the original settled fund, and partly of income of the added funds]. The trustees decided to allocate £47,000 for immediate

distribution, leaving the balance for consideration when the accounts for the year ending Mar. 31, 1949, were available, and the following resolution was passed."

I should state that nothing turns in this case on the trustees' decision to hold over, so to speak, until the next half-year, the difference between £47,000 and £63,375. I observe, however, that, according to the minute, the decision was to allocate £47,000 for immediate distribution. The minutes then proceed:

"The trustees resolved in exercise of their discretionary power under cl. 7 of the settlement that until further resolution of the trustees the balance of the income which the trustees shall decide to be available for immediate distribution in each half-year after making such distributions (if any) to adult beneficiaries as the trustees shall in each half year in their discretion think proper shall belong to such of the issue of Sir Edmund Vestey as are objects of the said power and are under twenty-one years of age at the date of the relevant half-yearly distributions and if more than one in equal shares except that John Vestey, one of Sir Edmund's grandchildren, being the son of Mr. William Vestey, shall be allotted two shares in such distribution."

Therefore, Mr. John Vestey (who is now nearing his majority) is allotted a share twice as large as that allotted to the other infants. Then the minutes go on:

"Out of the above-mentioned sum of £47,000 the trustees decided to pay £1,000 each to the following adult beneficiaries . . . then set out, leaving £42,000 available for the issue of Sir Edmund Vestey who are under twenty-one divisible as follows . . ."

Then their names are set out, and, following what had previously been said, John, the first named, gets double the shares of the other five [there being, at the date of that resolution, six infant beneficiaries], so that there are, in effect, seven shares of £6,000 each, £42,000 in all. Finally:

"The trustees, being of the opinion that none of the income falling in the current half-year to infant beneficiaries under the trustees' resolution above is required for the maintenance of such beneficiaries, resolved that that income should be accumulated in accordance with s. 31 of the Trustee Act, 1925."

The first thing to note is that the first resolution, so called, appears on the face of it to be a resolution covering future exercises of the discretion, but it has been pointed out that it could not, of course, be an effective exercise, *nunc pro tunc*, for the future, and that it must, therefore, be regarded as a statement of policy to be followed, subject, of course, to review and possible alteration on every subsequent occasion. So far as this particular distribution of the half-year's income to Sept. 30, 1948, is concerned, it lays down what the trustees decided then to do with the £47,000 in hand. The decision—and I repeat the vital words—was a decision that, subject and after payment to the adults, the balance "shall belong" in certain proportions to the infant beneficiaries. Then, after the result of the first resolution has been set out, there follows the second resolution, which is represented to be—and, I think, rightly—a subsidiary resolution, namely, that the £42,000 which is to belong to the infants, not being required for immediate maintenance, must, as a result, be accumulated pursuant to s. 31 of the Trustee Act, 1925. That being the form of the resolution, the sums in question were set aside in books kept by the bank. Investments have been made of the sums set aside and of the income as it has accrued due, on the footing that s. 31 of the Trustee Act was operative in regard to these sums, and, accordingly, that Lloyds Bank was simply giving effect, subject to the directions of the managing trustees, to the statutory duties imposed by s. 31.

There are, I think, two quite separate questions. The first question is: Whether

such an operation fell at all within the relevant words of cl. 7 of the settlement. Did the operation constitute either a payment to the infants or an application for their benefit? It is not suggested that it could be an application for their support, and, therefore (to be effective) it must be either a payment to the infants or an application for their benefit. HARMAN, J., was of opinion that it was neither, and that the operation, being outside the ambit of the discretionary trust, was wholly ineffective. He, therefore, did not have to consider the second question, namely: Assuming that the operation was effective, *i.e.*, that it constituted either a payment to the infants or an application for their benefit, were the trustees right in their second resolution, which proceeded on the footing that, as the result of what they had done, s. 31 came down, so to speak, and fastened on the sum so set aside, and required, in the absence of maintenance demands, the accumulation of the income pursuant to that section? There is a further question which emerged during the course of the argument. Supposing that the right answer be that the first part of the resolution, the first stage in the operation, was a valid exercise of the trustees' powers under cl. 7, but that they were wrong in supposing that s. 31 of the Trustee Act had anything to do with the result, is the proper conclusion (a) that the original allocation stands as either a payment to the infants or an application for their benefit, or (b) that, since the trustees may be taken only to have exercised the discretion on the footing that the result produced would be an accumulation under s. 31, and since, on this hypothesis, they were mistaken in thinking that s. 31 would apply, the whole operation ought to be treated as ineffective—thus arriving at the same result as HARMAN, J., arrived at, namely, that there had been no effective exercise of the discretion?

Before I turn to s. 31, I think it might be convenient to say a word about the next resolution passed by the trustees on Apr. 29, 1949, in respect of the next half-year's income, namely, that which had accrued to Mar. 31, 1949. The language of the minutes in that case is not quite the same. Under the heading "Income distribution," I find this: "The trustees considered the question of distribution of income, and it was noted that there was a total sum of £27,470 in hand"—that included, I take it, what was left over from the previous half-year—"and the trustees resolved to distribute the whole of this amount as follows." There then appears a table of distributions in favour of adult beneficiaries. The minutes go on:

"... and subject to these payments totalling £3,257.19s. 11d., to divide the balance of £24,212 12s. among the issue of Sir Edmund Vestey who are under twenty-one years of age in accordance with the resolution passed by the trustees on Feb. 2, 1949, as follows ..."

There then follows the necessary arithmetical table. Then there is repeated, in almost identical language, the second resolution of the earlier occasion:

"The trustees, being of the opinion that none of the income of the infant beneficiaries under the above resolution is required for the maintenance of such beneficiaries, resolved that such income shall be accumulated in accordance with s. 31 of the Trustee Act, 1925."

I need not refer to the third of the minutes (*viz.*, of a meeting held on Nov. 28, 1949), save to say that it followed almost precisely the language and effect of the second. It will be observed that there is this difference (and I leave out of further consideration the general language of the first resolution in so far as it indicated future policy) that in the first case the effective words are the decision "to allocate for immediate distribution" and the resolution that the £42,000 so to be distributed should "belong to" the infants in certain shares. In the second case the resolution is "to divide" the sum of cash so set out among the issue in similar shares. The wording is different, but, for the purposes we have to determine, it does not seem to me that anything turns on it. In each case, on

the face of that part of these resolutions, it was a resolution wholly to dispose of, in favour of the infants, the sum of cash left over for such disposal.

I now turn to the most difficult part of the problem, namely, the effect of s. 31. The contention of counsel for the infant beneficiaries is, to put it briefly, that, as a result of the first part of the resolutions, each of the infants, in each case, acquired a vested interest in a specific portion of the income for a particular half-year which had then become available. The necessary result of his having so acquired it (says counsel) is to bring the case within s. 31 of the Trustee Act, 1925. The language of s. 31, I confess, is by no means easy to follow, nor does it seem to me that the section has been put together in a way which makes the task of apprehending its effect as easy as might be. Finally, the variations in language between this section and other sections in the same part of the Act add to the difficulties of the judge who is called on to pronounce on the effect of these provisions. However, we can only do our best. Section 31 (1) is as follows:

“Where any property is held by trustees in trust for any person for any interest whatsoever, whether vested or contingent, then, subject to any prior interests or charges affecting that property . . .”,

a discretion is given to the trustees to apply a whole or part of the income for his maintenance during infancy. Section 31 (2) directs the trustees to accumulate the income not required for actual maintenance, and provision is made for the eventual destination of the income so accumulated in the alternative event of the infant in question either attaining or failing to attain majority. If the argument of counsel for the infant beneficiaries is correct it would follow that property was held in trust for a person for a vested interest of some sort, since on that argument each infant had acquired, by virtue of the trustees' resolution, a vested interest in a particular piece of income, derived from the property held by the trustees. That is the foundation on which the case for saying that the second part of these resolutions recording the effect of what they had done, and, in particular, the necessity for accumulation, has been rested. Counsel for the infant beneficiaries referred also to s. 31 (3), which deals with contingent interests. So far as relevant, it reads:

“This section applies in the case of a contingent interest only if the limitation or trust carries the intermediate income of the property . . .”

He says that—apart altogether, for the moment, from this resolution—the class of infant beneficiaries, the class of infant objects of the discretion, are, cumulatively and singly, persons of whom it may be said that they have a contingent interest in the trust premises. That, of course, would obviously not suffice to bring the section into operation of itself, because s. 31 (3) in terms provides that in the case of a contingent interest its application is limited to cases where the intermediate income is carried by the contingent gift. Counsel, however, says that you get over that in this way, that, as the discretion is exercised (and it must be exercised somehow each year), the absence of the qualification required by sub-s. (3) is, so to speak, remedied. I confess that, if the word “sophisticated” be fairly applicable to any part of the argument in this case, it is, to my mind, applicable to this part of the case for the infant beneficiaries, for I confess that, ingenious as is the argument, and lucid as has been, as always, its exposition by counsel for the infant beneficiaries, it leaves me entirely unpersuaded of its reality. We are dealing here with a sum of money which has been received by the trustees as income. It has accrued, it is in their hands, and there is imposed on them the obligation under cl. 7 of the settlement to distribute it, and, when they exercise that discretion, then the objects, of course, are entitled to receive the sums which the trustees decide to pay them. It seems to me inaccurate to describe the result of the exercise of this discretion as giving to the infants the right to say that they are persons who have acquired a vested interest in shares of income flowing from the corpus of the trust. I

do not propose to elaborate it. I simply must record my view that that part of the argument fails to persuade me. I do not think the case does come, by that process, within s. 31 (1), or, indeed, within s. 31 at all. The result follows that, assuming the resolution to be effective according to its terms, the conclusion recorded in the minutes that s. 31 thereupon operates, in my view, is erroneous.

I have, perhaps, gone too quickly, because the first question is (and, if it is answered as HARMAN, J., answered it, the problem with which I have been dealing does not arise): Is what the trustees did either a payment to any of these infants or an application for his or her benefit? HARMAN, J., gave a negative answer to both questions. He said that, according to the ordinary sense of our language, a resolution that a large sum of money should belong to infants, or be divided between them, followed by the method which had to be adopted, because some of these infants, being about two or three years of age, certainly could not possibly give any kind of receipt, was not a payment in any ordinary sense of the word. Counsel for the adult beneficiaries analysed for us the characteristics which, according to his argument, must be necessary if one is to say of an operation that it amounts to a payment. For example, it must postulate that the money paid passes altogether from the hands of the payer to the hands of the payee, and all property in it goes to the payee. Secondly, there must with the payment be something in the nature of a discharge to the payer. I say "something in the nature of a discharge," for counsel for the adult beneficiaries does not contend that one cannot have a payment unless one can produce a receipt signed by a person of full years. Still, there must be something, says he, which constitutes a discharge, though I am not clear that that something need necessarily be any activity on the part of the payee. For myself, I incline to the same view on this matter as HARMAN, J. I am not satisfied that what the trustees did can fairly be described as a payment to any of these infants, or that the trustees ever so regarded or intended it to be. I need not, however, express a final view, because, whether or no it be a payment, I have come to the conclusion that these operations did amount to applications of these moneys for the benefit of the infants.

On that matter, HARMAN, J., after referring to the observations of LORD CRANWORTH, L.C. (6 De G.M. & G. 463) in *Tench v. Cheese* (1), which support the view that certainly in certain circumstances an accumulation of moneys may have been properly described as an application for the benefit of the person on whose behalf the accumulation takes place, then felt constrained (as I read the note of his judgment) by the decision of EVE, J., in *Re Peel* (2) to hold that in this case what had been done could not be described as an application for the benefit of the infants. I think, as I read the judge's note, that he was influenced in arriving at that conclusion by supposing that the accumulation was the essential feature of these appropriations, so that what the trustees were, in effect, doing was no more than retaining the funds in certain proportions and accumulating them in circumstances which left it still doubtful who would be the persons who would ultimately be entitled to take the money. I have already indicated (and it is for this reason I dealt with it first) that, in my view, s. 31 of the Trustee Act, 1925, has no application to this case, and that, I think, is material in considering whether this allocation—I will use for the moment a neutral word—could be described as an application for the infants' benefit. I think that *Peel's* case (2) is in a vital respect wholly different from the present. Counsel for the infant beneficiaries invited us, if necessary, to say that it was wrongly decided, and it would, of course, be open to this court, but not open to HARMAN, J., so to hold. I do not think, however, that there is any necessity, or, indeed, ground, for holding that *Re Peel* (2) on its facts was wrongly decided, for the essential feature in that case, to my mind, is that the sum which was there being dealt with was a fund which had already been settled, in any event, on the infant in respect of whom discretion was being exercised.

The headnote in *Re Peel* (2) is ([1936] Ch. 161):

"On the marriage of O.P. and V.J., H.P. the father of the husband executed a deed whereby he covenanted with trustees that if the husband should die in his lifetime he would pay them an annuity of £1,000 in trust for V.J. so long as she should remain the widow of H.P. and thereafter upon trust to pay or apply the same for or towards the maintenance, education or benefit of any of the infant children of the marriage as the trustees might think fit."

- A The husband had died, and the wife had ceased to be the widow of the husband, but there was one issue of the marriage, namely, the infant defendant in the action. In those circumstances, the covenant provided that the £1,000 per annum was to be applied for the maintenance, education or benefit of that child in any event. That being so, the effect of what the trustees did or sought to do in not paying it over to the child's mother, but accumulating it, was, in truth,
- B mere retention. The essential difference between *Re Peel* (2) and this case seems to be that, in the present case, it cannot be predicted of the income, or any part of it, that it is in any event given to any of these infants. The first effect of the resolution of the trustees was to give to each infant a specific portion of the income, and without that resolution the infant was entitled to no part of it at all. That seems to me to provide a very marked difference, and enable, and, indeed,
- C require, the court to say that what is here done cannot be regarded as mere retention, as was the operation impugned in *Peel's* case (2). If *Peel's* case (2) is out of the way, it comes down to this, as a matter of ordinary common sense and the use of the language: Is a provision, to take John Vestey's case, that £12,000 shall belong to John Vestey an application for his benefit? If the question be fairly posed in that way, it seems to me impossible to give any but an affirmative answer. It is surely for his benefit that the trustees should resolve that
- D £12,000, which it was in their discretion to apply to any one of a considerable number of persons, should belong to John Vestey. I, therefore, with all respect to *HAERMAN, J.*, come to the conclusion (and I think I am unfettered by *Re Peel* (2), which seems quite a different case) that the first part of this resolution did amount to an application for the benefit of the infants.
- E I have already indicated my view, and I do not propose to expand it, that, treating the resolutions, as I think they should be treated, according to the sense of them on their face, as amounting to a disposition of this fund in such a way as to appropriate out and out the particular shares to the particular infants, s. 31 does not come into the picture at all. In other words, I think that the effect of each of the resolutions was so to exercise the discretion that in each
- F case each one of these infants became absolutely entitled to a particular sum of money so appropriated, and, s. 31 being inapplicable, those appropriated sums have now become part of the infants' respective estates. That is (and I come finally to the last point), unless the view which I have taken as to the non-application of s. 31 produces the result that the court should hold that there has been no effective exercise of the discretion on the ground, which I have already
- G indicated, that the trustees intended to undertake this operation on the footing that they were going to produce a specific result, and, if they produced a wholly different result, that it would not be right to say that they had exercised the discretion if the result of so holding would be to cause the resolution to have an effect which the trustees did not intend. I confess I find that not an easy problem, any more than any of the other problems in this case, and the way
- H in which the matter was put in Mr. Brown's affidavit has not, perhaps, made it any easier. I do not say that out of any discourtesy to Mr. Brown. He was stating what in truth happened, but I think one must look at the resolutions taking the thing as a whole. I am persuaded that counsel for the infant beneficiaries is right when he says that the essential thing which the trustees were doing was to make this distribution, which was a final decision how these funds should go between the infant beneficiaries. They were then of opinion that, by the ingenious encroachment on the matter of s. 31 of the Trustee Act,

1925, the result would be that the sums, *prima facie* vested in this way, became divested again and subject to the trusts imposed by the section, and they later, therefore, recorded, in order that those responsible should know what they had got to do and how to do it, that they must deal with these sums as being subject to the provisions of the various sub-sections of s. 31. They were only, therefore, setting forth the mechanical results which had got to be applied. I do not think that it can or ought to be said that, if, as I hold, the trustees wrongly thought that s. 31 would operate, then a result is produced substantially or essentially different from that which was intended. In other words, I think that the discretion was validly exercised by applying—if I take the first resolution—£42,000 for the benefit of six infants in this way, *viz.*, appropriating £12,000 to John absolutely and £6,000 to each of the other infants absolutely as their respective absolute property. Having done that, which I hold to be an application for their benefit, I think that is the end of it.

Various examples were put of what might happen if the trustees exercised the discretion in a somewhat different way, or, indeed, if the settlement had been different and had provided, not for the exercise of a discretion, but for a power of appointment. I do not propose to embark on further discussion of those hypotheses. The settlement did not provide for a special power of appointment, but it provided for the exercise of a discretion, and we must deal with it on that footing. The language at the end of cl. 7 of the settlement is very wide in its terms, and it may, or may not, enable the trustees to apply sums for the benefit of the infants by creating, so to speak, sub-trusts of a very elaborate character. That is a matter, again, on which it is not, I think, for the court now to venture any views, still less to give any advice. The trustees will be well able to procure any advice they require. If problems arise whether, having done this, that or the other, they have done something effective, no doubt on a future occasion some other judge will have the mental exercise of determining whether the trust has worked out quite as intended. I propose to confine myself to the particular problems which are now presented in this case, and for the reasons which I have stated I would reverse the conclusion of the learned judge and hold that the particular resolutions which I have mentioned operated as effective exercises of the discretion conferred by cl. 7 in that they operated to transfer the specified sums of money to the respective infants as their absolute property respectively, and, in my judgment, the view that s. 31 then proceeded to operate on the sums so appropriated was erroneous, so that the part of the resolution recording the necessity for accumulation should, in my opinion, be disregarded. I have said that I found the case difficult and complex, and I am grateful for the assistance we have received, but, with all due diffidence, having regard to the opposite view of the learned judge, that is my conclusion.

ASQUITH, L.J.: I respectfully agree, both with the conclusions and the reasoning of SIR RAYMOND EVERSLED, M.R., and I have no wish to add anything under either head.

JENKINS, L.J.: I agree. As we are differing from the learned judge, I will venture to add a few observations of my own. As regards the first question, namely, whether these allocations in favour of infant beneficiaries were within the power of the trustees under cl. 7 of the settlement, I entirely agree with what SIR RAYMOND EVERSLED, M.R., has said to the effect that such allocations were, at all events, applications of income for the benefit of the infants in whose favour they were made. Apart from any such allocation, no infant had any right to claim any part of the income, but was merely eligible to participate in any authorised distribution that the trustees might from time to time determine to make. An allocation of the kind here carried out would have the effect of making a certain provision for the infant concerned, and I cannot doubt but that the making of such a provision would be the conferring of a benefit on the infant, so that the application of income for that purpose would be an application for the

infant's benefit. With respect to the learned judge, I think that, in expressing the view in relation to this question to the effect that accumulation was not application for the benefit of an infant, he overlooked the important change of title, if I may so describe it, in favour of the infant which such an allocation would bring about. It is, therefore, unnecessary to decide whether these allocations might not also be justified on the ground that they were, within the meaning of cl. 7, payments to the infants. I agree that in a strict and literal sense there

A can be no payment unless there is not only a hand to pay but also a hand to receive and a recipient capable of giving a receipt. Thus, in the strict and literal sense, there can be no payment to an infant. Words such as these, however, must be construed in their context, and, inasmuch as this is a discretionary trust in favour of a class of persons which, *ex necessitate*, includes infant beneficiaries, I would be disposed, if it were necessary to do so, to put a wider

B interpretation on the expression "pay," and include in it the transaction consisting of the allocation of a share of any year's income to an infant absolutely, although, owing to his infancy, no receipt is possible. The different meanings that may be attached to expressions connoting "payment," according to the context in which they appear, are illustrated, on the one hand, by *Re Banbury* (3), where a provision in the will under which the trustees were to set aside an annual

C sum of £15,000 free of tax was held by DANCKWERTS, J., to be a provision for the payment of a stated amount free of income tax within the meaning of s. 25 (1) of the Finance Act, 1941, though, in truth, the transaction was not in the strict sense of the word a "payment," but merely the transfer of an amount from one account to another in the hands of the same trustees. On the other hand, in *Re Salaman* (4) it was held that the setting aside of investments to meet a legacy

D did not amount to payment of such legacy. Those cases illustrate the proposition that the meaning of the word "pay," like any other word, must depend on the context in which it is used, and, therefore, speaking for myself, were it necessary to the decision to do so, I would be disposed to hold that the transactions here under consideration could be warranted as payments within the meaning of cl. 7. At all events, as I have said, I entirely agree with SIR RAYMOND EVERSHED,

E M.R., that they were applications for the benefit of the infants. It follows, therefore, that these transactions had the effect of entitling the infants concerned absolutely to the amounts allocated to them respectively.

As to the second point, namely, the question whether s. 31 of the Trustee Act, 1925, applies, it is to be observed that the section, as appears from the opening words of sub-s. (1), is directed to the case "where any property is

F held by trustees in trust for any person for any interest whatsoever, whether vested or contingent." Where that condition is satisfied, then, subject to any prior interests or charges affecting the property, during the infancy of the person, if the interest so long continues, the income of that property is applicable at the discretion of the trustees for the maintenance, education or benefit of the infant. The vital provision for this purpose is not merely that income not so

G applied is to be accumulated under sub-s. (2), but that, under cl. (ii) of that sub-section, on the death of the infant under the age of twenty-one years the unapplied accumulations are to follow the destination of the property from which they arose. Thus, in the present case, if the section is applicable, the result would be that, should any of these infants die under the age of twenty-one, then the unapplied fund representing the income allocated to him or her on each occasion,

H plus the accumulations thereof, would revert to the funds under the settlement, and follow the destination of the corpus of those funds. Does s. 31 apply in the circumstances of the present case to a sum of income allocated by the trustees to an infant? For that to be the case, one must find that there is property held by trustees in trust for the infant for some interest or other, and that the amount received is income of that property. So far as corpus is concerned, the infants here have, as I understand it, contingent reversionary interests, such interests being contingent on their surviving the end of the specified period, on the

happening of which event there is, to put it shortly, a trust of the corpus for the issue of Sir Edmund then living *per stirpes*. But sums received by the infants under the exercise of the trustees' discretion cannot, in my judgment, be regarded as income of those reversionary interests. The reversionary interests in corpus do not carry the intermediate income, and are thus excluded from s. 31 by sub-s. (3). The whole of the intermediate income is exhausted by the discretionary trust and the trust for accumulation, where applicable. Such sums as may be received by an infant by an exercise of the trustees' discretion during the continuance of the specified period bear no relation whatever to that infant's contingent reversionary interest and are taken by the infant under a different title, *i.e.*, as an object of the discretionary trust, and not by virtue of his contingent interest in corpus. A

Next, as to income, can it be said that the infant has an interest in the property by reason of something analogous to a life or other limited interest in income? B In my judgment, on the language of this trust, that cannot be maintained. It may very well be that, if there were a trust in the form that the trustees should hold income for a period in trust for a number of persons in such shares as the trustees might determine, the shares from time to time allocated to an infant member of the class of beneficiaries should be regarded as a life interest in income, albeit of varying amount, with the result that the sums from time to time C allocated by the trustees to the infant's account would be subject to the provisions of s. 31. In this case, however, it is plain that no infant has, under the terms of the trust, any share or interest whatever in the income, unless and until the trustees, in the exercise of their discretion, decide to pay or apply to or for the support or benefit of that infant some part of the income from time to D time in hand. When that event happens, when the trustees decide to apply some part of the income in hand for the benefit of an infant, or to pay it to an infant, if the wider interpretation of that expression to which I have referred is admissible, then it seems to me that the infant becomes absolutely entitled to the amount in question by a new title consisting of the exercise of the trustees' discretion in the infant's favour, the infant having previously been merely a E person eligible to benefit under the discretion. The infant becoming entitled to the sum of income allocated to him or her under the trustees' discretion, in my judgment, must become, in accordance with the terms of the allocation, absolutely entitled to that sum. So far as I can see, the fact that in origin it was income of the fund applicable at the discretion of the trustees for a class including the infant concerned is, for the purposes of s. 31, irrelevant. The only F property in such circumstances held in trust for the infant for the purposes of s. 31 is, in my judgment, the sum of income allocated on the particular occasion. The result may, no doubt, be that any income produced by the investment of that sum is income of property held in trust for the infant which will, therefore, become subject to the provisions of s. 31, but, in my judgment, there is no room in such circumstances for the application of s. 31 on the footing that under the G settlement the sum of income in question is itself income of property held in trust for the infant. The form of cl. 7 of the settlement and the nature of the allocations here made, I think, are wholly inconsistent with that view. The sums allocated become the absolute property of the infant, with the necessary consequence that any application of s. 31 in the sense contended for is impossible.

I also agree with SIR RAYMOND EVERSHED, M.R., on the third question debated, and the result, in my judgment, is that the allocations made are valid H and must stand as absolute allocations to the infants of the amounts in question.

Appeal allowed. Costs of all parties to be taxed and paid out of the income of the funds.

Solicitors: Chas. H. Wright & Brown (for all parties).

[Reported by F. GUTTMAN, ESQ., Barrister-at-Law.]

NALDER AND ANOTHER v. ILFORD CORPORATION.

[KING'S BENCH DIVISION (Sellers, J.), October 5, 6, 10, 11, 12, 16, 1950.]

Public Health—Building regulations—Breach of bye-laws—Notice requiring removal of structures—Validity—“Owner” of premises—Statement as to right of appeal—Need to state right to apply for extension of time—Statutory extension of time limit—Form of notice to owner—Service on owner—Wrongful removal of structures—Damages—Public Health Act, 1936 (c. 49), s. 65 (1), (3), s. 300 (3), s. 343 (1)—Building Restrictions (War-Time Contraventions) Act, 1946 (c. 35), s. 3 (1).

Three adjoining properties were held on long leases at rents of £16, £15 and £15 respectively by a director of a company who let them on monthly tenancies to the company at rents of £62 10s., £62 and £62, which, being less than two-thirds of the annual values of the premises, were not rackrents within the meaning of the Public Health Act, 1936, s. 343 (1). The company erected on the premises five structures of breeze blocks, comprising (i) a wall with a gap in the centre, (ii) southern and eastern walls, (iii) southern, eastern and northern walls, with concrete beams and a tarpaulin cover to form a roof, (iv) a southern wall and an eastern wall including a reinforced concrete beam eighteen feet long running from wall to wall, and (v) southern, eastern and northern walls, with a wooden door at the western end and a roof. Structure (v) was used as a garage. It was intended that all the walls should in due course support roofs. Structures (iv) and (v) were erected before the end of 1945, the others in 1946. On June 14, 1946, the local authority sent a letter to the company stating: “It is . . . clear that many buildings and erections have been placed on the land at the rear of the above properties which do not comply with the council’s bye-laws and in many cases without plans having been submitted, and the council will . . . exercise their statutory powers to secure that these buildings and erections shall be either pulled down, or, in proper cases altered so as to comply with the bye-laws.” On Jan. 17, 1947, within twelve months after the completion of structures (i), (ii) and (iii) but more than twelve months after the completion of structures (iv) and (v), the local authority served a notice on the company under the Public Health Act, 1936, s. 65 (1), requiring it within twenty-eight days to remove the structures as contravening the bye-laws or to effect alterations to make them comply with the bye-laws. Nothing having been done in compliance with the notice, on Apr. 24, 1947, and following days the local authority entered on the premises and demolished the structures. In an action for damages for trespass by the director and the company against the local authority,

HELD: (i) the company was the owner of the premises within the meaning of the Public Health Act, 1936, s. 343 (1), since on the facts it would have received the rackrent of the premises if they had been let at a rackrent.

Principle stated by KENNEDY, J., in Truman, Hanbury, Buxton & Co. v. Kerslake ([1894] 2 Q.B. 778), applied.

Kensington Borough Council v. Allen ([1926] 1 K.B. 576), distinguished.

(ii) the right under s. 65 (3) of the Act of 1936 to apply to a court of summary jurisdiction for an extension of the period specified in the notice under s. 65 (1) was not a right of appeal which, under s. 300 (3), ought to have been stated in the notice of Jan. 17, 1947.

(iii) with regard to structures (iv) and (v) (in respect of which the notices were out of time under s. 65 (4) of the Act of 1936), the letter of June 14, 1946, constituted a sufficient notice to the company of the proposal of the local authority to take steps for enforcing a building law under the Building Restrictions (War-Time Contraventions) Act, 1946, s. 3 (1); but, as the director was an “owner” for the purposes of the Act, s. 3 (1) required that notice of the proposal should be served on him in that capacity; notice

served on the company was not service on the director in his personal capacity; and the local authority had, therefore, failed to comply with the requirements of the Act, and its action in regard to structures (iv) and (v) was unauthorised.

(iv) the plaintiffs (separately or jointly) were entitled to receive as damages in respect of structures (iv) and (v), not the cost of reinstating the structures, since their reinstatement would constitute a further infringement of the bye-laws, but damages measured by the injury to the reversion or the diminution in the value of the land, and, there being no evidence of such special damage, general damages only for trespass would be awarded. A

[AS TO CONTROL OF BUILDINGS, see HALSBURY, Hailsham Edn., Vol. 26, pp. 335-351, paras. 676-693; and FOR CASES, see DIGEST, Vol. 38, pp. 180-185, Nos. 211-246.] B

Cases referred to:

- (1) *Stevens v. Gourley*, (1859), 7 C.B.N.S. 99; 29 L.J.C.P. 1; 1 L.T. 33; 141 E.R. 752; 34 Digest 584, 53.
- (2) *Bowditch v. Wakefield Local Board*, (1871), L.R. 6 Q.B. 567; 40 L.J.M.C. 214; 25 L.T. 88; 36 J.P. 197; 26 Digest 523, 2234.
- (3) *Truman, Hanbury, Buxton & Co. v. Kerslake*, [1894] 2 Q.B. 774; 63 L.J.M.C. 222; 58 J.P. 766; 36 Digest 234, 732. C
- (4) *Wright v. Ingle*, (1885), 16 Q.B.D. 379; 55 L.J.M.C. 17; 54 L.T. 511; 50 J.P. 436; 26 Digest 491, 2018.
- (5) *Kensington Borough Council v. Allen*, [1926] 1 K.B. 576; 95 L.J.K.B. 481; 134 L.T. 665; 90 J.P. 105; 36 Digest 230, 708.
- (6) *Rayner v. Stepney Corpn.*, [1911] 2 Ch. 312; 80 L.J.Ch. 678; 105 L.T. 362; 75 J.P. 468; 38 Digest 212, 471. D
- (7) *Arlidge v. Tottenham Urban Council*, [1922] 2 K.B. 719; 92 L.J.K.B. 21; 127 L.T. 841; 86 J.P. 171; 38 Digest 214, 489.

ACTION for damages for trespass, and COUNTERCLAIM for £40 10s. 8d., the reasonable expenses of the demolition and/or removal of buildings not complying with bye-laws under the Public Health Act, 1936, s. 65 (3). E

The plaintiff, Nalder, was the leaseholder from the London County Council of 153, 155 and 157 Becontree Avenue, Ilford, at rents of £16 a year for No. 153 and £15 a year each for Nos. 155 and 157. He had let all three properties to the plaintiff company, Ilford and Dagenham Properties, Ltd., of which he was a director owning with his wife all but two of the shares, under an oral agreement on monthly tenancies at yearly rents of £62 10s. for No. 153 and £62 each for Nos. 155 and 157. On Apr. 24, 1947, purporting to act under the Public Health Act, 1936, s. 65 (3), the Ilford Corporation entered on the three properties and demolished five structures thereon as being unauthorised buildings which contravened the building bye-laws and were an unsatisfactory development of the estate in which they were situated. The plaintiffs claimed that this action constituted a trespass on the ground that: (i) the notices required to be served on the owner of the premises under s. 65 (1) were out of time under s. 65 (4), having been served more than twelve months after the completion of the erection of the structures; (ii) the structures were not buildings to which the bye-laws applied; (iii) the company on which the notices were served was not the "owner" of the structures within the meaning of s. 343 (1) of the Act of 1936; (iv) the notices were invalid as not complying with the requirements in s. 300 (3) of the Act of 1936 in that they did not specify the recipients' right of appeal against the decision of the corporation. The corporation disputed contentions (ii), (iii) and (iv) and, as to contention (i), said that the time was extended by the Building Restrictions (War-Time Contraventions) Act, 1946, s. 1 (1). F G H

W. G. Wingate and *H. P. B. Dow* for the plaintiffs.

Nield, K.C., *E. G. Moore* and *J. R. Macgregor* for the defendant.

SELLERS, J. : The individual plaintiff, Lawrence Marcus Nalder, is a director of the plaintiff company, Ilford and Dagenham Properties, Ltd., in which he and his wife are the owners of all but two of the hundred £1 shares, the capital of the company. Mr. Nalder is the leaseholder of a substantial number of properties in, and in the neighbourhood of, Becontree Avenue, Ilford, and, in particular, of Nos. 153, 155 and 157 Becontree Avenue, the properties with which this case is concerned. All three properties are held on long leases from the London County Council, No. 153 at a rent of £16 a year and the other two at £15 a year each. Mr. Nalder holds No. 153 Becontree Avenue as executor of his father's estate. From July, 1944, all three properties were let to the company on an oral agreement at a rent of £62 10s. a year for No. 153 and £62 a year for each of the other two on monthly tenancies. The properties in question consisted of premises designed for shops with residential accommodation above. In addition there had been erected in the gardens or space at the back of the main premises a number of buildings or structures which the defendant corporation regarded as unauthorised buildings which contravened the building bye-laws and were an unsatisfactory development of the estate in which they were situated. On Apr. 24, 1947, and some days thereafter the defendants by their servants entered on the three premises and demolished the following structures which are referred to on an agreed plan: No. 1, a southern wall in two parts (it has a gap or entrance in the middle); No. 2, the southern and eastern wall; No. 3, the southern wall, which is also the northern wall of No. 2, the eastern wall and the northern wall, and such cover as there was over that structure, being a number of cross concrete beams carrying a tarpaulin sheet or sheets; No. 4, the southern wall of which is also the northern wall of No. 3, and the eastern wall including a reinforced concrete beam eighteen feet long running from wall to wall; and No. 5, the building referred to as a garage and the link-up just to the south of it, the southern, eastern and northern walls of that building and a wooden door at the western end.

In this action, the plaintiffs allege that these acts were unlawful, and claim damages for trespass. By their defence the defendants admit they entered on the premises and carried out the demolitions, but they deny that they acted illegally or trespassed and allege that they acted under powers conferred on them by the Public Health Act, 1936, s. 65.

On Jan. 17, 1947, the defendant corporation served a notice headed "Public Health Act, 1936," on the plaintiff company in respect of each of the properties in question alleging in the case of No. 153 that the company were erecting a building, and in the other two cases that they had erected a building, which contravened the bye-laws. The buildings concerned were identified on a plan, and the infringements alleged were set out. The notice in each case required the company either to pull down or remove the work in question, or, if they so elected, to effect such alterations as might be necessary to make the work comply with the bye-laws within twenty-eight days from receipt of the notice. Nothing in compliance was done by the plaintiffs or either of them within twenty-eight days or at all, and the defendant corporation allege that they were entitled under the Public Health Act, 1936, s. 65 (3), to pull down the works, as they admittedly have done. If the three notices were valid, the defendant corporation have statutory sanction for doing that of which the plaintiffs complain. The plaintiffs allege that the notices were invalid, and a number of issues have arisen between the parties which call for determination.

The Public Health Act, 1936, s. 65 (4), provides that no such notice

"... shall be given after the expiration of twelve months from the date of the completion of the work in question ..."

I find that Nos. 1, 2 and 3 structures on the plan were erected in 1946 within the twelve months preceding the notice, but that Nos. 4 and 5 were erected before the end of 1945, and were, therefore, outside the period. The defendant corpora-

tion, apparently, took the view, and sought to establish before me, that Nos. 4 and 5 were constructed in 1946, but, having heard the witnesses and weighed the evidence, I feel no doubt that on this point the plaintiffs' evidence should be accepted. The notices, therefore, in respect of No. 155 in part and No. 157 were out of time under the Public Health Act, 1936, but the defendant corporation seek to rely on the Building Restrictions (War-Time Contraventions) Act, 1946, for an extension of the time, which contention I shall consider later.

[His LORDSHIP said that it was further submitted on behalf of the plaintiffs that the structures in question (or some of them) were not buildings to which the bye-laws applied. He considered the nature of the structures which had been demolished, and found that they had been constructed of breeze blocks, with a thin cement washing. No. 5 had a roof of similar material, and it had been intended that the walls of the other structures would in time support roofs. He held that the structures were buildings to which the bye-laws applied, and found it unnecessary to consider in detail *Stevens v. Gourley* (1) or other authorities cited to him where the question whether a structure was a building arose in different circumstances, and he continued:]

I deal next with the issue whether the notices were rightly served on the plaintiff company. Section 65 (1) of the Act requires the owner to be given notice

"... either to pull down or remove the work or, if he so elects, to effect such alterations therein as may be necessary to make it comply with the bye-laws."

The word "owner" is defined in s. 343 (1) of the Act as follows:

" 'Owner' means the person for the time being receiving the rackrent of the premises in connection with which the word is used, whether on his own account or as agent or trustee for any other person, or who would so receive the same if those premises were let at a rackrent."

The term "rackrent" is defined thus:

" 'rackrent' in relation to any property means a rent which is not less than two-thirds of the rent at which the property might reasonably be expected to let from year to year, free from all usual tenant's rates and taxes, and tithe rentcharge (if any), and deducting therefrom the probable average annual cost of the repairs, insurance and other expenses (if any) necessary to maintain the same in a state to command such rent."

I accept the evidence of the valuer called by the defendant corporation that £62 and £62 10s. are rents which are not rackrents. Mr. Nalder, therefore, was not the "owner" within the meaning of the Public Health Act. At the commencement of this judgment I set out the letting of the properties to the plaintiff company, and in the circumstances I find that the plaintiff company would be the person who would receive the same if the premises were let at a rackrent.

Various cases were cited to me in the course of the argument, but the circumstances were different in each case, and I think that I need only mention them. Reliance on *Bowditch v. Wakefield Local Board* (2) was placed by the defendant corporation in respect of the submission made by them which I accept. *Truman, Hanbury, Buxton & Co. v. Kerlake* (3) was also cited, and I think I might helpfully read an extract from the judgment of the Divisional Court in that case delivered by KENNEDY, J. I do not think that I need particularly refer to the facts of that case, but KENNEDY, J., says ([1894] 2 Q.B. 778):

"It appears to us to be impossible to treat as the person who would receive the rackrent, if the premises were let at a rackrent, persons who, at the time when the 'owner' of premises, as defined by s. 141 [of the Public Health (London) Act, 1891], has to be found, have not such an interest in the property that, if it was let at a rackrent, they would receive such rackrent. The

A words of the section, in our judgment, in the case of there being no one who in fact receives a rackrent from the actual occupier, designate as 'owner' the person who *rebus sic stantibus*, that is to say, with the interests in the premises as they then are, would, if they were let to an occupier at a rackrent, receive that rackrent. In this case, whilst the sub-lease to Aslett subsists, that is to say, for the next thirty and a half years and until a date only eleven days anterior to the expiring of the appellants' own interests, the appellants could not let to any one. The only person who could let the premises at a rackrent, the only person whose interest in the premises places him in a position to receive a rackrent, is Bishop, the assignee of the sub-lease to Aslett. His interest as assignee of that sub-lease gives him the power of so letting; and if the premises were so let, he is the person who would receive the rackrent. He chooses, it is true, to occupy the premises himself; but we see nothing to prevent the same person being both occupier of the premises and the 'owner' within the meaning of this section. The cases referred to in the course of the argument before us, *Bowditch v. Wakefield Local Board* (2) and *Wright v. Ingle* (4) in which questions as to the meaning of the term 'owner' in similar provisions of the Public Health Act, 1848, and the Metropolis Local Management Act, 1855, are raised, are not decisions directly in point; but there are passages in some of the judgments in those cases which appear to us, to some extent at least, to support the conclusion to which we have come in this case."

D I think that case and the authorities cited support the conclusion at which I have arrived. In the present case reliance was placed strongly by counsel for the plaintiffs on *Kensington Borough Council v. Allen* (5), but I think the complete answer is that there there was in fact a rackrent being paid, and that case, therefore, is not in point. On the evidence which I have accepted from the valuer here there was no rackrent being paid, and I have come to the conclusion, as I have said, that the company would be the person to receive the rackrent if there was one. Therefore, I hold that the company were rightly served.

E It was further submitted that the notices were invalid because they did not comply with the Public Health Act, 1936, s. 300 (3), which provides:

"In any case where such an appeal [*i.e.*, to a court of summary jurisdiction] lies, the document notifying to the person concerned the decision of the council in the matter shall state the right of appeal to a court of summary jurisdiction and the time within which such an appeal may be brought."

F The notices in this case did not make any reference to a right of appeal. It is contended on behalf of the plaintiffs that under s. 65 (3) there was such a right, and that, therefore, the notices are invalid because they failed to include a statement in regard to it. Section 65 (3) provides:

G "If a person to whom a notice has been given under the foregoing provisions of this section fails to comply with the notice before the expiration of twenty-eight days, or such longer period as a court of summary jurisdiction may on his application allow, the local authority may pull down or remove the work in question . . ."

H It is contended (and, I think, rightly contended) that that sub-section gives the right to a person so situated to apply to a court of summary jurisdiction to extend the time, and it is argued that such an application is a right of appeal which should have been stated on the notice.

I was referred to s. 290 by counsel for the defendant corporation. Both that section and s. 300 appear in Part XII of the Public Health Act, 1936. Section 290 (1) provides:

"The following provisions of this section shall, subject to any express modifications specified in the section under which the notice is given, apply in relation to any notice given under this Act which is expressly declared to

be a notice in relation to which the provisions of this Part of this Act with respect to appeals against, and the enforcement of, notices requiring the execution of works are to apply."

Reference was also made to s. 39 and s. 60 where—if I may take s. 39 (1) as an illustration—there is to be found an express stipulation in these terms:

"The provisions of Part XII of this Act with respect to appeals against, and the enforcement of, notices requiring the execution of works shall apply in relation to any notice given under this sub-section."

It is to be observed that s. 300 (1) provides:

"Where any enactment in this Act provides—(a) for an appeal to a court of summary jurisdiction against a requirement, refusal or other decision of a council; or (b) for any matter to be determined by, or an application in respect of any matter to be made to, a court of summary jurisdiction, the procedure shall be by way of complaint for an order, and the Summary Jurisdiction Acts shall apply to the proceedings."

Reference is thus made in s. 300 both to "appeal" and "application." Sub-section (3) relates only to appeals, and would appear, therefore, to refer to s. 300 (1) (a) but not expressly to s. 300 (1) (b).

It is clear that if a statute, even if it is only in form, requires that particulars of such a right of appeal should be given in a notice, the notice would be invalid if they were omitted. In *Rayner v. Stepney Corpn.* (6) part of the statutory form was omitted from the notice, but in a later case, *Arlidge v. Tottenham Urban Council* (7), it was held that the notice served by a local authority under the Housing, Town Planning, etc., Act, 1919, s. 28, was not rendered invalid because it omitted to state that the owner had the right of appeal mentioned in one of the sections of an Act which was applicable, and *Rayner v. Stepney Corpn.* (6) was distinguished. It appears that, apart from a statutory obligation, notwithstanding the desirability of inserting this information, it does not invalidate a notice if information as to a right such as is given here is omitted, and I do not find in the Public Health Act, 1936, an express provision that an application to extend time has to be notified to a person concerned. Such an application is not rightly described as an appeal, and where the statute uses in the same section the words "appeal" and "application" I see no reason for giving them both the same meaning. It was not contended before me that the buildings did not infringe the bye-laws, and, in my view, the evidence sufficiently establishes that they did in some at least of the ways alleged. For the reasons I have given, therefore, I find that the notices in respect of Nos. 1, 2 and 3 were valid and in accordance with the statutory powers of the corporation and that they provide a complete answer to the plaintiffs' claim relating to those buildings.

I turn now to consider buildings Nos. 4 and 5 which were not erected within twelve months of the service of the respective notices. The Building Restrictions (War-Time Contraventions) Act, 1946, s. 1 (1), provides that where during the war period—which is from Sept. 3, 1939, to Mar. 26, 1946—works on land have been carried out which do not comply with a building law, any period of time limiting the taking of steps for enforcing the law shall be calculated without regard to time elapsing during the war period. Section 2 (1) of the Act provides:

"At any time before the expiration of five years from the end of the war period, a person entitled to make an application under this sub-section with respect to any land may apply to an authority responsible for enforcing any building law or planning control for a determination under this section with respect to works on the land carried out, or a use of the land begun, during the war period."

Sub-section (2) requires the authority, on an application being made to it, to determine whether the works have failed to comply with the building laws or

planning, and, if so, to specify the law or control in question. Sub-section (3) requires the authority further to determine if works or use fail to comply as aforesaid

"... whether having regard to all relevant circumstances the works or use shall, notwithstanding the failure, be deemed so to comply either unconditionally or subject to ..."

A conditions. Section 2 (4) provides:

"An application under sub-s. (1) of this section may be made with respect to any land by the owner or occupier thereof, or by any person who proves that he has or intends to acquire an interest in the land which will be affected by a determination given on such an application or that he has borne any of the cost of carrying out works on the land during the war period."

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Either of the plaintiffs, therefore, might well have made application under s. 2. Section 3 (1) of the Act provides:

"Where during the period of five years beginning with the end of the war period any person proposes to take steps for enforcing a building law or planning control in the case of works on land not complying with the law or control in question carried out during the war period, or a use of land not complying with the planning control in question begun during that period, then—(a) unless an application under the last foregoing section in relation to the land has been made which has not been finally determined, he shall serve on every owner and occupier of the land not less than twenty-eight days' notice of the proposal, and if within the said period of twenty-eight days any person makes an application under the last foregoing section in relation to the land and within seven days of the making thereof serves on the person proposing to take steps as aforesaid notice that the application has been made, no steps for enforcing the law or control shall be taken until the final determination of the application; (b) if such an application has been made which has not been finally determined, no such steps shall be taken until the final determination thereof: Provided that no notice shall be required under paragraph (a) of this sub-section if steps for enforcing a building law or planning control in the case of any works on land are begun within twenty-eight days of the final determination of an application ..."

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I find that the works, Nos. 4 and 5, were carried out in the war period, and, therefore, the Act and those provisions relating to them which I have just read apply. On that finding it is urged on behalf of the plaintiffs that the defendant corporation have failed to comply with the requirements of the Act of 1946 in two respects: (i) that the corporation have not served notice that they propose to take steps to enforce the building laws at all; and (ii) that they have not served such a notice or proposal on the owner or occupier, and, therefore, as a consequence, that they have not shown that their entry on these premises and their demolition was sanctioned by statute and was legal and valid.

The corporation rely on a letter of June 14, 1946, which was sent by them to the plaintiff company. The letter concerned a number of matters. It was headed with reference to a considerable number of different properties in which Nos. 153, 155 and 157 were included, and I find these words in the third paragraph:

"It is also clear that many buildings and erections have been placed on the land at the rear of the above properties which do not comply with the council's bye-laws and in many cases without plans having been submitted, and the council will also exercise their statutory powers to secure that these buildings and erections shall be either pulled down, or, in proper cases, altered so as to comply with the bye-laws."

I find that that letter is adequate though it is an informal, and, perhaps, for-

tuitous, fulfilment of the requirements stating the corporation's intentions under the Act of 1946. The letter has been contrasted with a formal notice that was put in which, no doubt, would have been served if the corporation had accepted the position or recognised the position that some of the works carried out on these properties were properly described as works having been carried out in the war period. On the evidence which they had (and which they thought accurate) the corporation took the view, the erroneous view as I find, that they had been erected after the war period. Nevertheless, although that form of notice was given, as I read this letter I think it sufficiently complies with the requirements of indicating in its terms the course which the council proposed to take. There is no form specified in the Act of 1946, and, in my view, the letter is sufficient.

The second question that arises is whether that notice of proposal has been served in accordance with the requirements of the Act. The letter was addressed to the plaintiff company. Mr. Nalder was a director of the company, and I think at one time he signed letters as assistant secretary. It may well be (and the probability is) that he was well informed of all the activities of the company and received this letter, which came by registered post, or read it shortly after it was received by the company. But s. 3 (1) of the Act of 1946 requires that this notice of proposal, as it has been conveniently called, shall be served "on every owner and occupier of the land." The word "owner" there has the same meaning as it has in the Housing Act, 1936. That Act, by s. 188 (1), defines the word "owner":

" 'Owner,' in relation to any building or land, means a person other than a mortgagee not in possession, who is for the time being entitled to dispose of the fee simple of the building or land, whether in possession or in reversion . . . "

The person or authority which is entitled to dispose of the fee simple of the building or land is the London County Council, and under this definition, as I see it, they are "owners." The definition continues:

" . . . and includes also a person holding or entitled to the rents and profits of the building or land under a lease or agreement, the unexpired term whereof exceeds three years."

That person would appear to be Mr. Nalder. If this definition visualises, as it seems to, two owners, Mr. Nalder is to be regarded as an owner, and I have come to the conclusion, though not without some doubt, that I should so regard him. In those circumstances, if that be right, s. 3 (1) of the Act of 1946 requires that a notice should be served on him in that capacity. Notice served on the limited company, notwithstanding Mr. Nalder's close relationship to that company and the other observations I have made about his knowledge of the matter, was not a notice served on the owner, and where trespass is alleged and statutory authority is relied on the court must see that the requirements of the statute are fully and completely fulfilled. I must reject the suggestion that, because I could make a finding of fact (as I think I could) that Mr. Nalder knew of the contents of this notice and knew precisely as much as the limited company knew, there has not been a failure to serve on him the notice which the Act of 1946 requires. That being so, it seems to me that there has been a failure on the part of the defendant corporation, in that one particular only, to show that they acted in complete compliance with their statutory rights in doing what they did in Apr. 24, 1947, in regard to these two premises, and these two premises only—Nos. 4 and 5; and I find, therefore, that there was a failure to establish that statutory defence on which alone reliance has been placed.

Finding, as I do, that the entry on these premises and the demolition of the walls of No. 4 and the garage of No. 5 is unjustified, the question of damages then arises. Damages are claimed by both the plaintiffs in respect of these two

buildings. It is said (and rightly said) that the company has the right to immediate possession, and, therefore, is entitled to recover damages for trespass, and that the plaintiff, Mr. Nalder, is entitled to damages for the injury to the reversion which it is said is damaged. The way in which the damages are claimed is, I think, erroneous. It has been claimed that the plaintiffs or one or other of them should have the cost of reinstating the garage No. 5 and the walls of No. 4, but I think that is not the right measure of damages. Indeed, it would be a curious position if it were, because I am satisfied that the condition in which were these two structures was an infringement of the bye-laws, and it would be wrong to assess the damages as the cost of putting up once again a structure which would be the subject-matter of complaint. The true assessment of damage in this case, I think, would be the injury to the reversion or the diminution in value of the land, and of that I have no evidence. Another factor which bears on any claim for special damage is that, notwithstanding that I have found that by this omission to serve Mr. Nalder the notice was invalid and inoperative, the premises, nevertheless, were at any time within a period of five years likely, having regard to that condition, to be dealt with properly by the local authority, and the tenure of the company of those premises might have been very short. I think that on the evidence as it stands and the complete lack of any basis on which I can assess any special damages, I should not give any special damages at all. I think that no damage has been proved to my satisfaction. But this being a case of trespass, damages do flow and considerations have to be weighed as to what damages should be given or what is in a sense a technical trespass. I appreciate the intrusion on the rights of the parties, and that must not be permitted without full legal sanction and everything being done which ought to be done. I think that Mr. Nalder and the company were knowingly, and, perhaps, in war-time desirably, flouting the building regulations, but when the war was over that his and the company's attitude was not helpful on this matter and that the buildings were legitimately the cause of complaint by the corporation. In the circumstances I think that the right damages to award would be the sum of £25 to each of the plaintiffs for general damages for the wrong which the defendant corporation have committed by the omission which I have indicated, and there will be judgment accordingly.

Judgment for the defendants in respect of buildings Nos. 1, 2 and 3. Judgment for the plaintiffs for £25 each in respect of buildings Nos. 4 and 5. Plaintiffs to have half the taxed costs. Counterclaim dismissed without costs.

Solicitors: Bolton, Jobson & Yate-Lee (for the plaintiffs); K. F. B. Nicholls, town clerk, Ilford (for the defendants).

[Reported by F. A. AMIES, Esq., Barrister-at-Law.]

R. v. WALKER.

[COURT OF CRIMINAL APPEAL (Lord Goddard, C.J., Byrne and McNair, JJ.), October 16, 1950.]

Criminal Law—Depositions—Evidence given in answer to leading questions—Validity of committal—Indictable Offences Act, 1848 (c. 42), s. 17.

The appellant was convicted at quarter sessions of robbery. He contended that before the examining justices the depositions had been taken as a result of the witnesses being asked leading questions, and that in consequence the committal was bad.

HELD: the evidence had been taken from the witnesses and put into writing as was required by the Indictable Offences Act, 1848, s. 17, and,

though the practice of obtaining the evidence by asking leading questions was undesirable, the fact that it had been followed in the present case did not invalidate the committal.

R. v. Gee, R. v. Bibby, R. v. Dunscombe ([1936] 2 All E.R. 89), *distinguished*.

[AS TO THE TAKING OF DEPOSITIONS, see HALSBURY, Hailsham Edn., Vol. 9, pp. 107-111, paras. 139-142; and FOR CASES, see DIGEST, Vol. 14, pp. 192-198, Nos. 1720-1777 and Digest Supp.]

Case referred to:

- (1) *R. v. Gee, R. v. Bibby, R. v. Dunscombe*, [1936] 2 All E.R. 89; [1936] 2 K.B. 442; 105 L.J.K.B. 739; 155 L.T. 31; 100 J.P. 227; Digest Supp.

APPEAL against conviction at the Bolton Borough Quarter Sessions on a charge of robbery. The ground of appeal was that the depositions had been taken by means of leading questions and, therefore, the committal of the appellant for trial was bad. The facts appear in the judgment of the court delivered by LORD GODDARD, C.J.

Spafford for the appellant.

I. D. L. Glidewell for the Crown.

LORD GODDARD, C.J., delivered the following judgment of the court. The appellant was convicted at Bolton Borough Quarter Sessions of robbery from a woman whom he accosted in the street as if she had been a prostitute. When she resented his behaviour, he stole her bag and ran off with it, but dropped it on being chased. The only ground of appeal is that there was a wrongful committal for trial because, the appellant says, the depositions were taken by means of leading questions put to the witnesses. As was pointed out by this court in *R. v. Gee, R. v. Bibby, R. v. Dunscombe* (1), as there are no longer grand juries (they having been abolished in 1933), it is important that the committal for trial should be regular because it really takes the place of the finding of the true bill by the grand jury.

The Indictable Offences Act, 1848, s. 17, under which examining justices sit and which prescribes their procedure, provides that in all cases where any person shall appear before any justices

“... charged with any indictable offence ... such justice or justices, before he or they shall commit such accused person to prison for trial, or before he or they shall admit him to bail, shall, in the presence of such accused person, who shall be at liberty to put questions to any witness produced against him take the statement on oath or affirmation of those who shall know the facts and circumstances of the case, and shall put the same into writing, and such depositions shall be read over to and signed respectively by the witnesses who shall have been so examined, and shall be signed also by the justice or justices taking the same; and the justice or justices before whom any such witness shall appear to be examined as aforesaid shall, before such witness is examined, administer to such witness the usual oath or affirmation, which such justice or justices shall have full power and authority to do ...”

In *R. v. Gee* (1) no depositions were taken at all, but a statement was signed by the witness, who said it was before him and approved it, and it was handed in to the court. The justices thought, perhaps with some reason, that that was a convenient procedure, but we were obliged to hold that it did not comply with the statute. In the present case the recorder was satisfied, and evidence was given to show, that the witnesses here were asked questions. Whether they were asked leading questions or not does not matter for the purpose of the Act, because the Act does not say that they are not to be asked leading questions. There is no doubt that it would be very wrong for justices

A to allow a witness simply to be examined from a statement, the examining solicitor or counsel pausing now and again for him to say "yes" or "no." In this case, no doubt, the evidence was given in answer to leading questions because the appellant had made a statement beforehand in which he admitted all the facts. At the trial he asked the jury to draw other inferences than those suggested by the prosecution, but so far as the facts were concerned he admitted speaking to the woman, approaching her in an indecent manner in the street, and then taking her handbag from her. He set up the defence that he was trying to defend himself as she was attacking him with the handbag, but that is another matter.

B No injustice has been done, and we cannot possibly say that, because leading questions were put when the case was before the justices, that invalidates the whole committal. It does not. It may not be a desirable way of taking the evidence, but it is not a breach of the statute because under s. 17 the evidence is to be taken from the witnesses and put into writing, and that was done. We cannot hold that there has been a bad committal for trial, and, therefore, we cannot interfere with this conviction.

Appeal dismissed.

C Solicitors: Registrar, Court of Criminal Appeal (for the appellant); Edgar Fielding, Bolton (for the Crown).

[Reported by H. McL. MORRISON, Esq., Barrister-at-Law.]

Re GREEN (deceased). LINDNER v. GREEN AND OTHERS.

[CHANCERY DIVISION (Vaisey, J.), October 12, 16, 1950.]

E Will—Mutual wills—Identical terms—Husband and wife—Recital of agreement to make mutual wills—Each given absolute interest—In case of lapse, residuary estate divided into moiety, one moiety to be regarded as testator's personal moiety and the other as deceased spouse's moiety—Fresh will by husband after accepting benefit under wife's will—Implied trust in regard to wife's moiety of husband's residuary estate—Whether pecuniary legatees entitled to take as beneficiaries under trusts of wife's moiety and as legatees of similar legacies under second will.

F On Aug. 31, 1940, the testator and his first wife executed wills in identical form, *mutatis mutandis*. Clause 3 of each will recited that it was agreed between the spouses that, if the survivor of them had the use of the other's property during his or her lifetime, he or she would provide in his or her will for carrying out the wishes expressed in the will of the other. By G his will of Aug. 31, 1940, the testator gave his residuary estate, including his half share in their residence, to the first wife absolutely if she should survive him, but, if she should not survive him, he gave the house in its entirety to a certain hospital and directed that the remainder of his residuary estate should be divided into two equal shares, one moiety being considered as his own personal estate and the other moiety as the equivalent to any H benefit which he had received from the first wife by reason of her predeceasing him. By cl. 6 (b) he disposed of the half share which he regarded as his personal estate, and by cl. 6 (c) he disposed of the half share which he regarded as the first wife's moiety. The first wife died on Apr. 28, 1942, and, under the terms of her will, her residuary estate passed to the testator absolutely. On Sept. 25, 1945, the testator re-married, and on Dec. 19, 1946, he made a second will, whereby he gave certain pecuniary legacies, some of which were to beneficiaries to whom he had given pecuniary legacies

(though not in every case of an identical amount) by cl. 6 (c) of the will of Aug. 31, 1940. Subject to these and other legacies, he gave the whole of his residuary estate to his second wife. The testator died on Dec. 27, 1946, and the will of Dec. 19, 1946, was admitted to probate as his last will.

HELD: (i) as the testator's will of Aug. 31, 1940, and his first wife's will of the same date each contained a recital of the arrangement between them to make mutual wills and as the testator had approved the first wife's will by accepting her property thereunder, the provisions contained in his first will in regard to (a) the gift of the house to the hospital and (b) the disposition of the first wife's notional half share of the testator's residuary estate took effect as a trust, and, therefore, the executors of the last will held his estate on trust, first to give effect to the gift of the house to the hospital and then to carry into effect the provisions of cl. 6 (c) of the first will out of one half of the moiety of the residue, the other moiety passing under the provisions contained in the testator's last will.

Dufour v. Pereira (1769) (1 Dick. 419), *applied*.

Re Oldham ([1925] Ch. 75), *distinguished*.

(ii) as the pecuniary legacies given by the last will were not in every case identical with the pecuniary legacies given to the same legatees under cl. 6 (c) of the first will, the beneficiaries were entitled to take both a share in the trust fund under cl. 6 (c) and the legacies under the last will.

[AS TO MUTUAL WILLS, see HALSBURY, Hailsham Edn., Vol. 34, pp. 18, 19, para. 13; and FOR CASES, see DIGEST, Vol. 44, pp. 181, 182, Nos. 101-112.]

Cases referred to:

- (1) *Dufour v. Pereira*, (1769), 1 Dick. 419; 2 Harg. Jurid. Arg. 304; 21 E.R. 332; 44 Digest 181, 106.
- (2) *Walpole (Lord) v. Orford (Lord)*, (1797), 3 Ves. 402; 30 E.R. 1076; 44 Digest 178, 75.
- (3) *Noys v. Mordaunt*, (1706), 2 Vern. 581; 24 E.R. 128; *sub nom.*, *Noyes v. Mordant*, Gilb. Ch. 2; 20 Digest 350, 894.
- (4) *Re Oldham*, [1925] Ch. 75; 94 L.J.Ch. 148; 132 L.T. 658; 44 Digest 182, 109.
- (5) *Re Hagger*, [1930] 2 Ch. 190; 99 L.J.Ch. 492; 143 L.T. 610; Digest Supp.
- (6) *Stone v. Hoskins*, [1905] P. 194; 74 L.J.P. 110; 93 L.T. 441; 44 Digest 182, 107.

ADJOURNED SUMMONS to determine *inter alia* whether the executors of the testator's last will held his estate on trust to give effect to all or any, and, if so, which, of the trusts contained in an earlier will, made by the testator under an arrangement with his first wife, and containing, *mutatis mutandis*, similar provisions to those in the first wife's will, executed on the same date as the testator's earlier will. The first wife predeceased the testator, and, under the terms of her will, he took an absolute interest in the residue of her estate. Later, he re-married and made a fresh will which was admitted to probate as his last will. The facts and the relevant provisions of the wills appear in the judgment.

J. V. Nesbitt for the executor.

R. W. Jennings, K.C., and *T. A. C. Burgess* for the widow (the first defendant).

R. M. E. Nesbitt, Lionel Edwards, Belsham, Rawlence, Salt, K.C., and *Wilfrid Hunt, D. Cohen, B. S. Tatham* and *Bonner* for the remaining defendants, who claimed to be beneficially interested under the last will, or the trusts of the earlier instrument, or both.

VAISEY, J.: This summons raises a curious point which concerns the wills, which may be described as mutual or joint wills, of a husband and his wife, and the effect which those joint wills, or one of them, has in the events which have happened.

The testator, John Green, died on Dec. 27, 1946. He left a will, dated Dec. 19, 1946, which has been admitted to probate as his last will. That will was proved in March, 1947, and the estate which passed under it is of a value of £17,000, or thereabouts, with regard to personalty and a further £1,000 with regard to certain freehold property. The testator left a widow, Rosie Green, his second wife, the first defendant to this summons, whom he married on Sept. 25, 1945. His first wife, Ellen May Green, died on Apr. 28, 1942. The wills, in identical form, *mutatis mutandis*, which she and the testator made on Aug. 31, 1940, are the documents which give rise to the problem which it now falls to me to solve. I will call the testator's will of Dec. 19, 1946, which was admitted to probate, his second will, and the will which I am about to describe, his first will. I think that that document, combined with the corresponding document executed by the testator's first wife, contain all the evidence and information which is admissible and material in regard to the effect, if any, of those two documents.

In his first will, the testator, after appointing his first wife and his solicitor to be executors and trustees thereof, proceeded (in cl. 3) to recite as follows:

"Whereas my dear wife the said Ellen May Green has agreed with me that if she shall survive me and shall have the use of all my property during her lifetime without any liability to account she will provide in her will for the carrying out of my wishes as expressed in this my will for the event that I shall survive her and in consideration of such promise by me she has agreed to leave me all her property on my undertaking to provide for the carrying out of the terms of her will as expressed in her will of even date herewith for the event that she shall survive me and for that purpose I have provided as in cl. 6 (b) and (c) hereof below set out . . ."

He then referred to the fact that under the will of Mrs. Eleanor Hurst, who had died in 1939, the whole of her residuary estate had been given to him and his first wife absolutely, subject to the life interest therein of Mrs. Hurst's sister, Miss Bertha Nicoll. This gift was not to the husband and wife jointly, but to the husband and wife in equal shares, and, if only one of them should survive Mrs. Hurst it went to that one absolutely. The testator went on to recite as follows:

"... and whereas if either I the said John Green or my wife the said Ellen May Green shall have predeceased the said Bertha Nicoll the whole of the said residue will in consequence of the above provision pass to the survivor and whereas we the said John Green and Ellen May Green have agreed in that event to provide in our respective wills for the carrying out so far as applicable of the terms of each other's wills in so far as they shall be capable of being carried into effect just as if we had in any event both survived the said Bertha Nicoll and received half her estate and for that purpose I have provided as in cl. 6 (b) and (c) hereof below set out."

By cl. 4 the testator gave all his furniture and personal effects of every description to his wife:

"... but if I predecease her I direct that the same should be sold and the proceeds thereof be held upon trusts of my residuary estate."

By cl. 5 the testator gave all the rest of his property to his trustees on trust for sale and conversion, payment of debts and funeral and testamentary expenses, and then for investment. Clause 6 is sub-divided into heads (a), (b) and (c). By cl. 6 (a) the testator directed the trustees to stand possessed of the residuary estate on trust for the first wife if she should survive the testator, but, if she should not survive the testator, then:

"Upon trust as to the entirety of the said premises 141 Billy Lows Lane Potters Bar and all the household furniture therein for the Potters Bar Hospital absolutely . . ."

As the first wife did not survive the testator, the direction in this will as to the entirety of the premises, No. 141 Billy Lows Lane, Potters Bar, and the furniture therein, going to the Potters Bar Hospital absolutely would seem to have become effective. The testator then went on:

"... and as to the remainder of my residuary estate upon trust to divide into two equal moieties or half shares and to hold the respective half shares upon the trusts following that is to say: (b) (1) As to one such moiety or half share which shall be considered as my own personal estate as distinct from the other half share which shall be considered as equivalent to any benefit I have received by the previous death of my said wife or by reason of her predeceasing the said Bertha Nicoll my trustees shall hold such half share upon trust."

After providing for the payment of a number of legacies, he gave the residue of that moiety in equal shares to certain charitable institutions. Thus, cl. 6 (b) of the will is a complete testamentary disposition of property which the testator said was to be considered as his own personal estate. I call attention to that, because it may well be that the effect of this document on that moiety is entirely different from what is the case with regard to the other moiety. Clause 6 (c) deals with the other moiety or half share, which, as the testator says at the beginning of cl. 6 (c) (1),

"... shall be considered as the benefit I shall have received by virtue of my said dear wife having predeceased me ..."

Clause 6 (c) (1) continues:

"... in pursuance of the above recited premises my trustees shall hold the same upon trust."

Clause 6 (c) (2) contains directions to invest £2,000 free of legacy duty, to pay the net income therefrom by instalments to the first wife's brother, Ben Hinsley, and from and after his death to a certain hospital. Then there are a number of pecuniary legacies, and, finally, by cl. 6 (c) (5), the residue of that half share is to be divided in equal shares among certain charitable institutions.

I need not state with any great particularity the contents of the first wife's will, which is, *mutatis mutandis*, in terms which correspond very closely with the terms of the testator's will of Aug. 31, 1940. The first wife's will was duly proved by the testator and the solicitor, the two executors under the will, on Feb. 23, 1943. Her estate was of a value of about £1,500, including the half share of the premises, 141 Billy Lows Lane. Miss Bertha Nicoll, the tenant for life under the will of Mrs. Eleanor Hurst, died on Apr. 5, 1943, and thereupon the whole of Mrs. Hurst's residuary estate went to the testator as the survivor of himself and his first wife. This estate was of the approximate value of £15,400, with the result that, when the testator died, his estate was of the value which I have already mentioned, that is to say, far exceeding the value which attached to the first wife's estate. By his marriage to his second wife, on Sept. 25, 1945, the testator's first will, so far as it would take effect as a will, was, of course, revoked. By the second will, which he made after his second marriage, after appointing his second wife and two other persons to be his trustees, he gave a number of legacies, to which I shall call attention at a later stage, and then gave his residuary estate on trust for his second wife absolutely.

The first question is: Am I to ignore altogether the first will of the testator, or does the execution of that will contemporaneously with the corresponding will of his first wife operate by way of trust to any, and, if so, what, extent? There is some authority on the question of mutual or joint wills, but it does not afford me much assistance. The choice which is open to me is between three possibilities. First, it has been argued that, whatever may be the moral consequences of what was done, no one is entitled to claim anything under the testator's first will, and it can be regarded as revoked, first by his second marriage and again by his

second will. Secondly, it has been argued that the whole of the first will has to be carried into effect, both as regards what the testator called the moiety which he regarded as his own personal property and as regards the other moiety which was to be considered as the benefit which he had received by virtue of the first wife having predeceased him. The third possibility is whether, having regard to the arrangement between the husband and the first wife—for arrangement undoubtedly it was, in view of the recital at the beginning of cl. 3—effect has to be given to that arrangement with regard only to the second moiety.

The authorities, in my opinion, are not very helpful. First there is *Dufour v. Pereira* (1), which was decided by LORD CAMDEN, L.C., on July 18, 1769. In HARGRAVE'S JURIDICAL ARGUMENTS, vol. II, p. 304, at the end of his opinion on "The Walpole Case of Mutual Wills," [*Walpole (Lord) v. Orford (Lord)* (2)], that learned lawyer refers to *Dufour v. Pereira* (1) and sets out at length the judgment of LORD CAMDEN, L.C., which he describes (*ibid.*, p. 311) as "energetic and eloquent." It is clear, I think, from that judgment, that no reluctance was felt in saying that, when a will had been executed with a promise sufficiently definite and clear, and for a proper consideration, a trust could be raised quite apart from the character of the document. LORD CAMDEN, L.C., said (*ibid.*, p. 310):

"The parties by the mutual will do each of them devise, upon the engagement of the other, that he will likewise devise in manner therein mentioned. The instrument itself is the evidence of the agreement; and he, that dies first, does by his death carry the agreement on his part into execution. If the other then refuses, he is guilty of a fraud, can never unbind himself, and becomes a trustee of course. For no man shall deceive another to his prejudice. By engaging to do something that is in his power, he is made a trustee for the performance, and transmits that trust to those who claim under him. This court is never deceived by the form of instruments. The actions of men here are stripped of their legal clothing, and appear in their first naked simplicity. Good faith and conscience are the rules, by which every transaction is judged in this court; and there is not an instance to be found since the jurisdiction was established, where one man has ever been released from his engagement, after the other has performed his part. I have perhaps given myself more trouble than was necessary upon this point; because, if it could be doubtful, whether after the husband's death his wife could be at liberty to revoke her part of the mutual will, it is most clear, that she has estopped herself to this defence, by an actual confirmation of the mutual will—not only by proving it, but by accepting and enjoying an interest under it. She receives this benefit, takes possession of all her husband's estates, submits to the mutual will as long as she lives, and then breaks the agreement after her death. In this view the case falls within the rule of *Noys v. Mordaunt* (3). She takes under the joint will and can take no otherwise."

Those observations, I think, are in point, and I confess that the only difficulty which I feel is whether effect should be given to the whole of the first will of the testator in the case now before me, or only to that part which relates to the moiety which he has allocated to and associated with his wife. Before I decide that question, I will refer to other cases dealing with this point. In *Re Oldham* (4), a decision of ASTBURY, J., the headnote is ([1925] Ch. 75):

"A husband and wife made mutual wills in the same form in pursuance of an agreement so to make them, but there was no evidence of any further agreement in the matter. Each gave his or her property to the other absolutely with the same alternative provisions in case of lapse. The wife having survived and accepted her husband's property under his mutual will subsequently married again, and made a fresh will ignoring the

alternative provisions of her own mutual will:—*Held*, that in the circumstances there was no implied trust preventing the wife disposing of her property as she pleased.”

I would distinguish that case from the present because here the recitals, which are contained in similar form in the first will of the testator and in the will of his first wife, show a very definite bargain that, whoever died first, certain consequences were to follow, and it is those consequences to which, it is suggested, effect must be given.

Re Hagger (5), a decision of CLAUSON, J., is not dissimilar from the present case. The headnote to that case is ([1930] 2 Ch. 190):

“A husband and wife made a joint will, whereby they left certain property, which each possessed at the time of the death of the spouse first dying, to the survivor for life with certain absolute remainders over, and they agreed that the will should not be revoked without their mutual consent. The wife died first, and as from her death the husband received the income from the whole estate until his death:—*Held*, that from the death of the wife the property of which the husband was then possessed was subject to a trust under which the legatees in absolute remainder took vested interests subject to the life interest of the husband.”

The decision of LORD CAMDEN, L.C., in *Dufour v. Pereira* (1) was applied.

Finally, there is *Stone v. Hoskins* (6), a decision of SIR GORELL BARNES, P. The headnote starts with the proposition that ([1905] P. 194):

“Where two persons have made an arrangement as to the disposal of their property and executed mutual wills in pursuance of that arrangement, the one of them who predeceases the other dies with the implied promise of the survivor that the arrangement shall hold good; and if the survivor, after taking a benefit under the arrangement, alters his will, his personal representative takes the property upon trust to perform the contract, for the will of the one who has died first has, by the death, become irrevocable.”

The headnote then deals with the contrary position, *i.e.*, the case where the one who dies first has departed from the bargain by executing a fresh will, which is not the case now before me. I would observe here that in the present case the husband approved the first wife's will, which contained provisions corresponding to those which I have indicated as appearing in the husband's will, and thereby one might say that he indicated in the clearest possible way his assent to the arrangement which the recitals in both wills appear to indicate.

On the whole, although it is a difficult point, I think that the arrangement was one which is binding in equity as regards what is called in both wills the wife's moiety, and, having regard to the form of cl. 6 (b) in the first will, I think that the testator's moiety was his own personal property to do as he liked with, and, if he chose after his second marriage to make other provisions as regards that moiety, he was at liberty to do so. It is not a very easy point, and it may be that I am not taking the right view when I hold that, as regards his own moiety, the testator was free to do what he liked. Nothing could prevent him revoking the will, which he had done by the act of his second marriage. The only question is over what property any subsequent will operates. In my view, it can only operate as regards one moiety which was under the testator's control at his death, and, with regard to the other moiety, *i.e.*, the moiety which was notionally the property of his first wife, the pre-existing will must take effect, not as a will, but as evidence of a trust which is plainly to be discerned in the two wills, *viz.*, the first will of the testator—which, of course, never became a will in the sense that it was a proved will—and the will of the first wife which was proved and under which the husband took an absolute interest in the residue.

The first question in the summons is:

"Whether the plaintiff and the defendant Charles William Townsend as the executors of the last will of the said testator hold the estate of the said testator or any and if so what part or parts thereof upon trust to give effect to all or any and if so which of the provisions contained in (a) the last will or (b) the earlier will of the said testator."

A In my judgment, one moiety of the estate must be held on the trusts declared by the first will. The other moiety passes under the provisions contained in the second will subject to this, that, before the moieties are ascertained, the first will is also operative so far as regards the property, 141 Billy Lows Lane, the entirety of which is, under cl. 6 (a) of the first will, to pass with the furniture therein to the successors in title, whoever they may be under the National Health Service Act, 1946, of the Potters Bar Hospital absolutely.

B As I have held that para. 6 (c) of the first will took effect in conscience—"compact" is the word LORD CAMDEN, L.C., used in *Dufour v. Pereira* (1)—giving rise to a trust, it follows, I think, that effect must be given to the various provisions under cl. 6 (c) out of the fund available for their implementation. In his second will, however, the testator left a number of pecuniary legacies to the same effect, although not always identical in amount, as those contained in para. 6 (c) of the first will. I have a shrewd suspicion that he probably did not intend these legatees to receive the legacies under the second will in addition to the corresponding legacies which they take by way of trust under para. 6 (c) of the first will, but I do not see how I can give effect to what, I think, was his intention. It might have been different if the legacies given by the second will had been precisely identical with those given by cl. 6 (c) of the first will, but there are variations. In particular, three legatees receive £250, £250 and £500, respectively, in what I have identified as a trust, and £100 each under the second will. It seems to me that, in giving legacies by the second will, the testator, whether or not intentionally, conferred by the second will fresh gifts in addition to those under the arrangement with his first wife. Therefore, I must hold that the beneficiaries take both the share in the trust fund and the legacies under the second will (the will which has been admitted to probate as the testator's last will).

E *Declaration accordingly. Costs of all parties to be taxed, as between solicitor and client; one half to be paid out of the testator's moiety and the other half out of the moiety subject to the trust.*

F Solicitors: *Julius White & Bywaters* (for the plaintiff and second defendant); *E. Gordon Lawrence* (for the first defendant); *Rye & Eyre*; *Rexworthy, Bonser & Wadkin*; *Baker, Freeman, Watson, Hill, Bucknill & Co.*; *Clayton, Sons & Fergus*; *May, May & Deacon*; *George W. Bower & Son*; *Cunliffe & Airey*; *Edward F. Iwi*; *Trotter, Leaf & Pitcairn*; and *Gregory, Rowcliffe & Co.* (for the remaining defendants).

[Reported by H. McL. MORRISON, ESQ., Barrister-at-Law.]

Re SUIDAIR INTERNATIONAL AIRWAYS, LTD.
(In liquidation).

[CHANCERY DIVISION (Wynn-Parry, J.), October 16, 1950.]

Company—Winding-up—Execution—Execution not completed until after order for winding-up—English winding-up ancillary to foreign winding-up—Rights of creditor—Discretion of court—Companies Act, 1948 (c. 38), s. 325 (1) (c).

S., Ltd., a company incorporated in South Africa, became indebted to V., Ltd., in England in respect of certain aeroplanes and spare parts, for which, when S., Ltd., found difficulty in making payment, it was agreed that payment should be by instalments. S., Ltd., defaulted in payment of instalments, and V., Ltd., after certain correspondence had passed, issued a writ claiming the amount outstanding. On Dec. 7, 1949, on the application of V., Ltd., for judgment under R.S.C., Ord. 14, S., Ltd., obtained leave to defend. On Dec. 31, 1949, unknown both to V., Ltd., and the London office of S., Ltd., a petition for the compulsory winding-up of S., Ltd., was presented in South Africa. On Jan. 13, 1950, the time reserved for the delivery of the defence of S., Ltd., to V., Ltd.'s, writ expired (no defence having been delivered), and on Jan. 14, 1950, V., Ltd., signed judgment. On Jan. 17, 1950, S., Ltd., took out a summons to set aside the judgment, and on Jan. 18, 1950, a provisional winding-up order was made against S., Ltd., in South Africa without the knowledge of the London office or of V., Ltd. On Jan. 20, 1950, the summons to set aside judgment was adjourned to Feb. 8, 1950, on the application of S., Ltd., to enable S., Ltd., to file further evidence in support of the summons. On Jan. 24, 1950, V., Ltd., heard of the winding-up proceedings, and on Jan. 31, 1950, issued writs of *fiери facias*. On Feb. 10, 1950, the summons to set aside judgment was dismissed (no further evidence having been filed), and on Feb. 14, 1950, a final winding-up order was made against S., Ltd., in South Africa. The sheriff seized certain aeroplane engines under one of the writs of *fiери facias*. On Feb. 24, 1950, the provisional liquidator claimed the engines, and the sheriff issued an interpleader summons. On Mar. 28, 1950, a petition for winding-up S., Ltd., in England was presented, and on Apr. 24, 1950, an order was made thereon. On Apr. 18, 1950, the liquidator's claim was barred in the interpleader proceedings. V., Ltd., now applied under the Companies Act, 1948, s. 325 (1) (c), for an order that V., Ltd., be entitled to retain against the liquidator the benefit of the two writs of *fiери facias*, the executions not having been completed before the commencement of the winding-up.

HELD: (i) section 325 (1) (c) gave the court jurisdiction to do what was right and fair, and in the circumstances of the case it was proper to make the order asked for.

Re Grosvenor Metal Co., Ltd. ([1949] 2 All E.R. 948), *followed*.

(ii) even though, according to the law of South Africa, an execution put in force after the date of the presentation of the petition would be void and although the English winding-up was ancillary to the South African winding-up, no obstacle to the exercise of the discretion of the court under s. 325 (1) (c) in favour of V., Ltd., was thereby constituted, because, in dealing with the assets of the South African company within its jurisdiction, the court administered only English law.

Principle stated by VAUGHAN WILLIAMS, J., in *Re English, Scottish & Australian Chartered Bank* ([1893] 3 Ch. 394), *applied*.

[AS TO INCOMPLETE EXECUTION, see HALSBURY, 1949 edn., Vol. 5, pp. 778, 779, para. 1278; and FOR CASES, see DIGEST, Vol. 10, pp. 1013, 1014, Nos. 7031-7039.]

Cases referred to:

- (1) *Re Grosvenor Metal Co., Ltd.*, [1949] 2 All E.R. 948; [1950] Ch. 63; 2nd Digest Supp.

(2) *Armorduct Manufacturing Co., Ltd. v. General Incandescent Co., Ltd.*, [1911] 2 K.B. 143; 80 L.J.K.B. 1005; 104 L.T. 805; 10 Digest 1013, 7036.

(3) *Re English, Scottish & Australian Chartered Bank*, [1893] 3 Ch. 385; 62 L.J.Ch. 825; 69 L.T. 268; 10 Digest 1058, 7410.

A ADJOURNED SUMMONS under the Companies Act, 1948, s. 325 (1) (c), for an order that Vickers-Armstrongs, Ltd., the creditors, were entitled to retain against the liquidator the benefit of two writs of *fiery facias* issued at the instance of the creditors on Jan. 31, 1950, and addressed to the sheriffs of the counties of London and Gloucester, each indorsed to levy £8,789 18s. 4d. against the Suidair International Airways, Ltd., executions under which writs were not completed before commencement of winding-up.

B *R. E. Megarry* for the applicants, Vickers-Armstrongs, Ltd.
K. W. Mackinnon for the liquidator.

C WYNN-PARRY, J.: This summons raises a not uninteresting question in the compulsory liquidation of Suidair International Airways, Ltd., which is a company incorporated in South Africa. The company became indebted to the applicants in connection with the sale by the applicants to the company of certain aeroplanes and spare parts. The full purchase price had not been paid by the summer of 1949, and the applicants were pressing for payment. On June 13, 1949, a meeting took place between representatives of the applicants and representatives of the company. From the report of that meeting it is clear that the representatives of the company admitted to the representatives of the applicants that the company was liable for the amount unpaid under the contract. D The burden of the company's representations was that the company had no desire to avoid payment, but was at the time in some difficulty as regards making immediate payment and required time and asked that the amount outstanding should be made by instalments. To this proposition the applicants agreed, and matters proceeded on that basis until the company defaulted in paying the agreed instalments. They were again pressed by the applicants, and on Aug. 3, E 1949, the then acting managing director of the company wrote a letter to the applicants in the course of which he said:

"I am keenly aware of the fact that your account has been outstanding for an extensive period and also that to date you have received nothing but promises and evasions. I want you to understand that there is no question of F denying the account, nor is there any desire on our part to avoid payment. The question that exists is merely how this can be accomplished."

After further correspondence, the applicants, having received no satisfaction, issued a writ in the King's Bench Division, specially indorsed, claiming the amount alleged to be outstanding under the contract. On the hearing of the summons for judgment under R.S.C., Ord. 14, the company intimated its desire G to defend, and on Dec. 7, 1949, obtained leave to defend. The matter was referred to the official referee. A direction on the order for directions provided that the company should deliver its defence within twenty-eight days. That order was drawn up and there was no appeal.

H On Dec. 31, 1949, unknown both to the applicants and to the London office of the company, a petition for the compulsory winding-up of the company was presented by a creditor in South Africa. On Jan. 13, 1950, the time reserved by the order for directions for delivery of the company's defence expired and on the following day the applicants signed judgment in default of defence. On Jan. 17 the company took out a summons to set aside the judgment. On Jan. 18 a provisional winding-up order was made against the company in South Africa, an event which was known neither to the applicants nor to the London office of the company at the time, and a Mr. Vosloo was appointed provisional liquidator.

On Jan. 20, 1950, the summons to set aside the judgment was heard, and on the company's application was adjourned to Feb. 8 with a view to enabling the company to file further affidavit evidence in support of the summons. The company did not take advantage of that opportunity. On Jan. 24 the applicants first heard of the winding-up proceedings in South Africa from some extraneous source. The applicants took garnishee proceedings against the company's banking account, and, in addition, on Jan 31, 1950, they issued writs of *fieri facias*, and these were directed to the sheriffs of London and Gloucester. The summons to set aside the judgment was dismissed on Feb. 10. On Feb. 14 a final order for the winding-up of the company was made in South Africa. During this period the sheriff of Gloucester seized certain aeroplane engines estimated to be of the value of some £5,500—less than the amount claimed by the applicants. On Feb. 24 Mr. Vosloo, the provisional liquidator in South Africa, laid claim to these engines and this resulted in the sheriff issuing an interpleader summons.

On Mar. 28, 1950, the petition for the winding-up of the company in England was presented, and on that an order was made on Apr. 24. In the meantime, on Mar. 30, the interpleader summons was heard, and on Apr. 18 the liquidator's claim was barred. Finally, on Apr. 26, the present summons was issued by the applicants under the Companies Act, 1948, s. 325 (1) (c), asking that the applicants be entitled to retain against the liquidator the benefit of the two writs of *fieri facias*, each being indorsed to levy the sum of £8,789 18s. 4d., the amount claimed by the company and the amount for which judgment had been given in their favour.

Two points arise. First, it is said on behalf of the liquidator that, even assuming that the matter is to be judged entirely by English law, the applicants should not be entitled to the order for which they ask. My attention was called at an early stage, by counsel for the liquidator, to *Re Grosvenor Metal Co., Ltd.* (1), a judgment of VAISEY, J., which counsel frankly admitted placed considerable difficulty in his way on this point. In that case a judgment creditor of the company, having issued, but failed to complete, execution before the date on which the company went into liquidation, took out a summons for an order that, pursuant to the Companies Act, 1948, s. 325 (1) (c), the amount of the judgment debt, together with interest thereon, be raised out of the proceeds of sale of the effects of the company and paid to the judgment creditor. VAISEY, J., made it clear in his judgment that the case raised no general question of principle, but he dealt with the construction of the section with which I am concerned and the question whether head (c) of the proviso had made any alteration in the existing law. He referred to *Armorduct Manufacturing Co., Ltd. v. General Incandescent Co., Ltd.* (2), described that case as having always been regarded hitherto as the high-water mark of this jurisdiction, and went on to say ([1949] 2 All E.R. 949):

"I think that prior to the passing of the Companies Act, 1948, nothing short of a trick or some actual dishonesty would justify interference by the court. It is suggested that this new para. (c) of the proviso does no more than declare the law as it existed before the passing of the Act of 1948 and that I ought to proceed on the footing, as I should have proceeded before the Act of 1948 came into operation, that, in view of the decision in *Armorduct Manufacturing Co., Ltd. v. General Incandescent Co., Ltd.* (2), nothing short of trickery would justify my interference, but when I look at the words of para. (c) it appears to me that I am given a wider jurisdiction. In my view, it enables me to defeat the rights conferred on the liquidator either wholly or partially because of the words 'to such extent' . . . Therefore, I hold that under this proviso I have a wider discretion than I should have had before that proviso became part of the statute law."

Counsel for the liquidator very properly desires to preserve his right to argue in a higher court the question whether or not the reasoning of VAISEY, J., and his conclusion were right in that case, but he is constrained to admit that he could

not hope in this court to persuade me to differ on that point of construction from the judgment of VAISEY, J., and all I need say is that, as at present advised, I can see no ground on which I could be asked to differ from his conclusion.

The learned judge then gives the reasons why he came to his decision in that case. He says (*ibid.*, 950):

A "I am not going through the facts of this case. I do not think anybody could say there was any trickery here, but I hold as a fact that the applicants, Bebb Industries, Ltd., were persuaded, or induced, or requested, to stay their hands in the matter of this execution. While I acquit the officers of Grosvenor Metal Co., Ltd., of any kind of dishonesty or impropriety, I think that, but for their requests and the pressure they put on the applicants, this execution would have been completed before the commencement of the winding-up. I think that the rights of the liquidator must be set aside in favour of the applicants, and I so decide."

B He added ([1950] Ch. 65):

C "The section seems to give the court a free hand to do what is right and fair according to the circumstances of each case. It is just because the discretion is so wide and so uncontrolled, and because the words are so lacking in any sort of guidance, that the exercise of it is made so difficult. All I can say is that I have come to the conclusion that in this case the applicants, in all the circumstances, should succeed."

D My attention was called on behalf of the applicants to a number of authorities decided before the present Act, and, indeed, before 1911 when *Armorduct Manufacturing Co., Ltd. v. General Incandescent Co., Ltd.* (2) was decided. In the view which I take of the matter, it is unnecessary for me to discuss those authorities on this occasion. I am proposing to accept the construction which VAISEY, J., has placed on the section, not merely because I feel bound in the circumstances which I have adumbrated to do so, but also because I find myself, with all respect, in agreement with him. I propose, therefore, to treat myself as having, to use the learned judge's words, "a free hand to do what is right and fair according to the circumstances of each case." On that view, I find no need to investigate, discuss and reconcile the authorities to which I was referred.

E So far as the present case is concerned, I think it also is a case in which I should intervene at the request of the applicants. The case, it is true, is not quite the same as that disclosed by the facts in *Re Grosvenor Metal Co., Ltd.* (1). F There the inducement or request to the applicants to stay their hands appears to have been made after the judgment was obtained, and was directed to induce them to refrain from proceeding with the execution. This case appears to me to be, if anything, stronger. From the comparatively short review of the facts which I have made, it will have been observed that there was the clearest possible admission of liability in June, 1949, and a request acceded to by the applicants G that the company should be given the indulgence of being allowed to pay by instalments. An admission of the debt by the managing director is in his letter of Aug. 3, 1949, a letter in which he refers to the promises and evasions of his own concern. Nevertheless, when, in November of the same year, the applicants, who had been compelled to do so through the default of the company to provide even the instalments agreed on, started the action to which I have referred, the H company obtained leave to defend on an affidavit which categorically disputed the existence of any debt to the applicants and asserted that everything had been paid under the contract and, indeed, that it was the applicants who were at fault in not having supplied the company with proper information and statements of account. Thereafter, every possible obstacle was put in the way of the applicants, first, obtaining their judgment, and, secondly, obtaining any fruits from that judgment. In those circumstances it appears to me that it would be unjust if I were to exercise my jurisdiction otherwise than in favour of the

applicants, because, in my view, the company has here less than no merits, and it would be quite wrong that other creditors should come in and, claiming through the company, deprive the applicants of the fruits of their judgment, fruits which they would have gathered in but for the conduct of the company to which I have referred.

That takes me to the second point which was put forward by counsel for the liquidator. He says that the company is incorporated in South Africa and, consequently, domiciled there; the main liquidation is the liquidation in South Africa; and, therefore, the English liquidation, which is also later in date, is to be regarded as an ancillary liquidation. Evidence, the correctness of which is not disputed by the applicants, has been put forward on behalf of the official receiver in this liquidation that, according to the law in the Union of South Africa, the execution which was put in force after the date of the presentation of the petition in the Union of South Africa would be void in South Africa and of no effect whatsoever; no leave, therefore, could be obtained to proceed therewith; and, in consequence, the goods against which the execution has been put in force would become available as part of the assets of the company for the benefit of all the creditors thereof. It is urged that, whatever be the view under English law, and even assuming that I was against the liquidator on the first point, as I am, yet, in view of that evidence, I ought to refuse to exercise my discretion in favour of the applicants and thus give effect to the South African law. On principle, I can see nothing whatsoever to recommend that proposition, but the matter does not stand entirely without authority.

In *Re English, Scottish & Australian Chartered Bank* (3), VAUGHAN WILLIAMS, J., in the course of his judgment, says ([1893] 3 Ch. 394):

"... in construing the statute, one must bear in mind the principles upon which liquidations are conducted, in different countries and in different courts, of one concern. One knows that where there is a liquidation of one concern the general principle is—ascertain what is the domicile of the company in liquidation; let the court of the country of domicile act as the principal court to govern the liquidation; and let the other courts act as ancillary, as far as they can, to the principal liquidation. But although that is so, it has always been held that the desire to assist in the main liquidation—the desire to act as ancillary to the court where the main liquidation is going on—will not ever make the court give up the forensic rules which govern the conduct of its own liquidation."

With respect to the learned judge, it appears to me that that must be the common sense of the matter and that passage enunciates a principle which, so far as I know, has never been doubted.

It is said that all the passage refers to is questions of procedure, that s. 325 deals with a question of substantive law, and that, therefore, the passage, when properly regarded, does not constitute an obstacle to the adoption by the court of the argument put forward on behalf of the company. To that I would make two answers. The first is that I do not read VAUGHAN WILLIAMS, J., as confining himself to what, on a narrow view, may be said to be matters of procedure. I think that he intended his observations and the statement of the principle to apply to the decision of all questions arising in the ancillary liquidation. The second answer I would give is that, even if that passage could be read otherwise, I should be prepared, for myself, to say that I can see no sound reason for distinguishing between matters of procedure viewed in that narrow sense and matters of substantive rights. It appears to me that the simple principle is that this court sits to deal with the assets of the South African company which are within its jurisdiction, and for that purpose administers, and administers only, the relevant English law—that is, primarily the law as stated in the Companies Act, 1948, looked at in the light, where necessary, of the decided cases. If that

principle be adhered to, no confusion will result. If it is departed from, I cannot see how any other result would follow than the utmost possible confusion. Who could lay down as a clear and exhaustive proposition where the court was to draw the line in any particular case between administering the English law and the law of the main liquidation? For those reasons, I am of opinion that this application succeeds, and it succeeds with costs.

Order accordingly.

A Solicitors: *George & George* (for the applicants); *Kenneth Brown, Baker, Baker* (for the liquidator).

[*Reported by R. D. H. OSBORNE, Esq., Barrister-at-Law.*]

B

R. v. MURRAY.

[COURT OF CRIMINAL APPEAL (Lord Goddard, C.J., Byrne and McNair, JJ.), October 16, 1950.]

C

Criminal Law—Evidence—Confession—Allegation that confession improperly obtained—Ruling in absence of jury on admissibility—Right of counsel at trial again to cross-examine police and examine prisoner regarding circumstances in which confession obtained.

Criminal Law—Sentence—Corrective training—Adverse report by Prison Commissioners.

D

On the trial of an indictment for felony the only evidence proposed to be offered against the appellant was a confession made by him to the police before his arrest. He alleged that the confession was not voluntary, having been made on a promise given to him by the police, and that it was untrue. In the absence of the jury the recorder heard evidence from the police and the appellant and held that the confession was admissible in evidence. Later, when evidence was being given before the jury at the trial, he ruled that counsel for the appellant could not again cross-examine the police or re-examine the appellant regarding the circumstances in which the confession had been made.

E

HELD: the weight and value to be given to the confession was a matter for the jury, and, in considering that matter, they were entitled to form their own opinion on the way in which it had been obtained, and, therefore, counsel for the appellant was within his rights in claiming that he should be allowed to examine and cross-examine to show, if he could, that the confession had been procured by means of a promise of favour.

F

Per curiam: Where the Prison Commissioners report that an accused person is unsuitable for a sentence of corrective training or preventive detention it is undesirable that a court should ignore their opinion and pass such a sentence.

G

[AS TO CONFESSIONS BY DEFENDANT, see HALSBURY, Hailsham Edn., Vol. 9, pp. 203-210, paras. 291-297; and FOR CASES, see DIGEST, Vol. 14, pp. 410-421, Nos. 4303-4400.]

H

Case referred to:

(1) *R. v. Cohen and Bateman*, [1909] 2 Cr. App. Rep. 197; 73 J.P. 352.

APPEAL against conviction.

The appellant was charged at Lincoln Quarter Sessions on an indictment containing two counts, the first alleging that he had broken and entered the offices of a club and the second that he had attempted to break into other premises. He pleaded Guilty on the second count, but Not Guilty on the first

on which the only evidence offered for the prosecution was his own confession. At the trial he alleged that his confession had been improperly obtained. The recorder ruled it to be admissible evidence and later refused to permit counsel for the appellant to examine witnesses before the jury to show the circumstances in which the confession had been obtained. The appellant was convicted on the first count and sentenced on the whole indictment to four years' corrective training. The facts appear in the judgment of the court delivered by LORD GODDARD, C.J.

J. R. T. Hooper for the appellant.

Miss Henderson for the Crown.

LORD GODDARD, C.J., delivered the following judgment of the court. The appellant was indicted originally at Lincolnshire Assizes for breaking and entering the offices of the Lincoln City football club and stealing money and, in a second count, for attempting to break and enter a shop with intent to commit a felony. He pleaded Guilty to the second count. Owing to lack of time, the learned judge ordered him to be tried on the first count at the quarter sessions for the city of Lincoln. The appellant is a thief and a criminal well known to the police, and his defence to the charge was, in substance: "You only picked me up because you knew me. You knew I was in Lincoln, and, therefore, you arrested me." That was true. The police, in trying to find out who had broken into the club, knowing that the appellant was in Lincoln, and knowing his character, interviewed him. According to the police, he then made a full confession that he had broken into the club. At the trial he denied that he had made this confession voluntarily, and said that he was induced to make it by the promise of the police that they would make it light for him. He also gave evidence that he was in another place at the material time, so raising the defence of alibi.

As the appellant denied his confession and alleged that it had not been obtained from him voluntarily, the recorder, at the request of counsel for the appellant, quite properly heard at the outset evidence on the issue whether the confession had been obtained voluntarily or not. It was not only convenient, but also proper, that that matter should be decided once and for all at the opening of the case because the confession was the only evidence against the appellant except the evidence of arrest. The recorder, having heard the evidence of the police and that of the appellant, came to the conclusion that the evidence of the confession was admissible. The appellant had signed the confession in two places. The police gave their account, which the recorder believed.

At the trial the appellant gave evidence before the jury that he was not in Lincoln at the time of the offence. He was cross-examined as to his confession, but when counsel for the appellant desired, in re-examination, to question him about the circumstances in which the confession was obtained, the recorder, who had already refused to allow counsel for the appellant to cross-examine the police on this matter, would not allow him to do so. The recorder ruled that it was a question entirely for him, and when he came to sum up to the jury he said:

"I ruled that there were no circumstances in this case which justified the suggestion that the confession which is now before you was improperly obtained. I ruled that that confession was a voluntary confession obtained from the prisoner and given by him without any duress, bribe or threat. That is my ruling, and you must take it from me in this court. If I am wrong, somebody else will correct me hereafter. Therefore, you must approach the matter on the footing that there was a confession properly obtained according to our very zealously guarded rules of evidence so that no unfairness was done in the matter. That is how the matter stands."

The recorder went on to elaborate to the jury the fact that, on the one hand, the

appellant had confessed to the police, and, on the other hand, he now said that he was elsewhere, and he said that the jury must make up their minds which of those two stories was true.

A In our opinion, the recorder was wrong in the course he took. It was quite right for him to decide, in the absence of the jury and by hearing evidence, whether he could admit the confession. He had to rule on the admissibility of the terms of the confession, and, as he could find nothing in the evidence which was given before him to cause him to think that it had been improperly obtained, he admitted it, but the question of its weight and its value was for the jury, and in considering its weight and value, the jury were entitled to form their opinion on the way it had been obtained. Counsel for the appellant was entitled to cross-examine the police in the presence of the jury as to the circumstances in which the confession was obtained. At that time the confession was admissible in evidence, because the recorder had ruled so, but it was entirely within the right of the appellant or his counsel to cross-examine the police and to try again to show that the confession had been obtained by means of a promise of favour. B If counsel for the appellant could have persuaded the jury of that, he was entitled to invite them to disregard the confession.

C This point had better be settled once and for all. It has always, so far as this court is aware, in such a matter as this been the right of counsel for the defence to cross-examine again before the jury the witnesses who have already given evidence in the absence of the jury, because, if he can induce the jury to think that the confession has been obtained by some threat or promise, its value is enormously weakened. The weight of the evidence and the value of the evidence is always for the jury. The jury in this case were told that they were not to consider that question at all. That seems to the court to be a complete misdirection on a point of law. This court has always taken the view that, if a complete misdirection is given on a point of law, which goes to the root of the question, that must make the conviction bad because, as CHANNELL, J., pointed out many years ago in *R. v. Cohen and Bateman* (2 Cr. App. Rep. 207), if the law were otherwise the prisoner would be deprived of a chance of an acquittal by the jury which he might have. We, therefore, feel, though in this case there is not the least reason to doubt that the confession was true, that, as the jury were not given the opportunity of considering this matter, the conviction on the first count must be quashed. D E

[HIS LORDSHIP referred to the appellant's plea of Guilty to the charge contained in the second count of the indictment and the sentence of four years' corrective training imposed by the recorder on both the first and second counts, and continued:] This was the last case in which such a sentence should have been passed. If the recorder had imposed a sentence of preventive detention for seven or eight years, it might have been a very proper sentence, but the appellant is a man of thirty-three years of age who has been convicted on at least ten occasions, and when he has been convicted it has not been for one offence or two offences. F G In 1940 sixty-five cases of false pretences were taken into consideration; in 1941 six other cases; thirty-two other cases were considered when he was convicted of housebreaking at Nottingham; and so on. In the present case he asked for three other offences to be taken into consideration. He does not appeal against sentence, but we have to consider what sentence should be passed on the count which stands. What surprises this court is that not only did the recorder H think that corrective training was suitable for a man with this record, but he passed that sentence although the Prison Commissioners had reported that, in their opinion, he was unsuitable for corrective training. Because the Prison Commissioners report that a man is suitable for corrective training or preventive detention is not in itself a reason why the court should pass such a sentence, but if they report that he is not suitable for corrective training it is a very strong thing to disregard their opinion. It is undesirable to do so because, as we have pointed out ever since the Criminal Justice Act, 1948, s. 21, came into operation,

if sentences of corrective training—the same is true of preventive detention, but corrective training comes before this court more frequently in this respect—are too freely passed, it will embarrass the Prison Commissioners who administer this new form of punishment because the places in the prisons assigned for this particular form of treatment will be filled with unsuitable cases. We have pointed out again and again that corrective training is really a sort of extended Borstal training. A man of thirty-three who is steeped in crime as is this appellant does not mean to go straight and he would be a proper subject for a long term of preventive detention. We think that the right thing to do in the circumstances is to pass the maximum sentence for an attempt, and that is two years' imprisonment.

Appeal allowed and conviction quashed on first count. Sentence varied on second count.

Solicitors: *Registrar, Court of Criminal Appeal* (for the appellant); *J. H. Smith*, town clerk, Lincoln (for the Crown).

[*Reported by H. McL. MORRISON, Esq., Barrister-at-Law.*]

SMITH v. HAMILTON.

[CHANCERY DIVISION (Harman, J.), October 16, 17, 1950.]

Sale of Land—Contract—Time of the essence—Failure to complete purchase—Time not initially of the essence—Subsequent introduction of term—"Impropriety" on part of purchaser—Request for delay—Right to forfeit deposit and re-sell—Damages when property wrongfully re-sold.

On Feb. 26, 1949, the purchaser signed a memorandum that she had on that day purchased a dwelling-house from the vendor at the price of £3,000, and that she had paid £300 to stakeholders as a deposit. The special conditions of sale adopted the National Conditions of Sale, 15th ed., so far as not inconsistent with the special conditions, and fixed Apr. 4, 1949, as the date for completion. Condition 25 (1) of the National Conditions provides: "If the purchaser shall neglect or fail to complete his purchase according to these conditions, his deposit shall thereupon be forfeited (unless the court otherwise directs) to the vendor . . . and the vendor may, with or without notice or without previously tendering a conveyance, re-sell the property at such time, in such manner and subject to such conditions as he shall think fit." The purchaser had difficulty in raising the balance of the purchase money, and on Mar. 29, 1949, the purchaser's solicitors wrote to the vendor's solicitors stating: "We understand that . . . it will not be possible to complete the purchase on the date fixed by the contract." The vendor thereupon instructed the estate agents that in the event of the purchaser's not completing by Apr. 19, 1949, they were to sell elsewhere, and by a letter dated Apr. 5, 1949, the vendor informed the purchaser that the vendor reserved all his rights under the contract, but was prepared without prejudice to delay exercising such rights until Apr. 19. By a letter dated Apr. 19, 1949, the purchaser was notified by the vendor's solicitors that "the deposit has become forfeited" and that the vendor was proposing to re-sell. On Apr. 21, 1949, the house was re-sold. On May 2, 1949, the

purchaser offered to complete, then having the money available. The purchaser now claimed the return of her deposit and damages.

HELD: (i) as time was not initially of the essence of the contract as regards completion it was impossible for the vendor unilaterally to make it so in the absence of some impropriety on the part of the purchaser sufficient to entitle him so to do; the letter of Mar. 29, 1949, did not constitute such an impropriety, but, even if it did, it did not entitle the vendor to treat the contract as repudiated so soon as two weeks after the original date for completion.

Green v. Sevin (1879) (13 Ch.D. 589), *applied*.

(ii) the right to forfeit the deposit under Condition 25 did not arise until the purchaser had deprived himself of his equitable remedy of specific performance, and the purchaser had not so deprived herself by Apr. 5, and, therefore, the purported forfeiture was bad and the re-sale wrongful.

(iii) the purchaser was not entitled to recover as damages the expenses incurred in respect of fees of surveyors on behalf of building societies who were contemplated mortgagees.

[AS TO RESCISSION AND RE-SALE, AND FORFEITURE OF DEPOSIT, see HALSBURY, Hailsham Edn., Vol. 29, pp. 374, 375, para. 513; and FOR CASES, see DIGEST, Vol. 40, pp. 221-228, Nos. 1914-1985.]

Cases referred to:

(1) *Jamshed Khodaram Irani v. Burjorji Dhunjibhai*, (1915), 32 T.L.R. 156; 40 Digest 111, 882.

(2) *Green v. Sevin*, (1879), 13 Ch.D. 589; 49 L.J.Ch. 166; 41 L.T. 724; 44 J.P. 282; 40 Digest 113, 911.

(3) *Howe v. Smith*, (1884), 27 Ch.D. 89; 53 L.J.Ch. 1055; 50 L.T. 573; 48 J.P. 773; 40 Digest 226, 1959.

ACTION.

The plaintiff claimed a declaration that she was entitled to have returned to her the deposit paid by her to stakeholders in connection with a contract between herself and the defendant for the sale to her of the defendant's dwelling-house. She also claimed damages for breach of the contract of sale. The defendant counterclaimed for damages for breach of the contract by the plaintiff and a declaration that the plaintiff was not entitled to the return of her deposit.

Blackett-Ord for the plaintiff, the purchaser..

J. G. Monroe for the defendant, the vendor.

HARMAN, J.: This is an action for the return of a deposit and damages for breach of contract. It arises out of a contract whereby the purchaser agreed to purchase from the vendor a property known as Castle House, Parkhill, Bexley, Kent. The purchase price was £3,000, and the bargain was not completed on the day fixed by the contract. The vendor affected in substance to rescind and forfeit the deposit, round which the dispute centres. The property has been re-sold and no question of specific performance arises.

The vendor, the owner of the property, is a solicitor, retired from his practice, but still, at the time of these events, a member of the firm of Adler & Perowne, solicitors, of London Wall, and he had practised for many years as a solicitor.

In 1948 he was minded to dispose of the property, and he wanted to get £3,500 for it. He had disappointments, the purchaser for whom he looked did not materialise, and in the early part of 1949 he put the property into the hands of some estate agents, Relph & Sons, Ltd. He instructed them to sell it by auction, and they advertised it for that purpose. They prepared particulars advertising the sale on Mar. 3, 1949. Shortly before that date, the present purchaser came on the scene. She was a married woman, living in the vicinity, and had a small sum of money, £400 or so, which represented her life savings. She

had another house in Hampshire, which had belonged to her mother, and she was minded to acquire the Castle House property as, I think, a kind of speculation. She approached the vendor and had an interview with him. The upshot was that the vendor, being, I think, doubtful whether she was good for the money, sent her to Relph & Sons, Ltd. As a result of an interview with a representative of that concern, the purchaser, on Feb. 26, 1949, signed a memorandum on the back of the auction particulars acknowledging that she had "this day purchased the property, subject to the attached conditions, at the price of £3,000" and that she had paid £300 by way of deposit to the auctioneers, and she agreed to pay the remainder and to complete according to the conditions of sale so far as they applied to a sale by private treaty. She, in fact, paid £300 to the auctioneers which they held as stakeholders. A

The conditions provided that vacant possession was to be given on completion of the purchase, and adopted the National Conditions, 15th ed., so far as not inconsistent with them, and fixed Apr. 4 as the date for completion. Completion is dealt with by Condition 3 of the National Conditions, which provides: B

"The day fixed for completion shall be the day mentioned for that purpose in the special conditions. On the day fixed for completion the purchaser shall pay the remainder of his purchase-money at the office of the vendor's solicitor . . ."

There is the usual provision about interest. Condition 25 (1) provides: C

"If the purchaser shall neglect or fail to complete his purchase according to these conditions, his deposit shall thereupon be forfeited (unless the court otherwise directs) to the vendor and the vendor may, with or without notice or without previously tendering a conveyance, re-sell the property at such time, in such manner and subject to such conditions as he shall think fit."

Condition 7 deals with the time for the delivery of the abstract, the requisitions and replies to answers, and Condition 7 (3) provides: D

"In respect of the delivery of objections, requisitions and replies, time shall be of the essence of the contract."

The inference is that in no other respect is time of the essence of the contract. E

Having entered into that contract, the purchaser set about what she had rather lightheartedly undertaken, namely, to find the purchase money, and she found it much more difficult than she had supposed. Building societies would not lend her ninety per cent. of the purchase money on a house of this sort without further security. In the meantime, the title was investigated in the normal way, that part of the formalities being completed well within the time allowed. On Mar. 29, 1949, an engrossment of the conveyance was sent by the purchaser's solicitors to the vendor's solicitors, and the covering letter with that document contained this statement: F

"We understand that our client has been in communication with your Mr. Hamilton [the vendor] and informed him that she has had some difficulty in connection with the proposed mortgage and that, therefore, it will not be possible to complete the purchase on the date fixed by the contract."

In my judgment, that letter cannot be read as a repudiation of the contract by the purchaser. It merely says that there is a difficulty in connection with the proposed mortgage, and that, therefore, it will not be possible for her to complete on the day fixed. In other words, it is a request for delay, or an explanation of an inability to come on Apr. 4 with the purchase money in hand. G

When the vendor heard of this, he seems immediately to have made up his mind that the purchaser would never find the money. Accordingly, he writes to the estate agents a letter, enclosing the keys of the house, and saying: H

"In the event of Mrs. Darrell Smith [the purchaser] not completing by Apr. 19, subject to my solicitors' advice you are at liberty to sell at best advantage."

A He reminds them that there is this other purchaser waiting with £2,750. That is practically an instruction to the agents, when Apr. 19 arrives, immediately to sell the property to the other purchaser at that price, which is, in fact, what they did.

On Apr. 5, in accordance with their instructions, Messrs. Adler & Perowne, the vendor's solicitors, wrote a letter to the purchaser's solicitors, saying:

B "With reference to your letter of Mar. 29 the vendor has instructed us that he cannot agree to an extension of time to complete and that he reserves all his rights under the contract of sale. He is, however, prepared without prejudice to delay exercising such rights until the 19th instant. We should be glad to hear from you with a date for completion forthwith."

C That is not an attempt in any way to rescind the contract. I think it must be a reference to Condition 25 of the National Conditions. In other words, it says: "We will not exercise our right to sell or forfeit the deposit until Apr. 19, but we reserve all our rights in that respect."

D The purchaser made efforts to raise the money in various directions. She wrote to the vendor and explained her difficulties and her plans, which were rather wild, for the re-sale of the property to some Americans. That seems to have frightened him even more, and he became more and more convinced that he never would get the money. On Apr. 7 he wrote to her in these terms:

"I have your letter of yesterday's date and am sorry that I cannot agree to any extension of the time for completing this contract. Nor can I consent to giving possession till the purchase price is paid. Even the present delay is causing me serious inconvenience."

E He does not mention what inconvenience, and he does not say he has suffered any damage. The purchaser entered into various negotiations with building societies in an effort to get them to put up the money, and on Apr. 13, the time not having expired, her solicitors wrote in these terms:

F "We understand that our client is now endeavouring to make other arrangements for raising the necessary finances, and we hope to be able to write to you further in this matter immediately after the Easter break."

This letter was written on the Wednesday before Easter, so that meant they wanted another week or so. Immediately after the Easter break, namely, on Easter Tuesday, Apr. 19, the vendors' solicitors wrote:

G "We observe that your client is still unable to offer a date for completion and in these circumstances we are instructed to notify you that as the purchaser has failed to complete her purchase the deposit has become forfeited to the vendor and the vendor is proposing to exercise his right of re-sale forthwith."

H The property was in fact re-sold on Apr. 21. That letter thoroughly frightened the purchaser, who did what she ought to have done before—she applied to her husband and he took a hand in the matter, and, as a result, on May 2, her solicitors were able to write to the vendor offering to complete the purchase. By May 4 she was in a position to complete, and the question is whether, having regard to the terms of this contract, the vendor was in a position on Apr. 19 to do what he affected to do—in substance to rescind the contract and forfeit the deposit.

This was a contract for the sale of land, and it goes without saying at this date that, unless there was something special, the time limited in the conditions of sale for completion was not a date which, in the words of the old law, was of the essence of the contract. In other words, the equitable view which now prevails in regard to all contracts and has prevailed for a very long time in the case of real estate is that the court looks to the substance of the matter and will not allow provisions relating to dates to control the general view that the contract, when made, is to be performed if it is just and equitable so to do, notwithstanding that time be over-run. There are, of course, circumstances in which time can be said to be of the essence of the contract from the beginning. Everybody knows, for instance, that on a sale of licensed premises, or a sale of a shop as a going concern, and, perhaps, the sale of animals in certain circumstances, time is of the essence because it necessarily must be so. Apart from that, however, it would need very special circumstances to make time of the essence of the contract on a sale of an ordinary private dwelling-house with vacant possession.

It is quite true that the negotiations of the parties before the contract is made may have the effect of making time of the essence, and I was referred by counsel to a case where LORD HALDANE, in delivering the judgment of the Judicial Committee of the Privy Council, made a number of illuminating observations on this subject. It was an Indian Appeal, *Jamshed Khodaram Irani v. Burjorji Dhunjibhai* (1), which turned on a provision in the Indian Code. LORD HALDANE said, after reading the section of the Code (32 T.L.R. 157):

“ Their Lordships did not think that that section laid down any principle which differed from those which obtained under the law of England as regarded contracts to sell land. Under that law equity, which governed the rights of the parties in cases of specific performance of contracts to sell real estate, looked not at the letter but at the substance of the agreement, to ascertain whether the parties, notwithstanding that they named a specific time within which completion was to take place, really and in substance intended no more than that it should take place within a reasonable time . . . The special jurisdiction of equity to disregard the letter of the contract in ascertaining what the parties to the contract were to be taken as having really and in substance intended as regards the time of its performance might be excluded by any plainly expressed stipulation. But to have that effect the language of the stipulation must show that the intention was to make the rights of the parties depend on the observance of the prescribed time limits in a fashion which was unmistakable. The language would have that effect if it plainly excluded the notion that those time limits were of merely secondary importance in the bargain, and that to disregard them would be to disregard nothing that lay at its foundation. *Prima facie*, equity treated the importance of such time limits as being subordinate to the main purpose of the parties, and would enjoin specific performance notwithstanding that from the point of view of a court of law the contract had not been literally performed by the plaintiff as regards the time limit specified. That was merely an illustration of that general principle of disregarding the letter for the substance which courts of equity applied when, for instance, they decreed specific performance with compensation for a non-essential deficiency in subject-matter. But equity would not assist where there had been undue delay on the part of one party to the contract and the other had given him reasonable notice that he must complete within a definite time. Nor would it exercise its jurisdiction when the character of the property or when other circumstances would render such exercise likely to result in injustice. In such cases, the circumstances themselves, apart from any question of expressed intention, excluded the jurisdiction. Equity would

further infer an intention that time should be of the essence from what had passed between the parties before the signing of the contract."

I am invited here to say that what passed between these parties before the signing of this contract had that effect, but I am entirely unable to do so. Nothing took place between these parties which would not take place normally between the ordinary vendor of a private house and a purchaser. It is true that there were doubts expressed, perhaps, about the purchaser's ability to find the purchase money, but I cannot see that that would make time of the essence when it was not otherwise so. That is clear enough. Moreover, under the National Conditions of Sale time is not generally of the essence, as is shown by the special stipulation (No. 7) where that is desired.

If time be not of the essence of the contract initially, one party cannot, by his own motion, make it so, and to say that by writing a letter you can make time of the essence when it was not so before is quite inaccurate. That has been pointed out on many occasions, and, among others, by FRY, J., in *Green v. Sevín* (2). FRY, J., says (13 Ch.D. 599):

"What right then had one party to limit a particular time within which an act was to be done by the other? It appears to me that he had no right so to do, unless there had been such delay on the part of the other contracting party as to render it fair that, if steps were not immediately taken to complete, the person giving the notice should be relieved from his contract. It has been argued that there is a right in either party to a contract by notice so to engraft time as to make it of the essence of the contract where it has not originally been of the essence, independently of delay on the part of him to whom the notice is given. In my view there is no such right. It is plain on principle, as it appears to me, that there can be no such right. That which is not of the essence of the original contract is not to be made so by the volition of one of the parties, unless the other has done something which gives a right to the other to make it so. You cannot make a new contract at the will of one of the contracting parties. There must have been such improper conduct on the part of the other as to justify the rescission of the contract *sub modo*, that is, if a reasonable notice be not complied with. That this is the law appears to me abundantly plain."

Time being, in my judgment, not of the essence in the present case, the vendor could not, by his own volition, make it so unless there had been some impropriety by the purchaser. The day for completion being Apr. 4, it is clear that the vendor could not, on Apr. 5, the day after that date, serve a notice on the footing that there had been such an impropriety on the part of the purchaser as entitled him, as it were, to engraft time into the contract, and I do not think it was really suggested that there would be such a right apart from Condition 25 of the National Conditions of Sale, to which I have referred. It is suggested, however, that the vendor in this case had the right, because of the letter written to him on Mar. 29, 1949, in which the purchaser gave him notice that she would not be able to complete on the fixed day. If in that letter she had said: "I shall not complete," or "I cannot complete," or "Heaven knows when I may be able to complete," it may be that that would have amounted to something which would have entitled the vendor to deliver an ultimatum—and the letter of Apr. 5, 1949, really is an ultimatum. In my judgment, however, the letter of Mar. 29, which merely says: "We are very sorry we cannot complete just at the moment," is very far from being an anticipatory breach of the contract or anything which amounted to the kind of impropriety to which FRY, J., alludes in the case which I have cited. It does not entitle the vendor, as that learned judge said, to rescind the contract *sub modo*, i.e., to introduce into it a new term which was not there before, viz., that it must be completed within the next fortnight. Therefore, in my judgment, there was not—apart, as I have

said, from Condition 25, to which I shall refer in a moment—introduced a right by the letter of Apr. 5 to alter the contract in any way. When one looks at the letter of Apr. 5, it does not do any more than say: “We stand on our contractual rights, but we will not seek to exercise them until Apr. 19.” It has no effect to alter the contract in any way or to make time an essential part of it if it was not so before. That being so, I do not think the letter was seeking to make time the essence, to use an inaccurate expression. It merely was saying: A
 “We rely on our contractual rights.”

Supposing I am wrong about that and that the letter declining to complete on Apr. 4, 1949, did entitle the vendor to issue a kind of ultimatum, then the question arises: Was that a proper one to issue? In other words, was it a long enough time to give the purchaser? Could it be said that a delay of fifteen days after the date fixed for completion was sufficient to entitle the vendor to B
 say: “I treat you as having broken the contract and I claim the deposit accordingly”? It seems to me that the test of that may be: What would have been the position if, on Apr. 20, the purchaser had issued a writ for specific performance of the contract. Would it have been a good defence for the vendor to say: C
 “The purchaser is not entitled to specific performance because she has repudiated the contract. I accepted her repudiation before the writ was issued, and, therefore, she has no rights”? It would be surprising if it were so. I can find no instance where so short a delay as one of a fortnight has been held to entitle either a vendor or a purchaser to rescind. It would be something entirely new to hold that within so short a time, there having been no repudiation of the contract by the purchaser, the vendor could resist specific performance. Consequently, even if the letter of Apr. 5, 1949, did make time of the essence, it failed D
 with regard to the time it indicated.

Taking it for what it really is, *viz.*, a declaration that the vendor intends to stand on his rights, but not to exercise them for fourteen days, what were his rights at the end of those fourteen days? It depends, in my judgment, on Condition 25. That point seems to have been left open expressly by FRY, L.J., in *Houie v. Smith* (3), which is always cited with regard to deposits. In that case, E
 there was this somewhat similar clause (27 Ch.D. 90):

“... it was further agreed (cl. 8) that if the purchaser should fail to comply with this agreement the vendor should be at liberty to re-sell the premises in any manner, and the deficiency on such second sale thereof, with all expenses attending the same, should be made good by the defaulter at this present sale, and be recoverable as liquidated damages.” F

There was nothing about forfeiting the deposit there, but FRY, L.J., when dealing with that point, says (*ibid.*, 105):

“Whether a clause such as the 8th in the present contract gives the vendor a power of re-sale for a default in performance on the very day named, it is not now necessary to inquire.” G

Where you have in the special conditions a provision which, on the face of it, entitles the vendor to forfeit the deposit and to re-sell—without notice, be it observed—can that right be exercised on the day after that fixed for completion, or, as here, a fortnight later, the vendor having said that though his rights were rights to forfeit at once he would wait a fortnight and not exercise them? The condition which has to be satisfied is that the purchaser shall neglect or fail to complete his purchase according to those conditions. One of the conditions is that the purchase shall be completed on the day named in the special condition, *i.e.*, Apr. 4, 1949, but, as I have already said, everybody agrees that that date, unless in special circumstances, is not an essential part of the contract, and, therefore, the condition really is, I think—and I accept H

the argument of counsel for the purchaser on this point—that the purchase shall be completed on Apr. 4 or within a reasonable time thereafter. Therefore, when you get to Condition 25, the right to forfeit and re-sell does not seem to me to accrue until there has been a default by the purchaser in completing either on the day fixed or within a reasonable time. That right does not arise, I think, until the purchaser has deprived himself of the equitable remedy of specific performance by his delay or default or by a repudiation, express or implied, of the contract. Therefore, it does not seem to me that in this case the vendor can rely on Condition 25. If that be so, the purported forfeiture of the deposit is bad and the re-sale was wrongful. No question of specific performance has been raised here. The action is for the return of the deposit, and, in my judgment, the purchaser is entitled to have the deposit returned, but the stakeholder who is holding the deposit is not a party to this suit, and, therefore, I can make no order to that effect in this action. All I can do is to declare that the purchaser is entitled to give a good receipt for the deposit to the stakeholder. I shall order the vendor to pay interest at the rate of four per cent. on the amount of the stake until it is released. The stakeholder, of course, is not bound to pay interest. He puts the interest earned by the stake into his pocket. That is his reward for holding the stake.

The purchaser also asks for damages for breach of contract, and it may well be in a proper case that she would obtain those damages. General damages she could have, but, in this case, admittedly she has entirely failed to prove what they would be. She has made vague hints, but that is not enough. The special damages claimed are for certain survey expenses which were incurred by building societies who were contemplated mortgagees. Those, in my judgment, the purchaser cannot recover, because you cannot recover as damages for breach of contract expenses incurred in trying to raise money to fulfil the contract. I think such damage is too remote. It is no part of the bargain to complete the purchase of a house that the purchaser must necessarily incur the expense of mortgagees' surveyors.

Declaration that the purchaser was entitled to give to the stakeholder a good receipt for the amount of the deposit. Order that the vendor pays to the purchaser interest on the deposit at four per cent. from Feb. 26, 1949, until receipt of the deposit. Vendor to pay costs. Counterclaim dismissed with costs.

Solicitors: *Kinch & Richardson*, agents for *T. G. Baynes & Sons*, Bexleyheath (for the purchaser); *Adler & Perowne* (for the vendor).

[*Reported by R. D. H. OSBORNE, Esq., Barrister-at-Law.*]

PARKINSON v. BARCLAYS BANK, LTD.

[COURT OF APPEAL (Somervell, Cohen and Denning, L.JJ.), October 9, 10, 1950.]

Landlord and Tenant—Lease—Determination—Power for landlords to determine twenty-one years' lease at end of fourteen years if landlords "shall require the premises for the purpose of the business carried on by them"—Premises not required immediately at end of fourteen years—Only part of premises required.

The landlords carried on business in the lower part of premises owned by them and let the upper part to the tenant under a lease for twenty-one years. The lease contained a clause permitting the landlords to determine the lease at the end of the fourteenth year by six months' notice "if they shall require the premises hereby demised for the purpose of the business carried on by them." This clause, unlike various other clauses in the lease, did not refer to the premises "or any part thereof." The fourteen years expired on Mar. 25, 1948, and on May 27, 1947, the landlords served on the tenant a notice to quit and to deliver up possession on that date. The landlords intended to use part of the demised premises for the purpose of their business at some time during the last seven years of the term, but when they gave notice to quit admittedly they did not know the exact date when they would need to enter into occupation.

HELD: (i) on a proper construction of the lease, although the landlords did not require the premises for their business immediately at the end of the fourteenth year, they were entitled to determine the lease at that date as they would require the premises at some time during the last seven years of the term; (ii) the power to determine was exercisable notwithstanding that the landlords required part only of the premises for the purpose of their business.

[AS TO OPTION TO DETERMINE LEASE, see HALSBURY, Hailsham Edn., Vol. 20, pp. 69-71, paras. 77-79; and FOR CASES, see DIGEST, Vol. 31, pp. 535-540, Nos. 6805-6847.]

APPEAL by the tenant from an order of SELLERS, J., made on Apr. 24, 1950, dismissing the tenant's claim for damages for breach of contract. The facts appear in the judgment of SOMERVELL, L.J.

Beney, K.C., and Dare for the tenant.

Heathcote-Williams, K.C., and Winn for the landlords.

SOMERVELL, L.J.: This is an appeal by the tenant from a decision of SELLERS, J., which turns on the construction of a clause in a lease made on Mar. 28, 1934, between the landlords, Barclays Bank, Ltd., and the tenant, Mr. Parkinson, a dental surgeon. The lease was for twenty-one years, at a rent of £200 a year, and the demised premises were situated on the upper floor of a building known as 355 Station Road, Harrow, in the lower part of which the bank carried on its business.

By cl. 6 of the lease:

"Provided always and it is hereby agreed that if the lessee shall be desirous of determining this present lease at the expiration of the first fourteen years of the term hereby granted and of such his desire shall give six months previous notice in writing to the lessors or leave the same at or send the same by registered post to their registered office for the time being and shall pay all the rent and perform and observe all the covenants hereinbefore reserved and contained and on the part of the lessee to be paid performed and observed up to such determination or if the lessors shall be desirous of determining this present lease at the expiration of the first fourteen years of the term hereby granted and of such their desire shall give six calendar months previous notice in writing to the lessee or leave the same for him on any part of the demised premises then and in either

of the said cases immediately after the expiration of the said term of fourteen years this present demise and everything herein contained shall cease and be void but without prejudice to any claim by the lessors against the lessee in respect of any antecedent breach of any covenant or condition herein contained but notwithstanding anything hereinbefore contained the lessors shall only be at liberty to determine the said term hereby created at the expiration of the first fourteen years thereof if they shall require the premises hereby demised for the purpose of the business carried on by them."

A On May 27, 1947, the landlords served on the tenant a notice to quit and to deliver up possession on Mar. 25, 1948. It was made clear to the tenant that the landlords did not want the rooms at once. They offered him a lease, subject to a six months' notice on the basis that they would want the premises some time within the next seven years. There was a discussion whether the tenant could let them have one room. The tenant, having regard to the uncertainties of the lease, obtained other premises and moved there with his partner. In the present proceedings he claims that, on the facts proved and found by the learned judge, the landlords had no right to terminate the lease at the end of fourteen years because they did not require the premises demised for the purpose of the business carried on by them within the meaning of cl. 6.

B C The contention of counsel for the tenant is that for the landlords to come within the words of this clause the premises must be required for occupation for the purpose of the landlords' business on the date when the notice expires, that is, at the end of the fourteen years. He went on to submit that what the landlords had succeeded in establishing here, which admittedly falls short of that, did not justify the learned judge's finding. The findings of fact of the learned judge are not directly challenged. A witness for the bank whose evidence was accepted, stated that no definite date could be given as to the occupation by the landlords and that the tenant might be able to remain in occupation as long as two or three years, but sooner or later the landlords would have to go in. There was a question of mechanising the operations of the bank, which would involve obtaining machines from America, and at the date when the notice was drawn up it was not possible to calculate when such machines would be available. The learned judge sums it up in this way, and this summary must be taken subject to the findings to which I have referred:

D E "On the evidence I find that it has been established that the bank did require the premises at the time of the notice to quit so that they could use them during the remaining period of the lease. If no notice had been given, the bank could not have used them for seven years, and I am satisfied the bank intended and still intend to use them within a reasonable time, and long before the tenancy would have expired."

F G In some documents words with reference to requiring premises for a certain purpose may have the meaning for which counsel for the tenant contends. I would say that that would be the *prima facie* meaning if the provision could be operated at any time. If, for example, here the lease provided that the bank could give notice at any time during the whole of the twenty-one years if they required the premises for their business, there would be great force in saying "That means require them for occupation at the moment." There would be no justification for saying that notice could be given in 1950 when the premises were not required until 1951, but we have to construe these words in their context. The preceding words of cl. 6 give the landlords a right to determine the lease, as the tenant has the right, at the end of fourteen years. They have a right to take back to themselves at the end of fourteen years what they have granted, subject to a limitation that that right shall be exercised only if they require the premises for the purpose of the business carried on by them. In my view, the natural meaning of the words is that the landlords are entitled to possession if they require the premises for the purpose of the business carried on

by them during the period which is being dealt with by the proviso, *i.e.*, during the last seven years for which they will otherwise be deprived of possession of their property. The landlords are saying: "We let you have the premises for fourteen years, because we do not foresee wanting them over that period, but with regard to the other seven years if we want them over that period then we reserve the right to give notice." It would be absurd if the construction was that the landlords had no right to terminate the tenancy at the end of the fourteen years, although it might be clear that they would want the premises for their own purposes in a year or so, but could not say that they wanted to occupy them forthwith.

The first argument of counsel for the tenant was that the landlords would have no power to exercise their right of terminating the lease, because they could not say when they actually wanted to move into the rooms. On this point I agree with the learned judge. The second point taken was that on the evidence the landlords did not establish that they would require all the rooms, and I think that is right, but I do not think it right to say that the evidence shows that they only required one room. The evidence is that in their efforts to meet the tenant they said: "If we can have one room that might satisfy us for a great deal of the period, and we will do our best to delay our wanting the other rooms as long as possible." I accept that the evidence fell short of proving that they intended to use all the rooms within the seven years. The argument is that the clause did not say "require the premises or any part thereof," whereas in other parts of the lease there is an express reference to part. It is said that, that being so, this clause cannot be operated until the landlords require the whole of these premises for the purpose of their business. I do not take that view. It is a very short point and it does not admit of much elaboration. The learned judge said:

"It seems to me that if the bank genuinely and *bona fide* require part of the premises, that is quite sufficient to fulfil the requirements of this clause, because they could not, of course, use any part of the premises unless a notice was given. I think that is all that is contemplated in this particular part of the lease."

That seems to me the natural construction of the words as they appear in this agreement. For these reasons I think the learned judge was right on both points and the appeal should be dismissed.

COHEN, L.J.: I am of the same opinion. On the last point with which my Lord has dealt I do not desire to add anything to what he has said. On the first point, namely, the question whether or not the bank can be said in the circumstances to require the premises for the purpose of the business carried on by them, counsel for the tenant pressed us with the maxim that a deed must be construed *contra proferentem*. If, however, applying the ordinary principles of construction, we arrive at a clear conclusion as to what the parties meant by the language they used, I do not think the maxim on which counsel rely comes into action. Among the principles of construction is the rule that if of two constructions one gives business efficacy to a document, while the other leads to an improbable conclusion, the court must prefer the former. I think that this is essentially a case where that rule applies, and I think the learned judge arrived at the right conclusion. Let me imagine that at a meeting held on May 26, 1947, the day before the notice to quit, the landlords had to consider whether or not they required the premises comprised in the demise for the purpose of the business carried on by them and so were justified in giving the notice. I think that on the facts found by the learned judge a board of business men could only answer that question in the affirmative. On the facts set out in the correspondence and proved in evidence, it seems plain that they must have thought that they would require part of the premises for the purpose of mechanisation, quite apart from any

question of expansion of the business. It seems to me that in those circumstances it would be taking a very narrow view of the clause to say that they did not require the premises for the purpose of the business carried on by them because, having regard to the delivery date of the machines and so on, they could not fix the exact date at which the occupation might become a practical proposition. It is clear from the evidence that the landlords contemplated that it would become a practical proposition at some time within the seven years period. The fact that they have not yet occupied the premises and have granted a tenancy of them for a period of five years terminable on six months' notice to other tenants has nothing to do with the matter. Anybody considering the matter from a business point of view could only conclude that the premises were required for the purpose of the business carried on by them on Mar. 25, 1948, notwithstanding that they could not actually fix the date on which they could enter into immediate occupation. For these reasons, as well as for the reasons given by my Lord and the learned judge in the court below, I think the appeal fails and should be dismissed.

DENNING, L.J.: I agree.

Appeal dismissed with costs.

Solicitors: *Kimbers, Williams, Sweetland and Stinson* (for the tenant); *Baddeley, Wardlaw & Co.* (for the landlords).

[*Reported by C. N. BEATTIE, Esq., Barrister-at-Law.*]

J. F. PERROTT & CO., LTD. v. COHEN.

[COURT OF APPEAL (Somervell, Cohen and Denning, L.J.J.), October 11, 12, 1950.]

Landlord and Tenant—Lease—Encroachment by tenant on property of landlord adjoining demised premises, but not included in lease—Tenant claiming possession under lease—Acquiescence by landlords in de facto possession—Claim for cost of repairs.

Property was demised to a tenant by a lease which was made in 1936 and expired in 1948. From the commencement of the term the tenant took possession of certain lavatories which belonged to the landlords and adjoined the demised premises, but were not included in the lease. In 1943 the landlords wrote to the tenant, pointing out that the lavatories were not included in the lease and requiring him to come to an arrangement with them if he wished to continue to use them. The tenant refused to come to any arrangement, claiming that the lavatories were included in the lease, and he continued to use them until the end of the term without further opposition from the landlords. At the end of the lease the landlords brought proceedings against the tenant for damages for breaches of the tenant's repairing covenants in the lease, and they included in their claim for damages items in respect of non-repair of the lavatories.

HELD: as the tenant was claiming throughout the term of the lease to occupy the lavatories as part of the demised premises, and, except for their protest in 1943, the landlords had acquiesced in the *de facto* position, the lavatories should be treated as part of the demised premises and the tenant was liable in damages for not repairing them.

Tabor v. Godfrey (1895) (64 L.J.Q.B. 245), *applied*.

[AS TO ENCROACHMENTS, see HALSBURY, Hailsham Edn., Vol. 20, pp. 286, 287, paras. 321-323; and FOR CASES, see DIGEST, Vol. 31, pp. 554, 555, Nos. 7010-7017.]

Cases referred to:

- (1) *Berry v. Berry*, [1929] 2 K.B. 316; 98 L.J.K.B. 748; 141 L.T. 461; Digest Supp.
- (2) *Tabor v. Godfrey*, (1895), 64 L.J.Q.B. 245; 31 Digest 554, 7013.
- (3) *Hastings (Lord) v. Saddler*, (1898), 79 L.T. 355; 31 Digest 554, 7014.
- (4) *Central London Property Trust, Ltd. v. High Trees House, Ltd.*, [1947] K.B. 130; [1947] L.J.R. 77; 175 L.T. 332; 2nd Digest Supp.
- (5) *Rickards (Charles), Ltd. v. Oppenheim*, [1950] 1 All E.R. 420; [1950] 1 K.B. 616.

APPEAL by the tenant from a judgment of BIRKETT, J., dated May 11, 1950, awarding damages to the landlords for breaches of the tenant's repairing covenants in a lease of certain property. The lease, which was dated Aug. 5, 1936, expired in June, 1948, and the action was brought by the landlords on the determination of the tenancy thereunder. The breaches alleged related not only to the property demised by the lease, but also to certain lavatories which belonged to the landlords and adjoined the property demised, but which were not included in the lease. The tenant contended *inter alia* that, as the lavatories were not included in the lease, the repairing covenants did not apply to them. BIRKETT, J., found that the tenant had been in possession of the lavatories throughout the whole period of the lease and had asserted that his possession was under the lease. The learned judge held that it would be inequitable to allow the tenant now to repudiate his claim, and, therefore, he was liable in damages for not repairing the lavatories. The decision of the Court of Appeal is reported only on this point. The facts appear in the judgment of SOMERVELL, L.J.

Wooll, K.C., and Lester for the tenant.

Elwes, K.C., and Dennis Thompson for the landlords.

SOMERVELL, L.J., after stating the facts and finding for the landlords on the issue of liability for the alleged breaches of the repairing covenants in relation to the property demised by the lease, continued: There is a separate part of the case. Some of the items in the claim were in respect of the cost of repairs to lavatories. It is argued on behalf of the tenant that the lavatories were outside the lease, and that, therefore, dilapidations cannot be claimed in respect of them. It is true that the lavatories were in a building marked "D" on the plan and the lease [which was dated Aug. 5, 1936, and expired in June, 1948] does not include "D."

The question arose first in 1943. The landlords came to the conclusion that they might want these lavatories. It came to their knowledge that the tenant was claiming them under the lease, and on Aug. 12, 1943, a letter was written to the tenant on behalf of the landlords by their solicitor. In that letter, the landlords' solicitor said that he did not agree with the tenant's claim, and he ended the letter in this way:

"I may say that my clients are quite prepared to come to some arrangement with Mr. Cohen [the tenant] with reference to the future use of the lavatories . . . but when your company claims that they have a legal right to the use of the three lavatories under their lease or otherwise, my clients must repudiate any such claim, and the question of the future use of these lavatories, or any of them, must be settled at once and the terms reduced to writing. It will materially assist in arriving at a satisfactory arrangement if your company will write to me withdrawing any claim to the use of the lavatories without the permission of my clients, and if this is done by return and Mr. Cohen cares to see me to discuss what arrangements shall be made for the future, I shall be glad to see him for that purpose, if you will be good enough to make an appointment."

The tenant replied on Aug. 18, 1943, under the name of the company which he had then formed, saying:

"When the premises at Size Yard were leased to Mr. Henry Cohen, the lavatories in question were definitely included, and not until a week or so ago has Mr. Farrington, presumably on behalf of Messrs. J. F. Perrott & Co. [the landlords], verbally disputed our right to them."

Then he said that the lavatories had been white washed at his expense when the tenancy commenced in 1936 and again in 1938, that the keys had always been in his possession, and that Mr. Farrington [secretary and director of the landlords] had always been allowed the use of one of the lavatories. In reply to that letter the landlords' solicitor wrote another letter, saying:

"I note that your letter is signed by Mr. Henry Cohen, who is my clients' lessee, and when I am in a position to make any proposition with regard to the lavatories I will communicate with him."

At the trial of the action, this letter was put to Mr. Farrington, who was asked:

"Q.—Will you tell my Lord what happened after that with regard to those lavatories. Did Mr. Cohen and the Jubilee Coffee Roasting Co., Ltd. continue to use them or not? A.—Most certainly.

Q.—Was there any change in the position? A.—No change at all until the end of our lease."

Then Mr. Barry, who gave evidence for the tenant, was pressed to say that the lavatories were included:

"Q.—Does it not follow that in 1948 you were instructing Mr. Bieber [the tenant's solicitor] that the lavatories were yours? A.—Yes.

Q.—And that he must have got it from you that you regarded them as in the letting. He could not have got it from anybody else, could he? A.—It was an arrangement subsequent to the letting.

Q.—Precisely. A.—Because the first building had one lavatory. Under the Factories Act we must have lavatories."

Then a point, which was really a point of law, was put to him, and he admitted that he had asserted that they were included under the lease. In view of the tenant's conduct, extending over the whole period of the lease, the learned judge, basing himself on the equitable principle laid down in *Berry v. Berry* (1), held that the tenant was liable for the sum claimed in respect of the lavatories, although they were not included in the document of Aug. 5, 1936.

Counsel for the landlords cited to us *Tabor v. Godfrey* (2), where CHARLES, J., laid down this principle (64 L.J.Q.B. 247):

"The principle is that a man who gets in by reason of being tenant must take land as under his original take."

I need not go into the facts of that case in detail, but the tenant had occupied some land belonging to the landlord and adjoining the demised premises, but not included in the original demise. The learned judge said (*ibid.*):

"From first to last the lessee of [the demised premises] has occupied the strip just as if it were included in the demise, and so also the inside of the wall. [Counsel for the landlord] says it is no matter, as twelve years have not elapsed. But I think twelve years have elapsed of occupation of this strip of land inconsistent with the user of it as a right of way; and I should, apart from the legal question here, have to hold, certainly as to the strip, that the [tenant] had acquired a right to the freehold under the statute. But that is not the true inference, nor do I think the Statute of Limitations has anything to do with the case. But I do think that in the events which have happened, both the landlord and the tenant have treated this strip as part of the land demised."

In the case now before us, I think that, on the evidence which I have read, the learned judge would have been justified in coming to the conclusion—and, if we dealt with it on this basis, we should come to the conclusion—that from the

beginning both the landlords and the tenant treated these lavatories as part of the land demised. Counsel for the tenant has said (I think rightly) that there is nothing in *Tabor v. Godfrey* (2) which corresponds to the letter of protest written on behalf of the landlords, and that is the reason which makes the problem a difficult one. I think, however, that, having regard to the complete acquiescence of the landlords after that date in the *de facto* position, the only conclusion to which I can come is that the lavatories have been occupied throughout by the tenant as if they were part of the property demised. The attention of the landlords was drawn to the fact that the tenant was claiming them under the lease, and it is true that they then wrote a letter objecting to his claim, but that is all that they did, and, there having been one or two exchanges, they left the matter exactly where it was. I think that in those circumstances it is right to treat the lavatories as part of the demised premises and that the tenant—who at one time wanted them so treated—cannot now adopt the other position and say: “Although I have occupied them and treated them as part of the demised premises as against my landlords when they suggested that they were not part thereof, I shall now change my ground.” For those reasons, I think that the question in regard to the lavatories was rightly decided by the learned judge.

COHEN, L.J.: I am of the same opinion, and I only desire to add a word on the question of the lavatories. At one time I felt great doubt on that question. My doubt was whether the equitable principle on which the judge arrived at his decision was really applicable to the facts as he found them. Fortunately, I am not compelled to reach a conclusion on that point because counsel for the landlords called our attention to *Tabor v. Godfrey* (2), to which **SOMERVELL, L.J.**, has referred, and which was explained by the Divisional Court in *Lord Hastings v. Saddler* (3). As thus explained, *Tabor v. Godfrey* (2) seems to me to amount to this. Where a tenant has occupied land of the landlord's not included in the demised premises according to the terms of the demise, but adjoining thereto, and after the tenancy has determined the landlord seeks to eject his former tenant therefrom, but the tenant relies on the Statute of Limitations [in that case, the Real Property Limitation Acts, 1833 and 1874], the proper question for the judge to put to the jury, or to decide himself if there is no jury, is, as stated by **LORD RUSSELL, C.J.** (79 L.T. 356) in *Lord Hastings v. Saddler* (3):

“Do you think the land was occupied by the tenant as a mere extension of the *locus* of his tenancy? If you do you should find a verdict for the landlord. If you think the tenant took possession not as tenant, but with the object or desire simply of benefiting him himself, and so as to acquire the ownership of the land occupied under the Statute of Limitations, you should find for the tenant.”

If that be so, it seems to me, the proper conclusion on the facts of this case must be that the tenant was purporting to occupy the lavatories as part of the demised premises. He says so in his letter, and, though it is true, as **SOMERVELL, L.J.**, has pointed out, that his right to do so was disputed in writing by the solicitor to the landlords, none the less it is common ground that he continued to occupy the lavatories in exactly the same way as before, allowing Mr. Farrington the use of one of the lavatories down to the end of the tenancy. In those circumstances, it seems to me that the only proper answer to the question is that the occupation of the tenant was on the basis that the lavatories were part of the demised premises. For these reasons, as well as for the reasons given by **SOMERVELL, L.J.**, I think that the decision of the learned judge was right on all points and that the appeal should be dismissed.

DENNING, L.J.: I fully agree with the judgment of **SOMERVELL, L.J.**, and I, too, only wish to say a few words regarding the lavatories. It raises a question which has not hitherto been before this court, and it is this. If a lessee encroaches on property of the lessor which adjoins the demised premises, does

the lessee become liable to repair the property on which he has encroached just as if it was included under the covenants to repair contained in the lease?

The principle underlying the cases on encroachment is not, perhaps, strictly an estoppel, but it is akin to it. If a tenant takes possession of adjoining property and by his conduct represents that he is holding it under the demise, then, if the landlord acts on that representation by allowing the tenant to remain in possession, the tenant cannot afterwards assert that he is holding it on any other footing. The tenant cannot, for instance, claim that he is holding it adversely to the landlord so as to acquire a title under the Limitation Act, 1939, nor can he claim that he is only a licensee who has all the benefits of occupation but none of the burdens of the lease. The reason is because he has by his conduct made a representation that was intended to be binding, intended to be acted on, and was, in fact, acted on, and he cannot be allowed to go back on it. The representation was, in effect, a promise or assurance that the terms of the lease should apply to the adjoining piece of which he was in possession, and it is binding on the principle which I endeavoured to state in *Central London Property Trust, Ltd. v. High Trees House, Ltd.* (4). Conversely, if a landlord should allow a tenant to occupy adjoining property, and by his conduct represents to the tenant that it is included in the demise, and the tenant acts on the representation by using the adjoining property as part of the demised premises, the landlord cannot afterwards turn round and eject the tenant from it during the term of the lease. That was decided in *Tabor v. Godfrey* (2).

Applying these principles to this case, I agree that these lavatories should be treated as part of the demised premises and that the tenant is liable in damages for not repairing them. Counsel for the tenant said there was no *consensus ad idem* because the landlords wrote a letter showing they did not agree to the use of the lavatories by the tenant, and, therefore, there was no contract between them, but the answer to that argument is that it does not lie in the tenant's mouth to say it. He has successfully asserted all these years that the lavatories were included in the lease and he cannot now be allowed to go back on it. I know that this looks like treating an estoppel almost as if it were a cause of action, but it is habitually done in cases of waiver, see *Rickards (Charles), Ltd. v. Oppenheim* (5) ([1950] 1 All E.R. 423), and I see no reason why we should not do the same here. I agree, therefore, that the appeal should be dismissed.

Appeal dismissed with costs.

Solicitors: *Bieber & Bieber* (for the tenant); *Waterhouse & Co.* (for the landlords).

[Reported by C. N. BEATTIE, Esq., Barrister-at-Law.]

Reversed. H.L. [1951] 2 All E.R. 587.

EAST END DWELLINGS CO., LTD. v. FINSBURY BOROUGH COUNCIL.

[COURT OF APPEAL (Bucknill, Singleton and Birkett, L.J.J.), October 3, 4, 20, 1950.]

Compulsory Purchase—Compensation—Interest in war-damaged hereditament—Flats subject to Rent Acts demolished by enemy action—Cost of works payment—Whether compensation to be assessed on the basis that rents controlled—War Damage Act, 1943 (c. 21), s. 14 (1)—Town and Country Planning Act, 1947 (c. 51), s. 53 (1) (a).

Before 1944 the claimants owned certain property consisting of fifty-five flats which were subject to the Rent Restrictions Acts. On June 24, 1944, the flats were completely demolished by enemy action, and a cost of works payment in respect of the damage was determined to be appropriate. The vacant site was compulsorily acquired by the local authority, and, since none of the damage had been made good before the date of acquisition,

the costs of works payment was, by virtue of s. 14 (1) of the War Damage Act, 1943, to be converted into a value payment. The question arose of the amount of compensation payable to the claimants, having regard to the Town and Country Planning Act, 1947, s. 53 (1) (a), which provides that the value of the interest for the purposes of assessment of compensation shall be taken to be the value which it would have if the whole of the damage had been made good before the date of the notice to treat.

HELD (SINGLETON, L.J., *dissentiente*): by the combined effect of s. 14 (1) of the Act of 1943 and s. 53 (1) (a) of the Act of 1947 the basis of compensation was the value of the property immediately before the damage was suffered, and, consequently, compensation ought to be assessed on the assumption that the rents of the notionally new building would be restricted to the amount of the former standard rents.

Ellis & Sons Amalgamated Properties, Ltd. v. Sisman ([1948] 1 All E.R. 44), distinguished.

Decison of DEVLIN, J. (p. 81, *ante*), reversed.

[FOR THE TOWN AND COUNTRY PLANNING ACT, 1947, s. 53 (1), see HALSBURY'S STATUTES, Second Edn., Vol. 3, p. 1094, and FOR THE WAR DAMAGE ACT, 1943, s. 14 (1), see HALSBURY'S STATUTES, Vol. 36, p. 353.]

Case referred to:

- (1) *Ellis & Sons Amalgamated Properties, Ltd. v. Sisman*, [1948] 1 All E.R. 44; [1948] 1 K.B. 653; [1948] L.J.R. 929; 2nd Digest Supp.

APPEAL by Finsbury Borough Council from an order of DEVLIN, J., dated May 8, 1950, and reported p. 81, *ante*, whereby he upheld the award of an arbitrator assessing at £32,000 the amount of compensation payable to the claimants by the borough council in respect of certain war-damaged land which they had compulsorily acquired.

The claimants were owners of land in the borough of Finsbury on which, before the war, there were fifty-five flats which were subject to the Rent Restrictions Acts, 1920 to 1939. On June 24, 1944, these flats were completely demolished as a result of enemy action and had not been re-built. On Dec. 6, 1947, the Minister of Health confirmed a compulsory purchase order by which Finsbury Borough Council were to acquire the land on which the flats had been situate, and on July 28, 1948, the borough council served a notice to treat on the claimants. On May 9, 1949, the War Damage Commission determined that the appropriate payment under the War Damage Act, 1943, in respect of the damage suffered would, apart from the compulsory purchase order, be a cost of works payment. In assessing the compensation payable in respect of the compulsory acquisition of the land in question, the official arbitrator appointed under s. 110 (1) of the Town and Country Planning Act, 1947, purported to proceed on the assumption prescribed by the Town and Country Planning Act, 1947, s. 53 (1) (a), that the whole of the war damage had been made good before the date of the notice to treat. On this basis he had assumed that the rents legally recoverable in respect of the notionally new dwelling-houses would not have been subject to the statutory limits imposed by Rent Restrictions Acts on the rents up to the date of the demolition. The local authority contended that this basis of assessment was wrong, since the words "made good" in s. 53 (1) (a) of the Act of 1947 showed that the intention of the enactment was that the old building should retain its identity even after it had been reconstructed and that, consequently, the old restrictions on rents would continue to apply. It was agreed between the parties that, if this contention was right, then the amount of compensation should be £20,000. DEVLIN, J., held that, although the words "made good" in s. 53 (1) (a) were apt to include re-building the premises in substantially the same form as the previous building, nevertheless, on the authority of *Ellis & Sons Amalgamated Properties, Ltd. v. Sisman* (1), the notional new

building would be free from the rental limits attaching to the previous building and compensation ought to be assessed on that basis.

Lawrence, K.C., and Harold Brown for Finsbury Borough Council.
Rowe, K.C., and Squibb for the claimants.

Cur. adv. vult.

Oct. 20. The following judgments were read.

A **BUCKNILL, L.J.:** This is an appeal from the judgment of **DEVLIN, J.**, in which he decided that an award by an official arbitrator made on Feb. 14, 1950, was not wrong in law. The material facts are clearly set out in the award and I merely make a summary of them.

B The claimants are the freeholders of certain property in the borough of Finsbury, including a piece of land on which were some dwellings known as Winton Houses. These dwellings consisted of fifty-five working-class flats and were let to weekly tenants, and by reason of their rateable values were subject to the provisions of the Rent Restrictions Acts. On June 24, 1944, these dwellings were completely demolished as a result of enemy action. On Dec. 6, 1947, the Minister of Health confirmed a compulsory purchase order by which Finsbury C
Borough Council were to acquire the land on which the dwellings had been situate, and on July 28, 1948, the borough council served a notice to treat on the claimants. None of the damage to Winton Houses had been made good by that time. On May 9, 1949, the War Damage Commission determined that the appropriate payment under the War Damage Act, 1943, in respect of this war damage would, apart from the compulsory purchase order, be a payment of
D cost of works. The official arbitrator then dealt with the compensation payable to the claimants by the borough council. The claimants argued before him that the compensation should be £32,000, but the borough council argued that the sum should be only £20,000. Broadly speaking, the difference between these two sums depended on a decision of the question whether the property was to be valued with dwellings whose rents had been fixed by the Rent Restrictions Acts or not.

E The award of the arbitrator was as follows:

"I assess the compensation payable in respect of the said land on the assumption that, if the whole of the said war damage had been made good before the date of the said notice to treat, the rents legally recoverable in respect of the said dwellings would not be subject to the statutory limits imposed by the Rent and Mortgage Interest Restrictions Acts, 1920 to 1939, at the sum of £32,000."

F The borough council then moved the High Court to set aside or remit the award for further consideration on the ground that the arbitrator was wrong in law in his basis of the assessment of compensation. On appeal **DEVLIN, J.**, affirmed the award, and it is from his judgment that this appeal is made.

G As I see it, the question in dispute turns almost entirely on the proper interpretation of s. 53 (1) of the Town and Country Planning Act, 1947. The relevant words of that section are as follows:

H "Where an interest in land the value of which is to be ascertained in accordance with the provisions of s. 51 of this Act is an interest in a hereditament . . . which has sustained war damage, and any of that damage has not been made good at the date of the notice to treat, then if the appropriate payment under the War Damage Act, 1943, would, apart from the compulsory purchase . . . be a payment of cost of works—(a) the value of the interest for the purposes of the compensation payable in respect of the compulsory purchase shall . . . be taken to be the value which it would have if the whole of the damage had been made good before the date of the notice to treat . . ."

The critical words, therefore, in the sub-section are "the value which it [the interest in land] would have if the whole of the damage had been made good before the date of the notice to treat."

DEVLIN, J., based his decision on the ground that, if the whole of the damage had been made good, new dwelling-houses would have been built similar to those which had been demolished. On the authority of the decision of the Court of Appeal in *Ellis & Sons Amalgamated Properties, Ltd. v. Sisman* (1) these new buildings would be free from the rental limits which had attached to their predecessors, the demolished buildings. Therefore, the landlord in all probability could have let the new buildings at a higher rent than the standard rents of the demolished buildings, and to that extent the value of the new buildings, which is determined mainly by their rent-earning capacity, would have been more than if the old restrictions as to rent had attached to them.

Counsel for the Finsbury Borough Council argued that this basis of assessment was wrong, because the words "made good" which were used in s. 53 (1) (a) show that the intention of Parliament was that the old building should retain its identity after it had been repaired or reinstated. In other words, the dwelling must be considered as rising from its ashes, and its identity should be preserved by keeping its old standard rent. I think that this question is difficult to answer. The decision of the Court of Appeal in *Sisman's* case (1) was given in December, 1947, four months after the Act of 1947 had received the Royal Assent, and I doubt whether s. 53 (1) (a) was intended to deal with the problem what meaning the words "made good" were to have in the case of a demolished house of which a replica is made on a cost of works basis. We have, therefore, to apply the words of the section as best we can, being guided in the main by the natural meaning of the words, and at the same time not giving to them a meaning which would be plainly unreasonable or contrary to the general spirit of the appropriate legislation. I think that the strongest argument on behalf of the claimants was that the Act of 1947 enacts that the compensation is to be ascertained in accordance with the provisions of s. 51. These are the relevant words of s. 51:

"(1) Any compensation payable in respect of the compulsory acquisition of an interest in land by . . . a local or public authority within the meaning of the Acquisition of Land (Assessment of Compensation) Act, 1919, in pursuance of a notice to treat . . . shall be assessed in accordance with the provisions of that Act as modified by the provisions of this and the three next following sections."

One has now to look, therefore, at the Act of 1919 to see what those provisions were. Section 2 of that Act enacts that :

"In assessing compensation, an official arbitrator shall act in accordance with the following rules . . . (2) The value of land shall, subject as hereinafter provided, be taken to be the amount which the land if sold in the open market by a willing seller might be expected to realise . . ."

Counsel on behalf of the claimants argued that this test must be applied when interpreting the words "the value of the interest" in s. 53 (1) (a) of the Act of 1947. What, then, he asked, would have been the market value of the land if the whole of the damage had been made good before the date of the notice to treat in 1948? On the authority of *Sisman's* case (1) it clearly would have been the value of a dwelling which was not already fettered by a standard rent.

In *Sisman's* case (1) the material facts were that a house within the Rent Restrictions Acts was so extensively damaged by enemy action in 1941 that it was demolished by the local authority. The defendant was the tenant of the house, and, after the damage had occurred, he ceased paying rent. After the war the landlords proceeded to erect on the site another house similar in all respects to that which had been demolished. Before it was completed or fit for habitation they terminated the contractual tenancy of the tenant by notice to

quit. They then started an action in which they claimed declarations to the effect that the tenant had no rights in respect of the new building. The tenant resisted this claim and claimed a statutory tenancy in respect of it on determination of his contractual tenancy. The Court of Appeal (TUCKER and COHEN, L.J.J., and JENKINS, J.) held that the tenant could not claim the protection of the Rent Acts in respect of the plot of land on which the house stood. The house had been destroyed, and with its destruction had gone the rights of the tenant in it under the Rent Restrictions Acts. TUCKER, L.J., in the course of his judgment said ([1948] 1 All E.R. 46):

"... on the facts, which were undisputed, ... it is impossible to say that the house in the course of erection was the same house as that which had been damaged by enemy action. It clearly was not. The original house had been pulled down and had ceased to exist and an entirely new, though, no doubt, similar, house was in the course of erection."

Later the lord justice said (*ibid.*, 47):

"Therefore, the original house having ceased to exist and the tenant not being entitled to claim that the protection of the Acts throughout attached to the plot of land, he has also failed in his contention that the building in the course of erection on these premises was at the material date a dwelling-house let as a separate dwelling. That being so, he has no claim to occupy these premises now or at any future time."

Counsel for the claimants argued that this decision applied to the present case; that, since the old dwelling had been "completely demolished," the new notional dwelling, which *ex hypothesi* had taken its place before the notice to treat was given, would be free from the restriction of the old standard rents, and to that extent the dwelling, being a free house and not a rent controlled house, would naturally command a higher value in the market because it would have a higher rent-earning capacity. DEVLIN, J., accepted this argument. The learned judge said (*ante*, p. 82):

"All the dwellings were, by reason of the rateable values ... subject to the provisions of [the Rent Restrictions Acts] and they were, therefore, let at rents which did not exceed the standard rents ... That being the position, if the claimants, as owners of the building, had re-built the premises with the aid of a cost of works payment under the War Damage Act, 1943, or out of their own resources, they would not have been required to let the flats so re-built at the 1939 standard rents."

Counsel for the borough council, on the other hand, argued that the decision in *Sisman's* case (1) had no bearing on the proper meaning to be given to the words in s. 53 (1)(a), and that the words "as if the damage had been made good" postulate the continued existence of the old building. It is unreasonable, he argued, to talk about "making good" something which has been completely demolished. In the case of a ship sunk in mid-ocean by enemy action, would any reasonable person talk of "making good the damage to the ship?" On the other hand, in the case of a demolished building it was not unreasonable to consider it as continuing to exist in a sense, because the foundations at any rate would remain and its location could be fixed.

After anxious reflection on the point, in the course of which my opinion has leaned towards one side and then towards the other, I think that the argument of the borough council is right, and that what seems to me to be the plain intention of s. 53 (1) should not be affected by the decision in *Sisman's* case (1) which was dealing with a different legal result of a similar set of facts. It seems to me that the cardinal principle of the War Damage Act, 1943, was to compensate the loser by war damage for what he has actually lost, to give him no more and no less. Whether he gets what is called in the Act a cost of works payment or whether

he gets what is called in the Act a value payment, this principle is applicable in every case. If the War Damage Commission had decided that the compensation to the owners was to be met by a value payment, he would, I think, clearly have got compensation on the basis that the value of his property was already controlled by a standard rent. A value payment is defined by s. 6 (1) (a) of the Act of 1943 as being a payment of an amount determined by reference to the depreciation in the value of the hereditament caused by the damage, as provided by s. 10. By s. 10 (1) the amount of a value payment is to be an amount equal to the amount of the depreciation in the value of the hereditament caused by the damage, that is, the amount by which the value of the dwelling in the state in which it was immediately after the damage is less than its value in the state in which it was immediately before the damage. Clearly, therefore, if the War Damage Commission had decided that compensation was to be based on a value payment, the value of the hereditament would be affected by the limitation on its rent-earning capacity, and I do not see why this factor should not also operate if the commission determines that compensation shall be on a cost of works basis. This cardinal principle seems to emerge clearly from a perusal of s. 7 and s. 8 of the War Damage Act, 1943. Section 7 declares, in effect, that the question whether a payment under the Act is to be a payment of cost of works or a value payment is to be determined as follows: The payment shall be a payment of cost of works unless the war damage involves total loss. War damage is deemed to involve total loss only if the cost of reinstating the building in the form in which it existed immediately before the occurrence of the damage would be likely to be more than the difference between its market value after its reinstatement and its market value with the damage not made good. Again, the effect of s. 8 (2) is that war damage is to be made good by reinstating the building in the form in which it existed immediately before the damage, and the amount of the payment is to equal the proper cost of the works executed for making good the damage.

Section 14 of the War Damage Act, 1943, which has not been repealed by the Town and Country Planning Act, 1947, deals with partially damaged land which has been acquired compulsorily and enacts:

"(1) Where the appropriate payment in respect of war damage to a hereditament would apart from this provision be a payment of cost of works, if land . . . is acquired compulsorily . . . then . . . (a) the commission shall make a payment . . . in respect of the damage so far as made good before the date of the acquisition . . . of cost of works, and, in respect of the damage so far as not made good before that date, a value payment . . ."

The words of s. 53 (1) which we have to consider must, I think, be interpreted with s. 14 of the Act of 1943 in mind. Reading these two sections together it appears to me reasonably clear that in all cases where a house has received war damage, whether it has been totally demolished or not, the basis for the compensation is to be the value of the house as it was immediately before the damage was done. I do not think the fair reading of s. 53 (1) of the Act of 1947 coupled with s. 14 of the Act of 1943 is that an entirely new and, so to speak, "free" house is to be valued, but the value is to be that of the original house as it stood before the war damage. The alternative interpretation adopted by the arbitrator appears to me to lead to at least two results, neither of which, I venture to think, Parliament intended when passing these Acts. (i) The owners of a house which is partially damaged and then compulsorily acquired will receive compensation on the value of that house with the whole of its damage made good, but, nevertheless, still with its rental value controlled by its standard rent fixed under the Rent Restrictions Acts. On the other hand, if the house is completely demolished, the owner will receive his compensation on the basis that the notional repairs done to "make good" the damage and to reinstate the house as before has produced a house which is free from the control of the Rent Restrictions Acts,

and, therefore, more valuable than the damaged house when reinstated. This seems to be unreasonable, and one should not impose an unreasonable interpretation on the words of a statute unless forced to do so because there is no other possible and reasonable interpretation. (ii) The second objection which I see to the interpretation put on the section by the arbitrator is that it tends to defeat the salutary object of the Rent Restrictions Acts which is to restrict the increase of rents of small dwelling-houses. Such an interpretation would have this result, if in a thickly populated area such as Dockland (an attractive target for enemy bombs) one might very well have hundreds of small houses demolished, and when reinstated their successors would be no longer controlled by the standard rents of their immediate predecessors. To that extent in that area the main object of the Rent Restrictions Acts would be stultified. It may be said that these effects will result if the owner were voluntarily to re-build his house after being damaged to such an extent as to make it necessary to do so, and to construct what was in effect a new house. Under the authority of *Sisman's* case (1) he will then presumably be entitled to claim a rent not limited by the standard rent of the old house. That may be so, but I do not think that the point which we have to decide was considered at all by the Court of Appeal in *Sisman's* case (1). The sole question which we have to decide is the amount which the State has to pay for the acquisition of land. While I sympathise with the owner who is deprived of his property by enemy action and think it fair that the State should compensate him for his loss, I do not see why he should make a profit out of the transaction at the expense of the State. The houses were worth £20,000 before the bomb fell. I think the owner should receive as compensation £20,000, not £32,000.

I, therefore, am of opinion in this difficult and important case that the appeal should be allowed and the case remitted to the arbitrator for further consideration.

SINGLETON, L.J.: Compensation for the land acquired by the borough council, the acquiring authority, under the Finsbury (Killick Street) Compulsory Purchase Order, 1947, is to be assessed as at the date of the notice to treat, namely, July 28, 1948. At that date there were no buildings on the land. Some form of bomb damage occurring on June 24, 1944, had resulted in the complete demolition of the dwelling-houses which had been known as Winton Houses, and which, with the land, had belonged to the claimants. There had been fifty-five separately let dwelling-houses, and they were subject to the provisions of the Rent and Mortgage Interest Restrictions Acts, 1920 to 1939. Forty-two of the tenancies were statutory tenancies and thirteen were contractual tenancies. No notice to quit had been served on any of the tenants after the demolition of the premises; indeed it may be said that the claimants contemplated re-housing them, or some of them, in the event of their re-building the premises. It was not suggested in argument that this affects the legal position.

The principles on which compensation is to be assessed are to be found in s. 51 and s. 53 of the Town and Country Planning Act, 1947. The former section provides that in a case such as the present, compensation is to be assessed in accordance with the provisions of the Acquisition of Land (Assessment of Compensation) Act, 1919, as modified by s. 52, s. 53 and s. 54 of the Act of 1947. By s. 2 (2) of the Act of 1919 the value of the land is to be taken as the amount which the land, if sold in the open market by a willing seller, might be expected to realise. Section 53 of the Act of 1947 deals with compensation to be paid in the case of a hereditament which has sustained war damage (any of which has not been made good at the date of the notice to treat) if the appropriate payment under the War Damage Act, 1943, would, apart from the compulsory purchase or apart from any direction given by the Treasury under s. 20 (2) (b) of that Act be a payment of cost of works. This case falls under s. 53. Apart from the compulsory purchase order the appropriate payment under the War Damage Act, 1943, in respect of war damage would, by virtue of a determination of the

War Damage Commission dated May 9, 1949, be a payment of cost of works. None of the war damage had been made good at the date of the notice to treat. In the events which have happened the cost of works payment becomes a value payment and is payable to the acquiring authority: s. 14 of the War Damage Act, 1943. Thus, under s. 53 (1) (a) of the Act of 1947 the value of the interest for the purposes of the compensation payable in respect of the compulsory purchase is to be taken to be the value which it would have if the whole of the damage had been made good before the date of the notice to treat.

If there had not been any bomb damage and the borough council had taken the necessary steps to acquire the land and the dwelling-houses on it, compensation would have been assessed on the basis that the rents of the dwelling-houses were controlled, for that was a factor by which a willing seller (and a prospective purchaser) would have been influenced. The question which arises in the present case is whether the compensation is to be assessed on the basis that the rents are subject to the control of the Rent Restrictions Acts or not. It is obvious that, if the basis is freedom from control of the Acts, the claimants will receive a much higher figure than they would get otherwise: the comparative figures are £32,000 and £20,000. The official arbitrator awarded the claimants the sum of £32,000 on the assumption that, if the whole of the war damage had been made good before the date of the notice to treat, the rents legally recoverable in respect of the dwellings would not be subject to the statutory limits imposed by the Rent Restrictions Acts. DEVLIN, J., upheld the award of the arbitrator, and in this appeal it is sought by the acquiring authority to reverse his judgment and to have it declared that the award is bad in law by reason of the assumption which the official arbitrator made on the question as to control of rents. It is said, and said with force, that it cannot be right that the owners of the property should be paid by the acquiring authority £12,000 more than they would have received if the bomb or bombs had not fallen on it. The position is not quite so extraordinary as it sounds at first, if it be right to say (a) that if the claimants had obtained a cost of works payment and re-built the houses they would be free from control under the Rent Restrictions Acts (though, of course, re-building takes time), and (b) that if the re-building is done by the acquiring authority they will have a property free from control of the Acts and thus of greater value than would have been the case if there had been no war damage.

The Act of 1947 received the Royal Assent on Aug. 6, 1947. On Dec. 12, 1947, judgment was given in the Court of Appeal in *Ellis & Sons Amalgamated Properties, Ltd. v. Sisman* (1), and on the decision in that case DEVLIN, J., based his judgment. Though other points were raised the basis of the decision in *Sisman's* case (1) was that the house had ceased to exist and the tenant was not entitled to claim that the protection of the Rent Restrictions Acts attached to the plot of land on which the house formerly stood. Equally in the present case the dwelling-houses which constituted Winton Houses were completely demolished in June, 1944. As I read the judgments of TUCKER and COHEN, L.JJ., in *Sisman's* case (1) none of those who had been tenants could at any time after the demolition of the property establish a claim to occupy any part of the premises, for each of the dwelling-houses had ceased to exist. At the date of the notice to treat no one could have established such a claim.

Turning again to s. 53 (1) (a) of the Act of 1947, compensation is to be assessed according to the value which the interest of the claimants would have if the whole of the damage had been made good the day before the date of the notice to treat. The notional making good seems to me to cover a case in which there had been complete destruction or demolition, and the only point appears to be whether, as one has to imagine that the damage has been made good, one ought also to consider it as made good subject to the control as to rents which attached to the hereditament before it suffered war damage. I do not see my way to read this into the section. No doubt the point was not present to the minds of the framers of the section or it might well have been covered. It is

not for the court to re-write the section or to insert into it words which it thinks ought to be there, or which might have been there if this point had been considered by Parliament. The section pre-supposes damage (which may entail demolition), and at some time thereafter a notional making good of that damage. It does not provide, as it might have done, that the value of the interest is to be that which it would have had if the hereditament had never suffered war damage at all. It seems to me that in view of the decision in *Sisman's* case (1) the claimants are right on the strict wording of the section, and compensation falls to be assessed on the basis of the assumption made by the official arbitrator. For these reasons, I am of the opinion that the judgment of *DEVLIN, J.*, is right and that the appeal should be dismissed.

BIRKETT, L.J.: This was an appeal by the metropolitan borough of Finsbury, hereinafter called the acquiring authority, against a decision of *DEVLIN, J.*, made on May 8, 1950. The learned judge had dismissed a motion made on behalf of the acquiring authority for an order that the award of the official arbitrator selected by the Reference Committee to hear and determine a reference between the claimants, the East End Dwellings Co., Ltd., and the acquiring authority, dated Feb. 14, 1950, should be set aside or remitted to the official arbitrator for re-consideration on the grounds that the arbitrator was wrong in law in the assessment of the compensation.

The claimants are the owners of certain freehold land in Collier Street and Killick Street in the metropolitan borough of Finsbury. A compulsory purchase order was made by the acquiring authority, and the order was confirmed by the Minister of Health on Dec. 6, 1947. On July 28, 1948, a notice to treat was served on the claimants by the acquiring authority. A portion of the land owned by the claimants which was the subject of the compulsory order was the site of fifty-five dwelling-houses and certain detached sheds, and these houses were completely demolished on June 24, 1944, as a result of enemy action. None of the damage had been made good at the date of the notice to treat. On May 9, 1949, the War Damage Commission determined that the appropriate payment under the provisions of the War Damage Act, 1943, would, apart from the compulsory purchase order, be a payment of cost of works. Before the total demolition of the houses on June 24, 1944, all the fifty-five houses were let to tenants at weekly rents to which the provisions of the Rent and Mortgage Interest Restrictions Acts, 1920 to 1939, applied. It appears to have been agreed between the claimants and the acquiring authority that, if the official arbitrator should value and assess the compensation to be paid on a certain basis, the sum to be paid should be £20,000, and, if he should assess it on another basis, the sum should be £32,000. The decision of the official arbitrator was that the sum should be £32,000, and *DEVLIN, J.*, upheld the decision of the official arbitrator. The question at issue before *DEVLIN, J.*, and before this court is whether the official arbitrator, in making his award of £32,000, was wrong in law in basing his assessment on an assumption that he was not entitled in law to make. The assumption appears in para. 1 of the award and reads:

"I assess the compensation payable in respect of the said land on the assumption that, if the whole of the said war damage had been made good before the date of the said notice to treat, the rents legally recoverable in respect of the said dwellings would not be subject to the statutory limits imposed by the Rent and Mortgage Interest Restrictions Acts, 1920 to 1939, at the sum of £32,000."

Now this court is not concerned with the figures. If the official arbitrator was entitled to make the assumption which he did, it is agreed that his figure is correct; if he was not so entitled then the figure is to be £20,000.

The question turns on the construction of s. 53 (1) of the Town and Country Planning Act, 1947, but the provisions of the War Damage Act, 1943, must also

be considered. It is important to remember that the question before the official arbitrator was not the assessment of war damage, but the assessment of compensation for war damage. The official arbitrator found that the houses owned by the claimants had been completely demolished. It is clear from the decision of the Court of Appeal in *Ellis & Sons Amalgamated Properties, Ltd. v. Sisman* (1) that if and when new buildings were erected to replace the old buildings formerly on the site, no previous statutory tenant would be able to say that his statutory tenancy continued in the newly-erected building, and, accordingly, the Rent Restrictions Acts would not apply. It is true that the provisions of the Landlord and Tenant (Rent Control) Act, 1949, might apply, but, in any event, the rents the landlord could obtain would be higher than the rents obtainable in 1939.

The War Damage Act, 1943, must be first considered, and particularly s. 6, s. 8, s. 10, s. 13 and s. 14, but in view of the earlier judgments in this case I need not take up time by reciting them. Section 53 (1) (a) of the Act of 1947 is the governing provision:

"The value of the interest for the purposes of the compensation payable in respect of the compulsory purchase shall . . . be taken to be the value which it would have if the whole of the damage had been made good before the date of the notice to treat."

In the present case (i) There had been war damage suffered. (ii) None of the damage had been made good at the date of the notice to treat. (iii) The appropriate payment under the War Damage Act, 1943, was a cost of works payment. Accordingly, by the combined effect of s. 14 (1) of the Act of 1943 and s. 53 (1) (a) of the Act of 1947, the cost of works payment is converted into a value payment and goes to the acquiring authority, and the land is to be valued on the footing that the war damage had been made good before the date of the notice to treat.

There are obviously two views which can be taken on the construction of s. 53 (1) (a). One is the view taken by the official arbitrator and the learned judge that one should regard the damage as having *actually* been made good at the date of the notice to treat and that you should assess the compensation on that basis. That means in the present case that a property is in being at the date of the notice to treat to which the decision in *Sisman's* case (1) applies, and, therefore, the rents to be obtained are not subject to the previously existing statutory limits. The other view is that the statute contemplates, not an *actual* making good of the damage suffered, but a *notional* making good of the damaged property before the date of the notice to treat as the basis of the compensation. The words "shall be taken to be the value" support the view that what is being done is to assume that the damaged property has been made good, so that as far as possible the actual damage suffered no longer exists. In other words, the section contemplates a state of affairs in which the claimant is put back into the position he was in before the damage occurred.

All forms of damage are within the section, whether the damage be slight or severe or, as in the present case, a total demolition. In the case of slight damage to a dwelling-house "the whole of the damage had been made good" would mean that the house was now as it was before the war damage occurred, and I think that the interpretation of these words is the same whatever the extent of the damage. I cannot think that it was the intention of Parliament, nor indeed is it a state of affairs that one could view with any approval, that an owner should be placed in a better position, so far as compensation is concerned, if his house is wholly destroyed than he would be if his house suffered slighter damage. The *principle* on which compensation is assessed must remain the same in both cases, however much the amounts may differ. I think that the words of the statute "shall be taken to be the value which it would have if the whole of the damage had been made good before the date of the notice to treat" mean that the basis of the compensation in cases of war damage of this kind is to be the value of

the property before the injury or damage was suffered. The decision in *Sisman's* case (1), in my opinion, is irrelevant to the question this court has to decide. In my view, s. 53 is dealing with a *notional* state of affairs and not the *actual* one. The learned judge, with the greatest respect to him, fell into error when he based his decision on a supposed *actual* re-building by the owner before the date of the notice to treat and then felt bound to follow the decision of the Court of Appeal in *Sisman's* case and apply it to the newly-constructed building he had postulated. Part V of the Town and Country Planning Act, 1947, provides a code of compensation, and s. 53 is a part of that code and deals with all cases whatever the extent of the damage where compensation is to be based on a cost of works payment. The words "if the whole of the damage had been made good," in my opinion, mean a restoration to the state existing before the damage was suffered. When one "makes good" one wipes out the damage suffered, and the property is to be valued as though the original property was in existence at the date of the notice to treat with all the damage made good, and as though the property was in being as it was before the bomb fell. The careful argument of counsel for the claimants, based on considerations arising from the words of s. 51 of the Act of 1947 and s. 10, s. 13 and s. 14 of the Act of 1943, cannot, I think, affect the true construction of s. 53 (1) (a) of the Act of 1947.

I am of opinion that the official arbitrator was wrong in law in making the assumption stated in the award, and I think the learned judge was wrong in sustaining it. In my opinion, the appeal should be allowed and the matter referred back to the official arbitrator to decide the value of the compensation leaving out of account the assumption on which his original award was based.

Appeal allowed with costs.

Solicitors: *John E. Fishwick*, clerk and solicitor of Finsbury Borough Council (for the borough council); *George C. Carter & Co.* (for the claimants).

[*Reported by J. D. PENNINGTON, ESQ., Barrister-at-Law.*]

NOTE. *Followed. Re MEYERS (dec'd.).* [1951]
1 All E.R. 538.

Re GLASS' WILL TRUSTS. PUBLIC TRUSTEE v. SOUTH-WEST MIDDLESEX HOSPITAL MANAGEMENT COMMITTEE AND OTHERS.

[CHANCERY DIVISION (Vaisey, J.), May 23, 1950.]

Will—Legacy—Destruction of object—Gift to hospital—Vesting of hospital in Minister of Health after date of will but before death of testator—National Health Service Act, 1946 (c. 81), s. 6.

National Health Service—Legacy to hospital—Destruction of object—Vesting of hospital in Minister of Health after date of will but before death of testator—National Health Service Act, 1946 (c. 81), s. 6.

ADJOURNED SUMMONS under R.S.C., Ord. 55, r. 3 (a), for the determination (*inter alia*) of the question whether a legacy of £250 free of duty by the will of Thomas Waterworth Glass bequeathed to the King Edward VII Memorial Hospital, Ealing, was, in the events which had happened, payable to the South West Middlesex Hospital Management Committee, or how otherwise the said sum ought to be applied.

By his will, dated July 2, 1948, Thomas Waterworth Glass, who died on Jan. 21,

1949, appointed the Public Trustee to be executor and trustee thereof and provided (*inter alia*):

"I bequeath the following pecuniary legacies namely ... £250 to the King Edward VII Memorial Hospital Ealing ... and I declare that the receipt of the treasurer or other proper officer ... shall be a sufficient discharge to my executor. I direct that every legacy ... bequeathed by this my will shall be paid free of legacy duty."

Probate of the will was granted to the Public Trustee on June 14, 1949. The King Edward VII Memorial Hospital, Ealing, was founded in 1871 under the name of Ealing Cottage Hospital, and was re-named in 1911. On July 5, 1948, the hospital vested in the Minister of Health under the National Health Service Act, 1946, s. 6, as a voluntary hospital, and the management committee was established pursuant to s. 11. Immediately before July 5, 1948, the hospital was an unincorporated body administered by a committee of management which was not dissolved by s. 78 of the Act as it retained certain functions in respect of a "Samaritan Fund" connected with the hospital. All the activities of the hospital prior to July 5, 1948, continued to be carried on thereafter.

The attention of the court was drawn to the decision of ROXBURGH, J., in *Re Morgan's Will Trusts* ([1950] 1 All E.R. 1097) where a similar bequest was made "for the benefit of" a certain hospital. ROXBURGH, J., there said (*ibid.*, 1098) that the gift "... is not 'to' anybody; it is 'for the benefit of' the Liskeard Cottage Hospital ... the gift is to supplement the funds available for carrying on the work of the Liskeard Cottage Hospital."

Case referred to:

(1) *Re Morgan's Will Trusts*, [1950] 1 All E.R. 1097.

R. O. Wilberforce for the plaintiff, the Public Trustee.

Denys B. Buckley for the first and fifth defendants, the South West Middlesex Hospital Management Committee, and the Attorney-General.

Droop, Burnett-Hall and Cockle for other defendants, various beneficiaries under the will.

VAISEY, J.: It seems to me that this is a simple case of a gift of a sum of money to a named hospital, the identity of which seems to be beyond dispute, by a will dated before the National Health Service Act, 1946, came into operation and having effect at the death of the testator after that date. I have been referred to the decision of ROXBURGH, J., in *Re Morgan's Will Trusts* (1) where the words were very similar and the facts wholly indistinguishable. The words in that case were a gift "for the benefit" of the named hospital. Here we have a gift direct "to" the named hospital, and, following the decision of ROXBURGH, J., not only because I feel bound to do so in any case, but also because it is, in my opinion, deserving of being followed, I propose, in answer to the first question raised by the summons, to say that this legacy should be paid to the South-West Middlesex Hospital Management Committee (that being the appropriate regional committee for the area in which the hospital in this case is situate), and that it should be paid to that committee to be applied by them for the purposes of the King Edward VII Memorial Hospital at Ealing.

Order accordingly.

Solicitors: *George C. Carter & Co.* (for the plaintiff); *Lambert, Hale & Procter* (for the first defendant); *Pritchard, Englefield, Sweet & Co.*, agents for *Nunn & Ashworth*, Cheltenham (for the second defendant); *Iliffe, Sweet & Co.*, agents for *Haddock, Pruen & Lintott*, Cheltenham (for the third defendant); *Le Brasseur & Oakley* (for the fourth defendant); *Treasury Solicitor*.

R.D.H.O.

Re WILSON'S WILL TRUSTS. TRYON v. BROMLEY-WILSON
AND OTHERS.

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Asquith and Jenkins, L.JJ.),
October 18, 19, 20, 1950.]

Will—Shifting clause—Validity—Uncertainty.

A By her will, dated July 4, 1890, a testatrix, who died on Jan. 23, 1892,
devised her D. estate to the use of M. (the second son of H.B.) for life with
remainder to his first and every other son in tail male, with remainder to
his first and every other son in tail general, with remainder to his first and
every other daughter in tail general. There followed similar limitations to
B A. (the third son of H.B.) for life, with remainders to his issue, and to H.
(the fourth son of H.B.) for life with remainders to his issue. The D. estate
was further limited on trusts (inoperative in the events which happened)
in favour of the first and every other son of H.B., and, finally, to the use
of the first and every other daughter of H.B. in tail general. The will
proceeded: " Provided always and I hereby declare that if any son daughter
or other issue of the said [H.B.] within the scope of the limitations herein-
before contained shall by any means whatsoever become actually entitled
C to the possession or the receipt of the rents and profits of the family estate
of [Sir H.] the father of the said [H.B.] meaning thereby the [S. estate] . . .
or the bulk thereof whether consisting of the same premises as that estate
now consists of or in any manner altered in the way of addition substitution
diminution or otherwise . . . then and so often as the same shall happen and
thereupon every estate hereinbefore limited for life or in tail male or in
D tail to the son or daughter of the said [H.B.] who or any of whose issue
shall so become entitled and as to such son or daughter to whom an estate
for life is hereinbefore limited to the first and other sons and the first and
other daughters successively of such son or daughter shall absolutely deter-
mine and the said premises hereinbefore devised shall go and remain to
the uses upon the trusts and with and subject to the powers provisos and
E declarations to upon with and subject to which the same premises would
have stood limited and settled by virtue of this my will if such son or
daughter had died and there had been a general failure of his or her issue
But nevertheless without prejudice as to any son or daughter of the said
[H.B.] to whom an estate for life is hereinbefore limited to any jointure
yearly rentcharge or portions which may have been charged by such son
F or daughter under the respective powers for those purposes hereinafter
contained before such son or daughter shall have become entitled in
possession to the said [S. estate] as aforesaid and without prejudice to any
powers remedies or terms of years for securing or raising any such jointure
or portions respectively."

G In 1897 the S. estate was re-settled as a result of which re-settlement the
S. estate was held for H.B. for life (he died in 1905), then for R. (H.B.'s
eldest son) for life with remainder to his sons in tail male, remainder to M.
for life with remainder to his sons in tail male, remainder to A. for life with
remainder to his sons in tail male, remainder to H. (who died a bachelor
in 1915) for life with remainder to his sons in tail male. There followed
remainders in tail general to daughters of the sons, and ultimately to E.
H (the daughter of H.B.) and her issue. On May 13, 1906, R. the life tenant
in possession of the S. estate under the re-settlement, died without issue
male. On July 19, 1906, M., who was then life tenant in possession of the
D. estate under the will and, in the event, the next entitled to the S. estate
on the death of R., disclaimed his life interest under the re-settlement in
order to avoid the operation of the shifting clause in the will. A result of
M.'s disclaimer was that A. became entitled to the S. estate, subject to
defeasance on the birth of issue to M., and the question arose whether the

defeasance clause in the will had so been brought into operation as to defeat the interests of A. and his issue in the D. estate.

HELD: (i) the validity of the form of the defeasance clause was so well settled by practice and had been accepted by the court and by conveyancers for so long that it would be wrong for the court now to pronounce the clause to be so uncertain as to be inoperative.

Re Hinckes ([1921] 1 Ch. 475), considered.

(ii) on the true construction of the defeasance clause, inasmuch as A. had become actually entitled to the possession or receipt of the rents and profits of the S. estate, the D. estate stood limited under the will as if A. had died and there had been a general failure of his issue, and it was not necessary, for the defeasance to operate in respect of any individual, that that person should have come into actual possession of his or her interest in the D. estate.

[AS TO DIVESTING, see HALSBURY, *Hailsham Edn.*, Vol. 34, pp. 400-407, paras. 447-451; and FOR CASES, see DIGEST, Vol. 44, pp. 1114-1118, Nos. 9654-9683.]

Cases referred to:

- (1) *Re Hinckes*, [1921] 1 Ch. 475; 90 L.J.Ch. 335; 124 L.T. 681; 44 Digest 472, 2913.
- (2) *Monypenny v. Dering*, (1852), 2 De.G.M. & G. 145; 22 L.J.Ch. 313; 19 L.T.O.S. 320; 42 E.R. 826; 44 Digest 551, 3697.
- (3) *Clavering v. Ellison*, (1859), 7 H.L. Cas. 707; 29 L.J.Ch. 761; 11 E.R. 282; 44 Digest 440, 2667.
- (4) *Re Exmouth (Viscount)*, (1883), 23 Ch.D. 158; 52 L.J.Ch. 420; 48 L.T. 422; 44 Digest 441, 2668.
- (5) *Re Lanyon*, [1927] 2 Ch. 264; 96 L.J.Ch. 487; 137 L.T. 806; 44 Digest 456, 2782.

APPEAL by the plaintiffs from an order of HARMAN, J., dated May 5, 1950.

HARMAN, J., held that, as a matter of construction, the effect of a shifting clause in the will of Gertrude Sophia Wilson deceased was not, in the events which had happened, to deprive Sir Arthur Bromley and his issue of their interests in the Dallam Tower estate, which formed part of the estate of the testatrix. On appeal it was further argued that the shifting clause was so uncertain in its terms as to be invalid.

Milner Holland, K.C., and *Wilfrid Hunt* for the plaintiffs, issue of Mrs. E. Tryon, daughter of Sir Henry Bromley, the fifth baronet.

Harold Christie, K.C., and *A. F. M. Berkeley* for the third, fourth, fifth and sixth defendants, Sir Arthur Bromley and certain of his issue.

Ungoed-Thomas, K.C., and *Hillaby* for the seventh and eighth defendants, other issue of Sir Arthur Bromley.

T. A. C. Burgess for the first defendant, Sir Maurice Bromley-Wilson, Bt., and the ninth, tenth and eleventh defendants, issue of Mrs. E. Tryon.

J. H. Lazarus for the second defendant, one of the trustees for the purposes of the Settled Land Act, 1925, of the Dallam Tower estate.

SIR RAYMOND EVERSLED, M.R.: I will ask JENKINS, L.J., to deliver the first judgment.

JENKINS, L.J.: This is an appeal from an order of HARMAN, J., dated May 5, 1950, on a question concerning the effect of a provision of the class known to conveyancers as a shifting clause, contained in the will of Miss Gertrude Sophia Wilson, the testatrix. The will is dated as long ago as July 4, 1890. The testatrix died on Jan. 23, 1892, and her will was proved on Apr. 20, 1892.

The question which we now have to consider arises in this way. Subject to certain prior interests, which are not now material, the testatrix was entitled to a landed estate known as the Dallam Tower estate in the counties of Westmor-

A land and Lancaster. She was a connection of Sir Henry Bromley, the fourth holder of the title. Settled in the Bromley family was a landed estate at Newark, in the county of Nottingham, known as the Stoke Hall estate. It seems the testatrix was minded to settle her Dallam Tower estate, to put it very shortly, on the grandchildren and remoter issue of Sir Henry (the fourth baronet) in such a manner as to ensure that, if any such grandchild or his issue became entitled to the Stoke Hall estate, then such grandchild and such issue should lose their interest in the Dallam Tower estate under the testatrix's disposition. That, very broadly and imperfectly, expresses her general object. At the date of the testatrix's death the position seems to have been that the Stoke Hall estate stood limited to Sir Henry, the fourth baronet, for life with remainder to the fifth baronet (also named Henry) for life with remainder to the eldest son of the fifth baronet, namely, Robert Bromley, who afterwards became Sir Robert Bromley, in tail male with remainders over. It was, no doubt, in the contemplation of the testatrix that, in due course, in accordance with the usual practice, there would be a disentailing and a re-settlement of that estate.

B In those circumstances the testatrix disposed of her Dallam Tower estate. The limitations of the will, so far as material, are of this nature. She devised the property, subject to certain prior interests, which, as I have said, are no longer material, to the use of Maurice Bromley, the second son of Henry Bromley (the fifth baronet), for life with remainder to his first and every other son in tail male, with remainder to his first and every other son in tail general, with remainder to his first and every other daughter in tail general. Then there are similar limitations to the third son of Henry Bromley, namely, Arthur Bromley, for life with remainders to his issue, and similar limitations in favour of the fourth son, Herbert Bromley, for life with remainders to his issue. Then there was a limitation which, in the events which happened, never took effect, in favour of the first and every other son of Henry Bromley, and, finally, a remainder to the use of the first and every other daughter of Henry Bromley in tail general. There was the usual provision cutting down estates tail to life interests in the case of persons born in the lifetime of the testatrix. The testatrix added a name and arms clause on which nothing turns for the present purpose. Then comes the proviso which has given rise to the present difficulty and I should read that proviso *in extenso*:

F “ Provided always and I hereby declare that if any son daughter or other issue of the said Henry Bromley within the scope of the limitations hereinbefore contained shall by any means whatsoever become actually entitled to the possession or the receipt of the rents and profits of the family estate of Sir Henry Bromley the father of the said Henry Bromley meaning thereby the Stoke Hall estate near Newark in the county of Nottingham or the bulk thereof whether consisting of the same premises as that estate now consists of or in any manner altered in the way of addition substitution diminution or otherwise and so that this proviso shall not be rendered inoperative by reason of such estate or any part or parts thereof being subjected to any charges or incumbrances whatsoever then and so often as the same shall happen and thereupon every estate hereinbefore limited for life or in tail male or in tail to the son or daughter of the said Henry Bromley who or any of whose issue shall so become entitled and as to such son or daughter to whom an estate for life is hereinbefore limited to the first and other sons and the first and other daughters successively of such son or daughter shall absolutely determine and the said premises hereinbefore devised shall go and remain to the uses upon the trusts and with and subject to the powers provisos and declarations to upon with and subject to which the same premises would have stood limited and settled by virtue of this my will if such son or daughter had died and there had been a general failure of his or her issue But nevertheless without prejudice as to any son or daughter of the said Henry Bromley to whom an estate for life is hereinbefore

limited to any jointure yearly rentcharge or portions which may have been charged by such son or daughter under the respective powers for those purposes hereinafter contained before such son or daughter shall have become entitled in possession to the said Stoke Hall estate as aforesaid and without prejudice to any powers remedies or terms of years for securing or raising any such jointure or portions respectively."

I should, finally, refer to the provisions as to charging jointures and portions, as a point was made of them in argument in conjunction with the provision I have just read saving jointures or portions charged by sons or daughters of Henry Bromley against whom the shifting clause might afterwards operate. The provisions as to charging jointures and portions empowers any person made tenant for life of the Dallam Tower estate, either before or after he or she becomes entitled to possession or receipt of the rents and profits, to charge a jointure and portions as therein mentioned. Then there is a provision to the effect that, if any tenant for life exercises the power of appointing a jointure or of charging portions before he or she becomes entitled to possession,

"the rentcharge or sum of money charged for portions under such exercise of the said power shall not be a lien or charge [on the property charged] until the person by whom the same shall have been charged or some issue of his or hers shall or if of full age would have become entitled to such possession or receipt as aforesaid."

The testatrix having died in 1892, in 1897 there was the usual re-settlement of the Stoke Hall property. The effect of that re-settlement was that the Stoke Hall property was held for Henry Bromley, who had by then become Sir Henry, the fifth baronet, for life—he died in 1905—then for Sir Robert, his eldest son, for life with remainder to his sons in tail male, remainder to Sir Maurice, the second son, for life with remainder to his sons in tail male, remainder to Rear-Admiral Sir Arthur Bromley for life with remainder to his sons in tail male, and a remainder similarly for life with remainder to his sons in tail male to Herbert Bromley who died a bachelor in 1915. Then there were remainders in tail general to daughters of the sons, and, ultimately, there was a limitation in favour of Esther and her issue, she being the daughter of Sir Henry, the fifth baronet. On the death of the testatrix, Sir Maurice, who is still alive, aged seventy-five years or thereabouts, and has had no issue, became entitled to the first life interest in the Dallam Tower estate. He was also entitled in default of male issue of Sir Robert, to the next life interest under the re-settlement of the Stoke Hall estate. Sir Robert, the life tenant in possession under that re-settlement, died without issue male on May 13, 1906, and this raised at once an immediate question under the shifting clause contained in the testatrix's will, for, if Sir Maurice became actually entitled to possession or receipt of the rents and profits of the Stoke Hall property, the shifting clause would operate against him and his issue. To avoid that result, on July 19, 1906, *i.e.*, within three months or thereabouts of Sir Robert's death, he disclaimed his life interest under the re-settlement of the Stoke Hall property, so, if that disclaimer was effective, he never became actually entitled to possession or receipt of the rents and profits of the Stoke Hall property and the effect of the shifting clause was avoided. The result, however, of that disclaimer was that Sir Arthur did become actually entitled to possession or receipt of the rents and profits of the Stoke Hall property, his interest being accelerated by Sir Maurice's disclaimer. It was, no doubt, defeasable in the event of the birth of issue to Sir Maurice, but nevertheless was unquestionably an interest under which he became actually entitled to possession or to receipt of the rents and profits.

A question was raised as to the effect of Sir Maurice's disclaimer. That question came before NEVILLE, J., in 1911. He held that the disclaimer was effective, but he also held that Sir Maurice's interest in the Dallam Tower estate was liable to be defeated in the event of the birth to him of issue who became actually

entitled under the limitations of the re-settlement to possession or receipt of the rents and profits of the Stoke Hall property. It is to be observed that the matter was argued before NEVILLE, J., on the footing that the shifting clause was a perfectly valid clause.

A There has been no material change, I think, in the facts necessary to be stated, but for reasons which, no doubt, appear to the parties good and sufficient the question has now been raised whether the interests of Sir Arthur and his issue in the Dallam Tower estate have been defeated under the shifting clause by reason of the fact that, by the joint effect of the re-settlement and of Sir Maurice's disclaimer, Sir Arthur did become, and has been since 1906, actually entitled to the possession or receipt of the rents and profits of the Stoke Hall estate. That is strictly a future question, but, owing to the importance to the parties of knowing where they stand as regards these assets, we have thought it proper, B as the learned judge, HARMAN, J., did, to deal with it now.

C The case assumes a rather different form before us from that which it took before HARMAN, J. Two points were raised before us—first, the question of the effect of the shifting clause on the footing that it was a valid clause, which was debated before HARMAN, J., and, secondly, the new point whether the event on which the defeasance provided for by the shifting clause was expressed to take effect was not couched in such uncertain language as to make the defeasance wholly invalid. If the latter question were to be answered in the sense that the shifting clause is wholly invalid, the result would be to destroy the foundation of all argument as to the effect of the clause, and, indeed, to make that argument nugatory. I, therefore, think it right to deal with the second and new point first.

D The elaborate shifting clause which I have read is no new clause. It was not new in 1890 when the testatrix's will was prepared. It is a recognised clause well known to conveyancers which appears in DAVIDSON'S PRECEDENTS AND FORMS IN CONVEYANCING, I think for all practical purposes *ipsissimis verbis*, certainly in the 1864 edition (p. 516), and it may be that it appears in still earlier editions. It also finds a place in KEY AND ELPHINSTONE'S CONVEYANCING PRECEDENTS, 11th ed., which was published in 1923. It there appears with some variations, but the essentials of it are to be found in vol. 2, pp. 748, 749. It is a clause, moreover, which has been before the courts on at least one previous occasion. We have been referred to *Re Hinckes* (1), where the Court of Appeal, on appeal from ASTBURY, J., had to consider a settlement containing a clause which in all material respects is *verbatim* the same as the clause in the will of this testatrix. The question before ASTBURY, J., and the Court of Appeal in that case E was not whether this clause was valid or not. None of the very eminent counsel concerned in the case ever thought of suggesting that it was invalid. The matter which had to be decided was whether an ingenious document executed by a person who would otherwise have been entitled to the actual possession or receipt of the rents and profits of the relevant property had had the effect of giving this individual the best of two worlds by entitling him through the medium of a G trust to an annual sum substantially exhausting the income of the property in question, but which by its terms gave possession to the trustees and to the trustees alone. The Court of Appeal came to the conclusion, affirming ASTBURY, J., that the person concerned had not become entitled to the actual possession or receipt of the rents and profits of the property within the meaning of the shifting clause, and, therefore, that the shifting clause did not operate. There H was, as I have said, no express decision one way or the other as to the validity of the clause because that matter was not raised, but it does seem to me to be of the greatest significance that some conveyancer or conveyancers of the greatest ingenuity should have evolved this elaborate trust scheme to get rid of the effect of the shifting clause, that there should have been an elaborate argument before the judge of first instance and the Court of Appeal on the effect of this ingenious device, and that its effect should have been determined by ASTBURY, J., and the Court of Appeal without anyone ever suggesting that there

was any other way out of the operation of the shifting clause than the device which had been adopted. It was very much in the interest of the individual concerned to argue, if there was any reasonable prospect of success, that the clause was actually invalid so that it did not matter a straw whether his ingenious trust document was effective or not, but nobody thought of raising that point.

In those circumstances, in my judgment, it would not now be right for this court to hold that a time-honoured clause, which has the authority of conveyancing text-books of the first rank and has had such authority for a matter of more than eighty years and has been dealt with in this court on the footing that it is a valid clause, is, in truth, invalid because its terms are so uncertain that the court will not regard them as a proper basis for a defeasance. This aspect of the case has been the subject of ingenious argument and we have been pressed with this or that hypothetical combination of circumstances, in which the veriest Solomon of a judge could not possibly tell whether the individual concerned had become entitled to the possession or receipt of the rents and profits of the Stoke Hall estate within the meaning of the will or not. In my judgment, it is unnecessary for the purposes of this case to embark on any discussion of those hypothetical examples. If and when situations of the kind do actually arise it may become necessary for the court to determine in a particular case or cases whether the shifting clause has been brought into operation or not. For the present purpose, for my part I would dispose of this part of the case by saying that the validity of this clause is so well settled by practice that it would be wrong for this court, especially in view of the implied sanction which the clause received in *Re Hinckes* (1), now to hold that it is other than a perfectly valid shifting clause which has the effect it is expressed to have in those cases in which a beneficiary brings himself within its terms.

There remains the construction of the clause on the footing that it is a valid clause. The questions really are: (i) Has Sir Arthur Bromley become entitled to the possession or the receipt of the rents and profits of the Stoke Hall estate, and (ii) If so, does the clause on its true construction take away the interests of himself and his issue in the Dallam Tower estate? As regards the first question the answer is: Yes. Beyond a peradventure Sir Arthur has been entitled to actual possession or receipt, and has been, as I understand it, in actual possession or receipt, of the rents and profits of the Stoke Hall estate ever since 1906. That being so, does the clause on its true construction operate to defeat the interests of himself and his issue in the Dallam Tower estate? It seems to me, there can only be one answer. In my view, this clause says in the clearest possible terms, applying it to the events which have happened, that, inasmuch as Sir Arthur has become actually entitled to the possession or receipt of the rents and profits of the Stoke Hall estate, every estate in the will limited for life or in tail male or in tail to Sir Arthur, and, inasmuch as the interest is a life interest, to the first and other sons and the first and other daughters successively of Sir Arthur are absolutely determined, and the premises must go, to put it shortly, as if he had died and there had been a general failure of his issue. I find it impossible to extract any other meaning from this clause on any reasonable construction of it.

HARMAN, J., who was pressed with the possible difficulties and injustices to which this construction of the clause might give rise, felt himself able to hold the contrary on the ground that this construction of the clause made election impossible as between the Stoke Hall estate and the Dallam Tower estate, but, so far as I am able to discern, it is not a clause which gives rise to any question of election at all. The testatrix, for reasons which, no doubt, seemed sufficient to her, provided that a person becoming actually entitled to possession or receipt of the rents and profits of the Stoke Hall estate should thereby lose his interest in the Dallam Tower estate, and that the interests of his issue should in like manner be defeated. Possibly it might have been more reasonable for her to provide that there should be no defeasance unless and until the party concerned came into actual possession of both properties and that in such case the party

should be able to choose between the two, but the short answer to that is that the testatrix did not so provide. The only relevant event prescribed by the testatrix is actual entitlement to the possession or receipt of the rents and profits of the Stoke Hall estate. There is not a word to suggest that, in addition to that, the person against whom the defeasance is to operate must come into actual possession of his or her interest in the Dallam Tower estate.

A It was suggested to us that there were words on which such a further requirement could be imported into the conditions of the defeasance. First, it will be remembered that the clause begins with these words:

“ I hereby declare that if any son daughter or other issue of the said Henry Bromley within the scope of the limitations hereinbefore contained shall . . . become actually entitled to the possession ”

B of the Stoke Hall estate. It is suggested that the words “ any son daughter or other issue of the said Henry Bromley within the scope of the limitations hereinbefore contained ” mean “ if any child or other issue of the said Henry Bromley becomes entitled in possession under the limitations hereinbefore contained.” I find myself unable to place that construction on the words. C “ Within the scope of the limitations hereinbefore contained ”, in my judgment, means no more than “ being an object of the limitations hereinbefore contained ” or “ to whom the property is limited under the limitations hereinbefore contained.” It is a phrase which, it seems to me, clearly excludes the idea of actual possession as a determining factor. It refers to interest and not to possession at all. That seems to me to become even plainer when one reads the immediately adjacent words with their reference to actual entitlement in D possession. Where the testatrix means to refer to actual entitlement to possession she has no doubt as to the proper words to use. So, I should say the words relied on are not only incapable in themselves of bearing the meaning suggested, but, even if there was any doubt about their meaning taken alone, in their context it is abundantly plain that they have no reference to actual possession at all.

E Next it was pointed out that the defeasance is in the form that “ every estate hereinbefore limited . . . shall absolutely determine . . . ” It was argued with ingenuity that an interest cannot determine until it has begun, and that an interest cannot begin until it takes effect in possession, and from these premises the conclusion was adduced that the interests which were to determine under the shifting clause must be only and exclusively interests in possession. In my judgment, no such inference can be drawn from the use of the word F “ determine.” There is one very good reason. By definition from the terms of the clause itself the interests which are to determine are all the interests of the son or daughter and his or her issue. They all determine *uno flatu* and at once. Obviously of those interests only one could be an interest in possession in any event; all the others must *ex necessitate* be interests in remainder or reversion. Therefore, if the use of the word “ determine ” introduces any ambiguity of the kind suggested, the testatrix had made herself her own dictionary and showed G that in her view, at all events, an interest in expectancy can “ determine.” If corroboration of that view be needed, some slight support is to be found in the provisions of the Finance Act, 1894, which contains an exemption from death duties with respect to certain expectant interests. Section 5 (3) of that Act provides:

H “ In the case of settled property, where the interest of any person under the settlement fails or determines by reason of his death before it becomes an interest in possession, and subsequent limitations under the settlement continue to subsist, the property shall not be deemed to pass on his death.”

There is thus, at all events, statutory authority, if authority be needed, for the view that an interest can be accurately described as “ determining ” if it fails while it is yet reversionary in character.

Finally, reliance was placed on the provision saving jointures. It was said that, inasmuch as, by the terms of the settlement, a jointure, though it could be charged by a prospective life tenant, should not become a lien or charge until the life tenant should become entitled to possession, therefore the defeasance clause must be confined in its operation to persons attaining interests in possession in the Dallam Tower estate. That seems to me to be a *non sequitur*. The defeasance clause would operate in a proper case to defeat an interest in possession in the Dallam Tower property, and to meet such a case it would be quite appropriate to provide that the jointure should remain unaffected, but it by no means follows from that that the defeasance clause operates only and exclusively in cases in which the interest to be defeated is an interest in possession. I, therefore, reject that argument also.

We were referred to a number of authorities about the effect of divesting clauses made to depend on entitlement to property, and it was pointed out that the court will always construe such references to entitlement, where it is reasonably possible to do so, as meaning actual entitlement in possession. I will not refer to those cases, for the principle is well settled, but that principle does not advance the case here sought to be established. The event here admittedly and expressly made the occasion of the defeasance is becoming actually entitled to the possession or receipt of the rents and profits of the Stoke Hall estate. That is not in question, and it is not in question that in the present instance this event has happened, but there is nothing in the principle to constrain the court to read into the clause a further condition, which cannot be found in it on any reasonable construction, to the effect that the estate to be divested must itself also be an interest in possession.

For these reasons, in my judgment, this appeal should be allowed, and for the relevant declaration made by HARMAN, J., there should be substituted a declaration to the effect that in the events which have happened the shifting clause has operated with respect to all the interests of Sir Arthur and his issue in the Dallam Tower estate.

SIR RAYMOND EVERSHED, M.R.: I am of the same opinion. My brother has stated so cogently the reasons which have influenced him that I will, out of respect to the different opinion entertained by the learned judge and to the argument put before the court, state only briefly the points which most have impressed me.

As JENKINS, L.J., has observed, HARMAN, J., was influenced by thinking that there should be found here, or was found here, an election. He says:

"I cannot but think that this defeasance was not intended to take effect unless and until both estates were vested or were about to vest in possession, because it is only then that the person put to election can properly be called on to say: 'I shall have this one, or I shall have the other one.' It seems to me to be so unlikely that she intended to put the thing irrevocably beyond the reach of Sir Arthur and the whole of his issue by an event which happened something like fifty years before the chance of Dallam Tower vesting in possession occurs that I am inclined to adopt what is, perhaps, not a very easy construction of the words in order to effect what I think must have been the intention."

With all respect, I think the premise is not well founded. I do not think that any question of election arises. When I turn to the relevant clause it is, I think, apparent that, unless it can be found that Sir Arthur Bromley at the relevant date was not within the description of

"a son . . . or other issue of the said Henry Bromley within the scope of the limitations hereinbefore contained,"

the result contended for by the plaintiffs must have happened, for the clause provides that if such a person

“shall by any means whatsoever become actually entitled to the possession or the receipt of the rents and profits of the [Stoke Hall estate] then . . . and thereupon every estate ”

A shall determine. “Then and thereupon ” are words of emphasis, and they must refer to the event of becoming actually entitled to possession of the Stoke Hall estate. Sir Arthur Bromley admittedly did so become entitled. Therefore, the defeasance must have operated unless it could be said that at that date, in 1906, he was not a person “within the scope of the limitations ”, etc. I think, for reasons which have already been stated, that it is impossible to import into that formula “within the scope of the limitations ” qualifying words limiting its effect to persons taking an interest in possession under the limitations. The words mean precisely what they say. Sir Arthur Bromley was a person “within the scope of the limitations ” of Miss Wilson’s will, for he took an interest under those limitations dependent on the failure or defeasance of prior limitations.

C There only remain the words to which attention has been already directed—“determine ” and “go and remain ” and the reference to the jointuring power. It is said that they are more apt in relation to interests in possession than to vested interests not in possession. For the reasons already given, I do not agree. I should be guilty of mere repetition if I traversed again the ground which JENKINS, L.J., has already covered. The considerations mentioned would, in any event, to my mind, have to be extremely strong—not merely causing doubt, D but of compelling force—if their effect was to necessitate the construction of the phrase “within the scope of the limitations hereinbefore contained ” so as to be confined to persons taking interests in possession.

E That covers the matter which was argued in the court below, but I should add also a reference to the point already mentioned, to which our attention was directed by junior counsel for the plaintiffs, *viz.*, the point that where actual possession is required by the testatrix as a necessary test or qualification it is clearly so expressed, but in the relevant part of the clause there is a marked absence of the phrasing used in reference to Stoke Hall in respect to which actual possession was required. Perhaps if the word “entitled ” had appeared in the relevant part of the clause it might have been possible to say on the authority of such cases as *Monypenny v. Dering* (2) that “entitled ” in such a clause as F this ought to be construed as “entitled to possession.” But even that word (which appears in reference to the Stoke Hall estate) is not to be found in the relevant language referable to the Dallam Towers’ case.

G On the other point which was debated in this court, the question whether the clause is so uncertain in effect as to be wholly void, I also agree with what has fallen from JENKINS, L.J. It is, no doubt, true that a defeasance clause is construed with some strictness. The language of LORD CRANWORTH in *Clavering v. Ellison* (3) (7 H.L. Cas. 725), quoted in *Re Exmouth (Viscount)* (4) by FRY, J., is (23 Ch.D. 165):

“ I consider that, from the earliest times, one of the cardinal rules on the subject has been this: that where a vested estate is to be defeated by a condition on a contingency that is to happen afterwards, that condition must be such that the court can see from the beginning, precisely and distinctly, upon the happening of what event it was that the preceding vested estate was to determine ’.”

H But, as pointed out by RUSSELL, J., in the *Lanyon* case (5) this language must be closely analysed. There is a distinction between uncertainty in expression and uncertainty in operation. In the *Exmouth* case (4), though the meaning of the words used was clear enough, still it was uncertain whether or not

the event defined by the words had happened. Given in this case that it would be uncertain, though the words were clear, whether any person or more than one person might be indicated at any one time, then I think there might be a case for saying that the clause was uncertain in operation, and, therefore, ought not to be treated as valid. But I am far from satisfied that in this case there is any ground for supposing that the words are such that in operation they might be found applicable to more than one person at one and the same time. No doubt, this elaborate formula is not easy in some respects to construe, but to say that a document is difficult of construction is not the same thing as saying that it is so vague and obscure as to be unintelligible, and, therefore, unenforceable. It is a common event for these courts to have to construe provisions in wills and settlements, and it could not surely be said that a clause such as this failed in effect if it raised a point of construction such that it was thought desirable to take on it the opinion of the court. Nor would it be sensible to say that it failed if the court thought the point was a difficult rather than an easy point of construction. It is, no doubt, a matter which may some day have to be determined whether the phrase "if by any means whatsoever" has the effect of comprehending within the formula a person who took his title, not under any settlement or re-settlement of the estates as they now stand, but by ordinary purchase in the market. It may be a question which some court will be asked to decide whether the clause will operate if there is at some date the purchase of a wholly new and different landed estate in substitution for the old estate at Newark, or whether the clause will operate in the case that, there being no landed estate, the person entitled under the settlement or re-settlement is a person entitled to the income of capital moneys only. It would be wrong for the court now to express an opinion about these points, for if they do arise for determination the parties interested in the argument may be quite different from those who are now before the court. Suffice it for me to say that I am not satisfied that those points are of such obscurity that a court would be forced to say that the clause is so uncertain in expression as to be ineffective. I am strongly moved to that conclusion for the reasons which my brother has already mentioned, namely, the long and respectable ancestry which this particular clause has, deriving its origin from the early precedent of Mr. DAVIDSON. Not only that, but NEVILLE, J., when he considered this very case in 1911, expressed his opinion that he could find no ambiguity in this clause. True this particular point was not argued, but obviously the whole clause was studied. Equally, in *Re Hinckes* (1) this court expressed itself as clear in thinking that a provision substantially identical with this clause was not open to any attack on the ground of ambiguity. WARRINGTON, L.J., for example, said ([1921] 1 Ch. 487) that the particular phrase "if by any means whatsoever" presented no difficulty at all, though he did not in fact state his view of its effect. LORD STERNDALÉ, M.R., said that the clause was not only grammatically unambiguous, but also artistically admirable. In these circumstances, I think it would be wrong for this court now to hold that a clause of this character was wholly void or wholly ineffective because of uncertainty in expression or operation. For these reasons, I think that the appeal should be allowed.

I should add to what has fallen from my brother on the facts that in December, 1949, there was executed a release by Sir Maurice Bromley-Wilson of his life interest in a sum of £1,000 being capital of the Dallam Tower estate so that, *quoad* that particular sum, there is, of course, a present question, but the substance of the case is a present question only in the sense that the parties concerned, for reasons which have appeared to be good and sufficient to them, desire, and, I think, reasonably desire, to have their rights determined by the court. But, of course, the particular event which would give rise immediately to the operation of the clause has not yet happened and may not happen for many years. I say that because, as I have already indicated, my present inclination is that it would not be right to make in this case any representation

order which would have the effect of concluding the matter against parties who are either not now before the court or who are not yet born at all.

ASQUITH, L.J.: I cannot possibly add to the judgments delivered by my Lords with which I entirely agree.

A *Appeal allowed. Costs of all parties as between solicitor and client to be paid out of the £1,000 fund and subject thereto out of the capital moneys of the Dallam Tower estate.*

Solicitors: *Rider, Heaton, Meredith & Mills* (for the plaintiffs, and the first, third, fourth, fifth, sixth, ninth, tenth and eleventh defendants); *Radcliffes & Co.* (for the seventh and eighth defendants); *Seaton, Taylor & Co.*, agents for *Arnold Greenwood & Son, Kendal* (for the second defendant).

[Reported by F. GUTTMAN, ESQ., Barrister-at-Law.]

B

C

R. v. MORRIS.

[COURT OF CRIMINAL APPEAL (Lord Goddard, C.J., Morris and McNair, JJ.),

Med. R. v. PEARCE. [1952]].
1 E.R. 718.

—Sentence—Common law misdemeanour—Sentence of imprisonment for longer than two years.

D *Customs—Smuggling—Conspiracy—Sentence.*

E The appellant pleaded Guilty to a charge of conspiring with other persons fraudulently to evade the payment of Customs duties amounting to over £9,000 on 10,116 watches of foreign manufacture. HALLETT, J., considering that it was a case which merited a sentence of more than two years' imprisonment passed a sentence of four years' imprisonment and ordered the appellant to pay £200 costs. On an appeal on the ground that the court had no power to award more than two years' imprisonment,

HELD: for a common law misdemeanour the court could pass a sentence of imprisonment and fine at discretion, and on the facts the sentence was not too severe.

F *Observations* regarding sentences to be imposed for offences against the Customs Acts.

[AS TO THE PUNISHMENT FOR A COMMON LAW MISDEMEANOUR, see HALSBURY, Hailsham Edn., Vol. 9, p. 227, para. 319; and FOR CASES, see DIGEST, Vol. 14, p. 477, Nos. 5195, 5196.]

Cases referred to:

- G** (1) *R. v. Castro*, (1880), 5 Q.B.D. 490; 49 L.J.Q.B. 747; 43 L.T. 78; 44 J.P. 732; *affd.*, *sub nom.*, *Castro v. R.*, (1881), 6 App. Cas. 229; 50 L.J.Q.B. 497; 44 L.T. 350; 45 J.P. 452; 14 Digest 477, 5196.
- (2) *R. v. Roberts and Morriss*, (1926), 134 L.T. 635; *sub nom.*, *R. v. Roberts*, 90 J.P. 84; Digest Supp.

APPEAL against sentence.

H The appellant pleaded Guilty at Lewes Assizes to a count in an indictment charging him with conspiracy to evade Customs duties, and HALLETT, J., sentenced him to four years' imprisonment. The ground of appeal was that the learned judge had no power to pass a sentence of more than two years' imprisonment. The facts appear in the judgment of the court delivered by LORD GODDARD, C.J.

Briant for the appellant.

M. J. Morris for the Crown.

LORD GODDARD, C.J., delivered the following judgment of the court. The appellant was indicted at Lewes Assizes before HALLETT, J., on two counts, the first charging him with conspiring between May 1, 1949, and Dec. 19, 1949, with three other persons (who do not appeal) and other persons unknown fraudulently to evade Customs duties on the importation of 10,116 foreign manufactured watches. A second count charged him with being knowingly concerned on Dec. 19, 1949, "in a fraudulent attempt at evasion of duties of Customs payable on the importation of 10,116 foreign watches." It was in evidence that the duty and the purchase tax together amounted to something over £9,000. The appellant pleaded Guilty to the first count and Not Guilty to the second. The prosecution, believing that the court could deal satisfactorily with him on the first count, did not ask that the second charge should be tried and a formal verdict of Not Guilty was returned. HALLETT, J., regarding the appellant as the head and fount of the conspiracy, said that, in his opinion, a sentence of two years was not sufficient, and he sentenced him to four years' imprisonment and ordered him to pay £200 for costs. The case is one of considerable public importance and HALLETT, J., has done a public service in passing the sentence he did so that it could be considered by this court, because there has been a widespread opinion that no sentence of more than two years can be passed for a common law misdemeanour.

This appeal raises two questions. First, whether the sentence is a lawful sentence, and, secondly, if it is a lawful sentence, whether or not it is too severe in the circumstances. To deal with the first point, at common law there were comparatively few felonies—murder, rape, arson, burglary and larceny were all common law felonies and so was the offence of mayhem—nor were there a great number of common law misdemeanours, so the judges always claimed to have the right of defining certain acts as misdemeanours, although they never attempted to do so in the case of felonies. The punishment for felony was always death till the reign of George IV. For misdemeanour the punishment prescribed was always imprisonment or a fine, or both imprisonment and fine. An examination of the history of the matter makes it abundantly clear that the imprisonment and fine were always at the discretion of the court. Magna Carta contained a clause providing that penalties should not be excessive, and in the Bill of Rights, 1688, it was also provided that excessive fines should not be imposed nor cruel and unusual punishments inflicted. SIR JAMES FITZJAMES STEPHEN, the great writer on criminal law in the last century, considered that the provision in the Bill of Rights was introduced because of the floggings inflicted on Titus Oates, Bedloe, and those concerned in the Popish Plot, which were considered too severe, and also because a fine of £40,000 had been inflicted on John Hampden the younger for his part in the Rye House plot, but there is no doubt, and it was recognised in *R. v. Castro* (1), that it was lawful for the court to impose imprisonment and fine at its discretion. Until 1816 the further penalty of the pillory could be imposed for any misdemeanour, but in that year the pillory was abolished for all offences except perjury. Later on, it was abolished altogether.

Of late years the courts have been very reluctant to impose a more severe penalty than two years' imprisonment, but that has been because during the latter part of the nineteenth century, and before the recent reforms were effected, imprisonment was a very severe punishment. In the days when shot drill, crank drill and the treadmill were everyday accompaniments of imprisonment, especially imprisonment with hard labour, a sentence of two years' imprisonment was regarded as very severe, and for any sentence over two years the law provided a sentence of penal servitude. Penal servitude was served in convict establishments. The discipline was different, the work was different, and the Penal Servitude Act, 1891, s. 1 (2), provided that where a court was empowered to pass a sentence of penal servitude a sentence of imprisonment for a term not exceeding two years could be given instead of it. That is why

courts often passed sentences of imprisonment for offences for which sentences of penal servitude for fourteen years or for life could be given, but, though that practice existed, the law remained the same as it had been, namely, that misdemeanours could be punished by imprisonment at discretion. No statute has taken that power from the court. The only alteration which has been made in the history of penal punishment was in 1926, after, in *R. v. Roberts and Morriss* (2), where grave offences under the Criminal Law Amendment Act, 1885, were charged, one of the prisoners was sentenced by AVORY, J., to three years' imprisonment, two years on one count of the indictment and one year on another count, the two sentences to run consecutively. For the offences in question a sentence of penal servitude could not be given. Such an offence was only punishable by two years' imprisonment, but the learned judge thought it such a gross case that he imposed a sentence of three years' imprisonment. That led to the passing of the Penal Servitude Act, 1926, which provided that where a person was convicted of two or more offences in respect of which he was liable to be sentenced to terms of imprisonment amounting in the aggregate to a period of not less than three years, the court might, instead of sentencing him to imprisonment, sentence him to penal servitude for a term not exceeding the aggregate period for which he might have been sentenced to imprisonment. Long before 1948 prison discipline had become of a less rigorous character in regard to the tasks allotted to prisoners. The treadmill and shot drill had disappeared. Prisoners sentenced to hard labour were only required to sleep on a plank bed for the first fortnight of their sentence and in time that hardship disappeared altogether, with the result that the rigours of a sentence of imprisonment which had existed at the time when CHARLES READE wrote in the mid-Victorian days had disappeared. There became very little difference, if any, between a sentence of hard labour and one without hard labour, and when Parliament began to consider the Bill which is now the Criminal Justice Act, 1948, there was no substantial difference between the treatment meted out to prisoners sentenced to imprisonment and those sentenced to penal servitude. The Criminal Justice Act, 1948, s. 1 (1) and (2), has abolished penal servitude and hard labour, and substituted imprisonment for the various forms of imprisonment which had hitherto been imposed. Section 1 (3) did away with the old first division and second division and made the sentence of imprisonment the only sentence to be given in all cases.

It, therefore, follows that the reasons which led courts to confine their sentences to two years when imposing a sentence of imprisonment in the ordinary way have disappeared. Now no sentence except one of imprisonment can be passed, and it is still the law—and it is just as well that it should be laid down and understood—that for common law misdemeanours, that is to say, any offences for which a statute has not prescribed any particular period of imprisonment, the law is, and always has been, that the court can pass a sentence of imprisonment and impose a fine at its discretion, provided that it does not impose an inordinate sentence. In the present case, HALLETT, J., having called attention in passing sentence to what, as we hold, he rightly thought was the law, passed a sentence of four years' imprisonment. It is said that that is too severe a sentence. It has often occurred to me that for some of the offences we have had to deal with since the war—black market offences and conspiracy to steal rationed goods—two years' imprisonment is a wholly inadequate sentence. A prisoner who behaves himself in prison nowadays gets one-third of his sentence remitted, and if a sentence of two years' imprisonment were passed for a particularly insidious and dangerous conspiracy, the prisoner might only serve for sixteen months. The present appellant was engaged in what can only be described as wholesale smuggling, a serious offence.

The main point put forward on behalf of the appellant is that under the Acts which deal with this matter the maximum sentence was two years' imprisonment.

The charge of conspiracy relates to an offence under the Customs Consolidation Act, 1876, and that provides that if any person

"... shall be in any way knowingly concerned in any fraudulent evasion or attempt at evasion of any duties of Customs ... [he] shall for each such offence forfeit either treble the value of the goods, including the duty payable thereon, or £100, at the election of the Commissioners of Customs; and the offender may either be detained or proceeded against by summons."

That was not the only sanction which was imposed because by s. 53 of the Summary Jurisdiction Act, 1879, the provisions of the Summary Jurisdiction Acts were made applicable to offences under the Customs Acts, and, therefore, if the penalties were not paid there was provision for sentences to be passed. Those sentences, however, were not so long as the sentences which can be imposed under the Finance Act, 1935, s. 15, which provides:

"Where a person is convicted of an offence under s. 186 of the Customs Consolidation Act, 1876 (which relates to evasions of duties of customs and of the laws and restrictions of the Customs relating to the importation, unshipping, landing and delivery of goods) the court may, if it thinks fit, in lieu of ordering him to pay a penalty, order him to be imprisoned for a term not exceeding two years."

Until the financial policy of the country altered in the nineteen thirties and duties were re-imposed on many articles of commerce, smuggling was a rare offence, because it did not pay. Very few articles—for example, tobacco and spirits—were subject to duty: It is, perhaps, significant that Parliament imposed this more severe penalty in the Finance Act, 1935, which extended the range of articles subject to duty. The Finance Act, 1943, s. 12 (1), provided that the offender could be sentenced to imprisonment as well as ordered to pay a penalty.

Counsel for the appellant argued that it is not right to impose on a man, under the guise of a sentence for conspiracy, a longer sentence than could be imposed for the substantive offence he conspired to commit. At first sight that appears a very attractive argument. If, it is said, a man conspires to commit an offence for which the maximum sentence is limited by statute to two years, it is not right, if he is convicted of the common law offence of conspiracy to commit the offence, to pass a sentence of imprisonment at discretion. In many cases, especially if the evidence showed that the defendant had been concerned in only one offence it would obviously be wrong to impose, on his conviction of conspiracy, a longer sentence than he could have received if he had been merely convicted of the substantive offence. When, however, it is found, as in this case, that the defendant has been engaged in smuggling on a very extensive scale over a period of many months the same considerations do not apply. Although it is customary when a man charged with smuggling is found in possession of a dozen or twenty or fifty watches to make one charge against him, there can be no doubt that he is endeavouring to evade the duty on each watch, so that each item he smuggles could be made the subject of a charge. For the purpose of the penalties the duty on each watch can be taken and multiplied by three. HALLETT, J., came to the conclusion on the evidence before him that the appellant had been engaged for a period of eight months either in preparing to smuggle or in actually smuggling. In the opinion of the court, it was a case which deserved severe punishment. The sentence of four years' imprisonment was a lawful sentence, and, in the opinion of the court, it was well deserved and this appeal fails.

Appeal dismissed.

Solicitors: *J. E. Dell & Loader*, Brighton (for the appellant); *Solicitor for Customs & Excise* (for the Crown).

[Reported by H. McL. MORRISON, Esq., Barrister-at-Law.]

FINDLAY v. RAILWAY EXECUTIVE.

[COURT OF APPEAL (Somervell, Cohen and Denning, L.J.J.), October 24, 1950.]

Costs—Payment into court—Sum awarded less than sum paid into court—Right of defendants to costs after date of payment in—Discretion of court—R.S.C., Ord. 22, r. 6.

A In an action for damages, brought by the plaintiff in respect of personal injuries which she had suffered in a railway accident, the defendants admitted liability and paid money into court. At the trial the plaintiff recovered a less amount than had been paid in. The judge gave the plaintiff the costs, notwithstanding the payment into court of a sum in excess of the amount of damages awarded. He gave no reason for penalising the defendants in costs, considering that the matter was in his absolute discretion. On appeal,

B HELD: a defendant who has paid money into court which exceeds the sum awarded to the plaintiff is a "successful party" within the meaning of the principle laid down by VISCOUNT CAVE, L.C., in *Campbell (Donald) & Co. v. Pollak* ([1927] A.C. 809, 811), and is entitled to be paid his costs as from the date of payment in.

C [AS TO COSTS AFTER PAYMENT INTO COURT, see HALSBURY, Hailsham Edn., Vol. 26, p. 99, para. 187; and FOR CASES, see DIGEST, Practice, pp. 874-876, Nos. 4156-4163.]

Cases referred to:

- D (1) *Campbell (Donald) & Co. v. Pollak*, [1927] A.C. 732; 96 L.J.K.B. 1132; 137 L.T. 656; Digest, Practice, 788, 3503.
 (2) *Ritter v. Godfrey*, [1920] 2 K.B. 47; 89 L.J.K.B. 467; 122 L.T. 396; Digest, Practice, 854, 4002.
 (3) *Brown v. New Empress Saloons, Ltd.*, [1937] 2 All E.R. 133; 106 L.J.K.B. 331; 156 L.T. 427; Digest Supp.

E APPEAL by the defendants from an order of BYRNE, J., made on Apr. 27, 1950, awarding the plaintiff costs against the defendants. The defendants had admitted liability and had paid into court an amount in excess of the amount eventually awarded as damages. The facts are set out in the judgment of SOMERVELL, L.J.

Berryman, K.C., and *W. G. Wingate* for the defendants.

F *C. G. Cowan* for the plaintiffs.

SOMERVELL, L.J.: This is an appeal from an order of BYRNE, J., in an action for damages for personal injuries. The appeal concerns costs only, and is made by leave of the judge.

J The proceedings were brought in respect of injuries suffered by the plaintiff in a railway accident on Oct. 24, 1947. It is clear from the correspondence that from some time before Feb. 25, 1948, the defendants were admitting liability. The defence was delivered on Mar. 23, 1948, and is in these terms:

"The defendants admit that they were negligent, but do not admit that the plaintiff suffered personal injuries, damage, or pecuniary loss, as alleged or at all."

I I construe that pleading as indicating that the only issue left was the *quantum* of damages, based on the extent of the personal injuries which the plaintiff could prove if the matter went to trial. Later, the plaintiff was being examined by her medical advisers and also by those of the defendants. There was a report in March, 1949, and on June 22, 1949, the defendants paid £920 into court under the ordinary procedure. That money was not taken out of court, and the case came on for trial on Apr. 27, 1950. Special damage, apart from the fees which had already been paid, had been agreed at £117 5s. 1d., and the learned judge

awarded £750 general damages, making in all a sum of £867 5s. 1d. That was less than the amount paid into court, and counsel for the defendants asked for costs. Counsel for the plaintiff submitted that the matter was entirely one within the learned judge's discretion and he asked for costs. The learned judge gave the plaintiff the costs, *i.e.*, he made exactly the same order as if there had never been a payment in in excess of the sum awarded. It is against that order that this appeal is brought to this court.

The general rule as to costs is R.S.C., Ord. 65, r. 1, and the rules with regard to payment into court are to be found in Ord. 22. Though I do not think it affects the issue one way or the other, in 1948 the rules were altered, and there is no longer a provision for payment into court with a denial or admission of liability. Order 22, r. 1, provides:

"(1) In any action for a debt or damages or in an Admiralty action the defendant may at any time after appearance upon notice to the plaintiff pay into court a sum of money in satisfaction of the claim . . ."

By r. 6:

"Except in an action to which a defence of tender before action is pleaded or in which a plea under the Libel Acts, 1843 and 1845, has been filed, no statement of the fact that money has been paid into court under the preceding rules of this Order shall be inserted in the pleadings and no communication of that fact shall at the trial of any action be made to the judge or jury until all questions of liability and amount of debt or damages have been decided, but the judge shall, in exercising his discretion as to costs, take into account both the fact that money has been paid into court and the amount of such payment."

With regard to the issue as it arises under Ord. 65, r. 1, in an ordinary case between a successful plaintiff and an unsuccessful defendant, or the other way round, the matter was considered in *Campbell (Donald) & Co. v. Pollak* (1), and the main result of the opinions in that case was to cut down to some extent certain opinions expressed in this court attempting to codify the circumstances in which a successful litigant could be deprived of costs. On the other hand, VISCOUNT CAVE, L.C., with whom two others of their Lordships agreed, and LORD ATKINSON, quoted with approval a statement of the matter taken from the judgment of LORD STERNDALÉ, M.R., in *Ritter v. Godfrey* (2), the judgment of ATKIN, L.J., in which was criticised. The Lord Chancellor quotes the words of LORD STERNDALÉ, M.R., as follows ([1927] A.C. 809):

"This was a case tried without a jury before the judge alone, and therefore in the absence of an order by him neither party is entitled to any costs. It therefore differs from a case tried before a jury, where there is a statutory right to costs if there be no order to the contrary. But there is such a settled practice of the courts that in the absence of special circumstances a successful litigant should receive his costs, that it is necessary to show some ground for exercising a discretion by refusing an order which would give them to him. The discretion must be judicially exercised, and therefore there must be some grounds for its exercise, for a discretion exercised on no grounds cannot be judicial. If, however, there be any grounds, the question of whether they are sufficient is entirely for the judge at the trial and this court cannot interfere with his discretion. On the authorities as they now stand the line between cases tried before a jury and cases tried by a judge is very fine."

I am not certain whether the sentence "If . . . there be any grounds . . . this court cannot interfere . . ." is meant to apply to the circumstances where the judge gives leave to appeal, or is meant to apply to cases where no such leave is given. VISCOUNT CAVE, L.C., expressed his approval of that passage, but he put it in this way (*ibid.*, 811):

"A successful defendant in a non-jury case has no doubt, in the absence of special circumstances, a reasonable expectation of obtaining an order for the payment of his costs by the plaintiff; but he has no right to costs unless and until the court awards them to him, and the court has an absolute and unfettered discretion to award or not to award them. This discretion, like any other discretion, must of course be exercised judicially, and the judge ought not to exercise it against the successful party except for some reason connected with the case."

The first point to be decided here is whether a defendant who has paid money into court which has not been taken out and exceeds the sum awarded to the plaintiff is a successful litigant or a successful party within those two statements of the law. I hold that he is, and that the principles there laid down apply. The main purpose of the rules for payment into court is the hope that further litigation will be avoided, the plaintiff being encouraged to take out the sum paid in, if it be a reasonable sum, whereas, if he goes on and gets a smaller sum, he will be penalised wholly or to some extent in costs. Once, therefore, the money has been paid in, the *lis* between the parties simply is: Is that sum sufficient to cover the damage which has been suffered. *Prima facie*, therefore, the defendants in the present case are entitled to be paid their costs as from the date of payment in, but, of course, as in other cases, there may be circumstances connected with the case which entitled the judge to make some order other than that of giving the successful litigant his costs, and counsel for the plaintiff submitted that there were such circumstances in this case. [HIS LORDSHIP referred to the submissions of counsel and the facts on which they were based, said that there were no circumstances entitling the judge to deprive the successful defendants of their costs, and concluded:] If I am right in holding that the defendants in the circumstances of this case are the successful litigants or parties then, on what I have read from the opinion of VISCOUNT CAVE, L.C., in the House of Lords, the learned judge went wrong in principle, and his order cannot stand, and this appeal must be allowed.

COHEN, L.J.: I am of the same opinion. Counsel for the plaintiff urged that, on the authorities, we should not interfere with the learned judge's exercise of his discretion unless either there was no material on which he could have reached the conclusion he did, or it was plain on the evidence and from his judgment that he had gone wrong in principle in reaching that conclusion. I think that on both grounds we are bound to interfere.

In the present case money had been paid into court in an action in which, owing to an admission of liability, the only issue was *quantum*. The plaintiff did not accept the money so paid in and recovered less than the amount paid in. In these circumstances, counsel for the plaintiff suggests that there are three possible orders which the learned judge might make, (i) that the defendants should recover costs after the date of payment in; (ii) that no order as to costs after that date should be made; and (iii) that the plaintiff should recover the costs of the whole action. It is, I think, as my Lord has said, a proper inference from the terms of R.S.C., Ord. 22, r. 6, that the normal order in a case where liability is admitted, the only issue is *quantum*, and the plaintiff recovers less than the amount paid in, would be that the first of the three courses I have mentioned should be adopted and the defendants should recover the costs incurred after the date of payment in. *Brown v. New Empress Saloons, Ltd.* (3), shows that in a proper case there should be no order as to costs after the date of payment in, but counsel was unable to refer us to any case where the third course had been adopted. I do not find it necessary to decide whether it can ever be right to make the defendants pay the costs after the date of payment in, but I think it could only be where there was something in the conduct of the defendants which justified the plaintiff in proceeding to trial. No such conduct is suggested here—

indeed, as counsel for the defendants pointed out, the defendants appear to have behaved with complete propriety throughout.

In my opinion, therefore, there was no material to support the learned judge's judgment. I think he went wrong in principle. His attention, as my Lord has said, was not expressly directed to Ord. 22, r. 6. When the discussion as to costs began, after counsel had said: "I would invite your Lordship to say that this is in every sense a very proper case in which the defendants should have an order for costs as from the date of payment into court," BYRNE, J., said: "That is entirely within my discretion, is it not?" Counsel for the defendants endeavoured to suggest that there was, at any rate, a definite way in which the discretion should be exercised, but counsel for the plaintiff submitted that the matter was entirely within the learned judge's discretion. I think that the proper inference from the discussion is that the learned judge accepted the latter submission, forgetting that under Ord. 22, r. 6, he was expressly directed to take into account both the fact that money had been paid into court and the amount of such payment. For these reasons I agree with the order proposed.

DENNING, L.J.: The learned judge gave leave to appeal on the question of costs, which is generally a matter for his discretion. The effect of giving leave is that the judge invites re-consideration by this court of his decision, and this court enters on a review of it with less hesitation than it would otherwise do.

In the present case I can well understand that the judge wanted to award the plaintiff her costs. A judge nowadays does not know what amount has been paid into court, and it is particularly galling for a judge, whose mind may have been fluctuating between £750 and £1,000, to find that because he chose the lower figure, the plaintiff not only gets merely that lower figure, but also has to pay much of it away in costs to the defendant. Knowing how close a thing it was in his own mind, he does not want a plaintiff to suffer because the payment into court happens to exceed the amount he awards. He would prefer not to take the payment into account, but the rules require him to do it.

The hardship on the plaintiff in the instant case has to be weighed against the disadvantages which would ensue if plaintiffs generally who have been offered reasonable compensation were allowed to go to trial and run up costs with impunity. The public good is better secured by allowing plaintiffs to go on to trial at their own risk generally as to costs. That is the basis of the rules as to payment into court, and I think we should implement them here, even though it means that the plaintiff has to pay out much of her damages in costs to the defendants. The only issue in the case was the amount of damages. The defendants paid a reasonable sum into court. The plaintiff took her chance of getting more, and, having failed, she must pay the costs. It must not be assumed, however, that, in allowing the appeal, this court is laying down a rule of law as to how a judge should exercise his discretion. We have no right to do that. It only means that in the present case, where the judge invited re-consideration of his decision, we think that, having regard to the rules as to payment into court, the plaintiff should be ordered to pay the costs from the date of payment in. I agree that the appeal should be allowed.

Appeal allowed with costs.

Solicitors: *M. H. B. Gilmour* (for the defendants); *Rule & Cooke* (for the plaintiff).

[Reported by C. N. BEATTIE, ESQ., Barrister-at-Law.]

RISK (otherwise YERBURGH) v. RISK.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Barnard, J.), October 13, 27, 1950.]

Nullity—Polygamous marriage—Petitioner domiciled in England—Marriage in Egypt with Moslem domiciled in Egypt—Law Reform (Miscellaneous Provisions) Act, 1949 (c. 100), s. 1 (1), (2).

In 1938 the wife, an Englishwoman domiciled in England, went through a ceremony of marriage according to Moslem rites at Alexandria, Egypt, with the husband who was a Moslem by religion and domiciled in Egypt. According to the marriage contract, the husband was entitled to have more than one wife, but he had not, in fact, married a second time. The parties lived together in Egypt until June, 1946, when the wife left the husband and returned to England where she had since resided. It was established that the ceremony constituted a valid marriage according to the law of Egypt. On April 27, 1950, the wife petitioned for a decree of nullity on the ground that at the time of the ceremony, when she was domiciled in England, she was incapable of contracting a polygamous marriage, and, therefore, the marriage was void *ab initio*.

HELD: in spite of its extended jurisdiction under the Law Reform (Miscellaneous Provisions) Act, 1949, s. 1 (1) and (2), the court could not entertain a petition seeking relief from a polygamous marriage since a party to such a marriage was not entitled to an adjudication in accordance with the matrimonial law of England.

Observations of LORD PENZANCE in Hyde v. Hyde and Woodmansee (1866) (L.R. 1 P.D. 133, 137, 138), applied.

[AS TO GENERAL PRINCIPLES OF VALIDITY OF MARRIAGE IN ENGLISH LAW, see HALSBURY, Hailsham Edn., Vol. 6, pp. 283-290, paras. 340-344, and 1950 Supplement; and FOR CASES, see DIGEST, Vol. 11, pp. 413-420, Nos. 800-864, and 2nd Digest Supplement.]

Cases referred to:

- (1) *Hyde v. Hyde and Woodmansee*, (1866), L.R. 1 P.D. 130; 35 L.J.P. & M. 57; 14 L.T. 188; 11 Digest 413, 800.
- (2) *Srinivasan v. Srinivasan* (otherwise *Clayton v. Srinivasan*), [1945] 2 All E.R. 21; [1946] P. 67; 114 L.J.P. 49; 173 L.T. 102; 2nd Digest Supp.
- (3) *Baindail v. Baindail* (otherwise *Lawton v. Baindail*), [1946] 1 All E.R. 342; [1946] P. 122; 115 L.J.P. 65; 174 L.T. 320; 2nd Digest Supp.
- (4) *Lindo v. Belisario*, (1795), 1 Hag. Con. 216; 161 E.R. 531; *on appeal* (1796), 1 Hag. Con. App. 7; 27 Digest 36, 123.
- (5) *De Reneville v. De Reneville*, [1948] 1 All E.R. 56; [1948] P. 100; [1948] L.J.R. 1761; 2nd Digest Supp.

PETITION by the wife for a decree of nullity.

The wife went through a form or ceremony of marriage with the husband at Alexandria, Egypt, according to Moslem rites. The wife was then domiciled in England, and the husband, a Moslem by religion, was domiciled in Egypt. According to the marriage contract the husband was entitled to have two, three or four wives, but he had not, in fact, married a second wife. It was contended for the wife that the court had jurisdiction, by virtue of the Law Reform (Miscellaneous Provisions) Act, 1949, s. 1 (1) and (2), to grant the petition on the ground that the wife, being a domiciled Englishwoman at the time of the ceremony, was incapable of contracting a polygamous marriage which was, therefore, void. The suit was undefended. The facts appear fully in the judgment.

William Lathey, K.C., for the wife.

Cur. adv. vult.

Oct. 27. **BARNARD, J.**, read the following judgment. The wife, Marjorie Elizabeth Risk, otherwise Yerburch, is praying the court to declare null and

void a ceremony of marriage which was solemnised between herself and Abdul Hamid Mustafa Risk, the husband. The case was undefended.

On July 31, 1938, the wife, who was then twenty-one years of age, of the Christian faith and domiciled in England, went through a ceremony of marriage at Alexandria, Egypt, according to Moslem rites, with the husband who was a Moslem by religion and domiciled in Egypt. According to the marriage contract the husband was entitled to have two, three, or four wives at one and the same time, notwithstanding the opposition of the one with whom he is already united in marriage. The husband has not, in fact, married a second wife. After the ceremony the parties lived together in Egypt and there has been issue of this union one child, born on Dec. 23, 1940. In June, 1946, the wife left the husband because of his alleged ill treatment of her, and came to England with the child. In addition to the wife's evidence I heard that of Mr. Antonopoulos, an expert on Egyptian law, who satisfied me that the ceremony of marriage constituted a valid marriage according to the law of Egypt and that the certificate of marriage, now before this court, would be received in the Egyptian courts as *prima facie* evidence of such a marriage. He also satisfied me that a fundamental condition of the validity of the marriage, according to Egyptian law, apart from any question of form, would be governed by the national law of each of the parties thereto.

The case put forward on behalf of the wife is this—(i) that the court has jurisdiction by reason of s. 1 (1) and (2) of the Law Reform (Miscellaneous Provisions) Act, 1949, and, (ii) having jurisdiction, that the wife, being a domiciled Englishwoman, at the time of the ceremony, was incapable of contracting a polygamous marriage, and, therefore, the marriage was void *ab initio* and, inferentially, void by Egyptian law.

As to the first point, the Law Reform (Miscellaneous Provisions) Act, 1949, s. 1 (1) and (2), extends the jurisdiction of the High Court to proceedings by a wife for divorce or nullity of marriage notwithstanding that the husband is not domiciled in England, if (a) the wife is resident in England and has been ordinarily resident there for a period of three years immediately preceding the commencement of the proceedings, and (b) the husband is not domiciled in any other part of the United Kingdom or in the Channel Islands or the Isle of Man. In the present case the wife has been resident in England for more than three years prior to the presentation of her petition, which is dated Apr. 27, 1950, and the husband is and always has been domiciled in Egypt. The question I have to consider is in what sense the terms "husband" and "wife" are used in this section.

LORD PENZANCE, in the course of his judgment in *Hyde v. Hyde & Woodmansee* (1), says (L.R. 1 P. & D. 133):

"But I expressed at the hearing a strong doubt whether the union of man and woman as practised and adopted among the Mormons was really a marriage in the sense understood in this, the matrimonial court of England, and whether persons so united could be considered 'husband' and 'wife' in the sense in which these words must be interpreted in the Divorce Act. Further reflection has confirmed this doubt, and has satisfied me that this court cannot properly exercise any jurisdiction over such unions."

In *Srini Vasan (otherwise Clayton) v. Srini Vasan* (2) and *Baindail (otherwise Lawson) v. Baindail* (3), all that the court decided was that a man who was domiciled in a country which permitted polygamy and had contracted a valid polygamous marriage in that country had the status of a married man according to the law of his domicile, and was, therefore, incapable of contracting a subsequent valid marriage in England, and in the latter case LORD GREENE, M.R., referred ([1946] 1 All E.R. 345) to the above quoted passage from the judgment of LORD PENZANCE and stated that, at any rate, rightly or wrongly, the courts have refused to regard a polygamous marriage as one which entitles the parties to

come for matrimonial relief to the courts of this country. Marriage, as understood by English matrimonial law, according to SIR WILLIAM SCOTT in *Lindo v. Belisario* (4) (1 Hag. Con. 230), is a contract according to the law of nature, antecedent to civil institution, which may take place to all intents and purposes, wherever two persons of different sexes engage, by mutual consent, to live together, and, according to LORD PENZANCE in *Hyde v. Hyde & Woodmansee* (1) (L.R. 1 P.D. 133), marriage, as understood in Christendom, might be defined as the voluntary union for life of one man and one woman to the exclusion of all others. Both definitions of marriage stress its monogamous character, and the matrimonial law of England recognises no other such marriage.

It seems to me to be clear, therefore, that, in spite of the extension of the jurisdiction under the Law Reform (Miscellaneous Provisions) Act, 1949, a petitioner cannot come to this court either to enforce the rights to or seek relief from a polygamous marriage, and, in view of the decision of the Court of Appeal in *De Reneville v. De Reneville* (5), I think that such a marriage, which is voidable, is also excluded from the jurisdiction of this court. Is such a marriage, which is void *ab initio* equally excluded?

If English law regards such a polygamous marriage as the one now before me as no marriage, it might seem at first sight that there could be no objection to the court saying so, for the decree would be declaratory. This would mean, however, that a successful petitioner would have the right to apply for maintenance and for custody, and this would also mean that if the present petitioner were the second, third or fourth wife of the husband the court would still have to entertain her petition, for under Moslem law the first wife is no more the wife than the remaining three. In the case now before me, although the ceremony was in Arabic, which language the wife did not understand, I am satisfied that she realised that it was a ceremony of marriage according to Moslem rites and that those rites permit of other wives. The wife entered into this marriage contract with a full knowledge of its polygamous character, and now on that very ground she seeks to have it set aside. On this aspect of the matter the words of LORD PENZANCE in *Hyde v. Hyde & Woodmansee* (1) are very much to the point. He said (L.R. 1 P. & D. 137):

“Is the court, then, justified in thus departing from the compact made by the parties themselves? Offences necessarily pre-suppose duties. There are no conjugal duties, but those which are expressed or implied in the contract of marriage. And if the compact of a polygamous union does not carry with it those duties which it is the office of the marriage law in this country to assert and enforce, such unions are not within the reach of that law. So much for the reason of the thing.”

LORD PENZANCE concludes his judgment in *Hyde v. Hyde & Woodmansee* (1) with these words (*ibid.*, 138):

“All that is intended to be here decided is that as between each other they are not entitled to the remedies, the adjudication, or the relief of the matrimonial law of England.”

LORD GREENE, M.R., in *Baindail (otherwise Lawson) v. Baindail* (3) refers ([1946] 1 All E.R. 345) with approval to this passage. Although in *Hyde v. Hyde & Woodmansee* (1) LORD PENZANCE was dealing with a petition for dissolution,

I feel satisfied that he advisedly used the word “adjudication” and, therefore, this court has no jurisdiction to entertain this petition, and the petition must, accordingly, be dismissed.

Petition dismissed.

Solicitors: *Cooper, Bake, Fettes, Roche & Wade* (for the wife).

[Reported by R. HENDRY WHITE, Esq., Barrister-at-Law.]

FULLER AND ANOTHER v. INLAND REVENUE COMMISSIONERS.

[CHANCERY DIVISION (Danckwerts, J.), Oct. 26, 1950.]

Revenue—Stamp duty—Voluntary disposition—Deed of declaration of trust made under power in earlier deed to vary trusts—Whether chargeable with ad valorem stamp duty—Stamp Act, 1891 (c. 39), s. 62—Finance (1909-10) Act, 1910 (c. 8), s. 74 (1).

By s. 74 (1) of the Finance (1909-10) Act, 1910: "Any conveyance or transfer operating as a voluntary disposition *inter vivos* shall be chargeable" on "the value of the property conveyed or transferred" with the same stamp duty as a conveyance on sale. By s. 62 of the Stamp Act, 1891: "Every instrument . . . whereby any property on any occasion except a sale or mortgage, is transferred to or vested in any person, is to be charged with duty as a conveyance or transfer of property . . ."

By a deed of declaration of trust dated Dec. 18, 1933, certain property was held on protective trusts for the benefit of H. during his life, and after his death on trust for his children or remoter issue as appointed, and in default of appointment for his children equally on attaining twenty-one, or being female, on marriage. The deed contained power for H., with the consent of the trustees, who had an absolute discretion to give or withhold consent, to appoint such new or other trusts of and concerning the trust fund or any part thereof as he might think fit. In exercise of this power, H., with the consent of the trustees, by deed of declaration of trust dated Nov. 12, 1947, directed that the trustees should raise the sum of £25,000 for his own benefit, and, subject thereto, that the trust property should be held as to each of two moieties on trust for each of two of his daughters for life and after the death of each in trust for her respective children or remoter issue as she should appoint, and in default of and subject to any such appointment in trust for her children. The Crown claimed *ad valorem* stamp duty on the value of the property (other than the £25,000) dealt with by the declaration of trust of 1947.

HELD: the declaration of trust of 1947 was an instrument whereby property was transferred to or vested in persons within the meaning of s. 62 of the Stamp Act, 1891, and was chargeable as a voluntary disposition *inter vivos* under s. 74 (1) of the Finance (1909-10) Act, 1910.

[AS TO STAMP DUTIES ON INSTRUMENTS GENERALLY, see HALSBURY, Hailsham Edn., Vol. 28, pp. 439-449, paras. 948-957; and FOR CASES, see DIGEST, Vol. 39, pp. 255, 256, Nos. 389-397.]

Cases referred to:

- (1) *Re Dilke*, [1921] 1 Ch. 34; 90 L.J.Ch. 89; 124 L.T. 229; 37 Digest 416, 256.
- (2) *Re Phillips*, [1931] 1 Ch. 347; 100 L.J.Ch. 65; 144 L.T. 178; Digest Supp.
- (3) *Re Watts*, [1931] 2 Ch. 302; 100 L.J.Ch. 353; 145 L.T. 520; Digest Supp.
- (4) *Re Joicey*, (1932), 76 Sol. Jo. 459; Digest Supp.
- (5) *Stanforth v. Inland Revenue Comrs.*, [1930] A.C. 339; 99 L.J.K.B. 327; 142 L.T. 641; Digest Supp.

APPEAL from a decision of the Commissioners of Inland Revenue that a deed of declaration of trust dated Nov. 12, 1947, was chargeable with *ad valorem* stamp duty as a "conveyance or transfer operating as a voluntary disposition *inter vivos*" within the Finance (1909-10) Act, 1910, s. 74 (1). The facts appear in the judgment of DANCKWERTS, J.

Cyril King, K.C., and *E. B. Stamp* for the trustees.

Upjohn, K.C., and *J. H. Stamp* for the Crown.

DANCKWERTS, J.: This is an appeal against a decision of the Commissioners of Inland Revenue that a transaction dealing with property under

a power exercised by a deed dated Nov. 12, 1947, in pursuance of two declarations of trust dated Dec. 18, 1933, and Oct. 28, 1942, attracts *ad valorem* stamp duty, the document in question being a "conveyance or transfer operating as a voluntary disposition *inter vivos*" within the meaning of s. 74 (1) of the Finance (1909-10) Act, 1910. The declaration of trust of Dec. 18, 1933, was not a declaration of trust *inter partes*. It was a declaration of trust made by the present appellants as trustees of the trusts. The trusts declared, so far as is material, were that the trustees should hold the income of certain bonds and the sum of £53,150 "and the property for the time being representing the same (hereinafter called 'the trust fund') on protective trusts for the benefit of the Honourable Esmond Cecil Harmsworth the son of the settlor," during his life, and

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"after the death of the son the trustees shall stand possessed of the capital and future income of the trust fund in trust for all or such one or more exclusively of the others or other of the children or remoter issue of the son"

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who should be appointed, and, in default of appointment,

"in trust for all his children or any child who attain or attains the age of twenty-one years or, being female, marry or marries, and, if more than one, in equal shares."

Clause 13 of that deed contained a power in these terms:

D

"The son may at any time or times hereafter with the consent in writing of the trustees (which consent they shall have an absolute discretion to give or withhold without giving any reason therefor or incurring any responsibility in that behalf) by any deed or deeds revocable or irrevocable appoint such new or other trusts of and concerning the trust fund or any part thereof as he may think fit."

The second declaration of trust, dated Oct. 28, 1942, merely added the sum of £800 in respect of the same trusts as the original declaration of trust.

E

By a deed made between the son of the settlor, the present Lord Rothermere, of the one part, and the trustees, of the other part, Lord Rothermere exercised that power which had been conferred on him by the original declaration of trust in the following manner. He directed that the trustees should raise a sum of £25,000 which was to be entirely for his own benefit, and, subject to the raising of that sum, he directed that the property remaining subject to the trusts of the

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principal deeds was to be held on trust as to one moiety for one of his daughters for life and after her death, as regards the capital and future income, for such one or more existing children or remoter issue as she should by deed or will or codicil appoint, "and in default of and subject to any such appointment in trust for all or any of the children." The other moiety was directed to be held on trust for another daughter and for her life, and similarly on trust for her children or remoter issue after her death. That was a declaration of new trusts by virtue

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of the power contained in the declaration of trust of 1933.

At first sight a declaration of trust of that kind does not seem to bear any great resemblance to a conveyance or transfer, but I have to consider what the statute says. I find that in s. 74 (1) of the Finance (1909-10) Act, 1910:

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"(1) Any conveyance or transfer operating as a voluntary disposition *inter vivos* shall be chargeable with the like stamp duty as if it were a conveyance or transfer on sale, with the substitution in each case of the value of the property conveyed or transferred for the amount or value of the consideration for the sale . . ."

As I have said, a mere declaration of trust does not, at first sight, seem to fall within that, but by s. 96 of the Act of 1910 that Act has to be construed with the Stamp Act, 1891, s. 62 of which provides:

"Every instrument, and every decree or order of any court or of any commissioners, whereby any property on any occasion except a sale or mortgage, is transferred to or vested in any person, is to be charged with duty as a conveyance or transfer of property: Provided that a conveyance or transfer made for effectuating the appointment of a new trustee is not to be charged with any higher duty than ten shillings."

This is a disposition, and the question is whether, by some artificial meaning which I have to give to the words in the Act of 1910, this disposition falls within the words contained in s. 62 of the Stamp Act, 1891. Some of the argument before me has been concerned with the question whether this power which Lord Rothermere exercised was a general or a special or limited power of appointment. It is clear that, for some purposes at any rate, it is, undoubtedly, a general power. That is established, it seems to me, by *Re Dilke* (1), and *Re Phillips* (2), in each of which cases the appointor could only exercise his powers subject to the consent of the trustees. It is true that in *Re Watts* (3), BENNETT, J., distinguished those cases where the consent to be obtained was not that of trustees but of a person who either was a present or a past tenant for life of the property concerned, but in *Re Joicey* (4) EVE, J., applied the earlier cases without any discussion of *Re Watts* (3). It is clear, I think, that in the present case this is a general power for many purposes although Lord Rothermere had to obtain the consent of the trustees of the settlement, but whether that is really the decisive point in this case is not clear to me. It is evident that this was a disposition, and what I have to consider is whether the effect of the disposition was to transfer or to vest any property in any person. What Lord Rothermere did was, not to transfer the investments which were the subject of the declaration of trust, but to alter the interest in those investments by changing the trusts contained in the original declaration of trust to new trusts which were declared by the appointment in the deed. It seems to me to be a highly artificial result to regard that as something in the nature of a conveyance or transfer in the ordinary sense of language. It appears, however, that *Stanyforth v. Inland Revenue Comrs.* (5) is an authority which compels me to give the more artificial meaning to the nature of a disposition for the purposes of this statute. In that case there was an appointment under a joint power of revocation and new appointment contained in previous dispositions of the estates, and by the exercise of that power of appointment the interests of beneficiaries previously existing under the effective trusts or limitations were cut out and interests of other persons were accelerated. LORD WARRINGTON in that case said ([1930] A.C. 344) that he agreed with the Crown that the deed in question operated as a voluntary disposition *inter vivos*. It is true in that particular case that a further power of revocation was reserved and the interests of the persons who took under that exercise of power were reduced to a very small sum because of the possibility of those interests being defeated by a further exercise of the power, but it was plain that it was decided by the House of Lords—and was treated as being almost beyond argument—that the deed in question did operate as a voluntary disposition *inter vivos*. I am bound to follow that decision and to hold that in the present case there was a disposition operating as a voluntary disposition *inter vivos*, and, accordingly, that the claim to stamp duty on the amount of the property, other than the £25,000, which is treated by the Commissioners as not being the subject of duty, is well founded, and, therefore, the decision of the Commissioners must be upheld.

Appeal dismissed with costs.

Solicitors: *Radcliffes & Co.* (for the trustees); *Solicitor of Inland Revenue* (for the Crown).

[Reported by C. N. BEATTIE, Esq., Barrister-at-Law.]

MAXWELL v. MAXWELL AND ANOTHER.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Wallington, J.), October 11, 12, 1950.]

Variation of Settlement—Variation inimical to interests of children—Compensation of children—Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 191 (1), s. 192.

- A The parties were married in 1940, and children were born in 1942 and 1943. In 1949 the marriage was dissolved on the husband's petition on the ground of the wife's adultery. The husband applied under the Supreme Court of Judicature (Consolidation) Act, 1925, s. 192, to vary a post-nuptial settlement asking that (i) the wife's rights, powers and interests in the husband's fund be extinguished as if she had died at the date of the decree absolute; (ii) the word "unmarried" be substituted for "a widower" in relation to the husband's life interest in the wife's fund after the death of the wife, so that the condition for the continuance of the interest would be that the husband should remain unmarried and not that the wife should have died; (iii) the husband be permitted to exercise his powers of appointment over his own fund in favour of the spouse and issue of any subsequent marriage of his during the lifetime of the wife; (iv) the wife's powers of appointment over her fund in favour of the spouse and issue of any subsequent marriage of hers be restricted to a husband married after the death of the husband and to children or issue of such second marriage born after his death. The husband also asked that, in order to compensate the children of the marriage for any loss which they might suffer owing to the variations asked for, the wife should be ordered, under s. 191 (1) of the Act of 1925, to settle £15,000 (or such sum as the court thought fit) of her unsettled moneys for the benefit of the children.
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HELD: it was proper that the four variations should be made; variation (iii) was prejudicial to the interests of the children of the marriage and the children ought to be compensated; and the wife, who was the guilty party and had funds available, would be ordered to vest in trustees £5,000 or investments of like value to be held by them on trust to pay the income thereof to the wife during her life and after her death to hold the same as to both the capital and the income thereof on trust for the children absolutely.

- E [AS TO SETTLEMENT OF THE PROPERTY OF A WIFE IN FAULT, see HALSBURY, Halsham Edn., Vol. 10, p. 797, paras. 1265, 1266; and FOR CASES, see DIGEST, Vol. 27, pp. 514-517, Nos. 5541-5575.]
- F

APPLICATION for an order that a marriage settlement dated Mar. 17, 1941, and modified by a deed dated May 27, 1946, be varied.

- G The husband and the wife were married in 1940 and they executed a post-nuptial settlement dated Mar. 17, 1941. As modified by the deed of May 27, 1946, the settlement provided, by cl. 4 (a), that the husband's fund should be held on certain trusts for the benefit of the husband, the wife, and the issue of the marriage. By cl. 4 (b) the settlement provided:

- H "As to the wife's trust fund upon trust to hold the income thereof on protective trusts for the benefit of the wife during her life and after the death of the wife to hold the income on protective trusts for the benefit of the husband if surviving during the residue of his life but so long only as he is a widower or there are infant children of the marriage living."

Clause 4 (c) and (d) provided for the ultimate trusts of both the husband's fund and the wife's fund after the death or re-marriage of the survivor of the husband and the wife. Clause 5 provided that, notwithstanding and in derogation of the preceding trusts, it should be lawful for the survivor of the spouses by deed or will or codicil to make provision for a spouse and issue of any subsequent

marriage of such survivor to take effect out of a certain proportion of the husband's fund if the husband should be the survivor or out of a similar proportion of the wife's fund if the wife should be the survivor.

There were two children of the marriage, born in 1942 and 1943. In July, 1949, the husband obtained a decree *nisi* of divorce on the ground of the wife's adultery. The decree was made absolute in September, 1949.

The husband applied for an order that the settlement (as modified) be varied, asking that (i) all rights, powers and interests of the wife in the husband's fund might be extinguished absolutely as if she had died at the date of the decree absolute; (ii) the word "unmarried" might be substituted for the words "a widower" in cl. 4 (b); (iii) the husband might be permitted to exercise the powers under cl. 5 during the lifetime of the wife; and (iv) the wife's powers under cl. 5 might be restricted to a husband married by her after the husband's death and to such children or the issue of such children of such marriage as might be born after the wife's death. The husband also asked (by leave, the application being made out of time) that, in order to compensate the children for any loss suffered by them as a consequence of the variations sought, the wife be ordered to settle for their benefit £15,000 (or such other sum as the court should think fit) out of her unsettled property under the Supreme Court of Judicature (Consolidation) Act, 1925, s. 191 (1).

In his report, the registrar recommended that variations (i), (iii), and (iv) should be made, but he was not prepared to recommend that the wife be ordered to settle further property. The husband now applied to vary the registrar's report by directing that variation (ii) be made and ordering the wife to settle £15,000 or such other sum as the court should think fit for the benefit of the children of the marriage. In the course of the argument, counsel for the husband submitted that £5,000 was a reasonable sum to be settled by the wife.

J. E. S. Simon for the husband.

Victor Williams for the wife.

R. L. Bayne-Powell and *J. B. Gardner* for the children.

Owen Swingland for the trustees of the marriage settlement.

WALLINGTON, J.: The registrar has reported the facts which he thinks are relevant and has, in the usual way, submitted a number of recommendations on the basis of which he suggests the variation of the settlement could properly proceed. The first recommendation which he makes is that the wife's rights, powers and interests in the husband's fund be extinguished as if she were dead. That is not, and could not be, opposed by anybody. It is an ordinary and proper order to make by way of variation of the settlement, and, accordingly, I adopt that recommendation in the registrar's report. The next recommendation is that the husband be permitted, during the lifetime of the wife, to exercise his powers under cl. 5 of the marriage settlement (the clause relating to the appointment of part of the husband's fund in favour of what I may call an "after-taken" wife and the children of a marriage with that after-taken wife). About that, if it stood alone, I should have no difficulty, because I think it would be just and equitable that those powers should be varied in the manner indicated in the recommendation. Counsel for the husband has also invited the court to vary cl. 4 (b) of the settlement by substituting the word "unmarried" for "widower" in that sub-clause and to make a consequential variation in sub-cl. (c) to provide (i) for the effects of the substitution of the one word for the other in cl. 4 (b), and (ii) for the rectification of some mistake or omission in the provisions of the trust. Such mistake or omission is, however, irrelevant to the matters before me.

Counsel for the wife has challenged that application on several grounds. It is also objected to by counsel appearing for the children on the same and one or two additional grounds—mainly on the ground that the interests of the children would suffer, although counsel for the husband argues that the only effect of

the substitution would be to express what the parties must have intended when they made the settlement. It is not impossible, as I see it, that, if I made that variation in cl. 4 (b), it might prove to be inimical at some point of time and in some circumstances to the interests of the children. Counsel for the husband submits that a single matter of that sort ought not to be dealt with in isolation, but that the interests of the children should be one of the considerations taken in conjunction with all the considerations that affect a question of this kind.

A I think that that submission is a right one. My view is that the interests of the children must have a very high place, and in relation to some circumstances, perhaps, the highest place or priority, when the court comes to consider the application to vary in the several ways in which that application is framed.

I have indicated my view as to the second of the variations which the learned registrar has recommended. There is no doubt that the adoption of that recommendation will prejudice the interests of the children to the extent of any proportion of the trust fund that may be appointed by the husband under the power of appointment, as the proportion appointed will be taken out of the funds settled for their benefit. The settlement allows such an appointment after the death of one of the spouses, but the variation sought and recommended by the registrar would give the husband the right to appoint during the lifetime of

C the wife. It would only be by limiting in amount the proportion of the funds which could be so appointed that the interests of the children could to the extent of that limitation be preserved. The earlier the time at which the appointment could be made under cl. 5, the earlier would the children's interests be interfered with and the longer the period during which the income of the appointed portion of the funds would be removed from the children. That is a matter of considerable

D importance. Counsel for the wife presses me not to risk any further possible interference with the children's interests by substituting the word "unmarried" for the word "widower." It is agreed that the second recommendation in the report is bound up with this other application for variation, *i.e.*, the substitution of one word for the other in cl. 4 (b).

E The conclusion at which I have arrived on this part of the case is that I ought to make the variation by the substitution of one word for the other, that being a matter affecting only the rights of the two spouses directly. It seems to me that the possibility of injury to the interests of the children arising out of that variation is so remote that I ought not to pay any serious attention to it now. This variation will involve further amendments in that part of the settlement of one kind or another, and to eliminate the possibility that any part of the funds, either income or capital, may be left for a period undisposed of the settlement must be varied as may be required for those purposes. If the parties can agree under competent

F advice as to the necessary amendments or variations, well and good, but, if they cannot agree or if there is any uncertainty in the minds of either of them, the variations for this purpose must be settled by one of the conveyancing counsel of the court.

G I come now to consider the effect of the second of the recommendations, *i.e.*, the acceleration of the powers of appointment. Counsel for the husband has agreed that this variation calls for some protection of the children's interests and asks for an order that the respondent wife do settle securities up to £15,000 on herself for life and after her death for the children of this marriage on the trusts usual in such a case. That application is made under the Supreme Court of Judicature (Consolidation) Act, 1925, s. 191 (1). I entertain no doubt that in a proper case such a settlement may be ordered and that it may be considered and dealt with at the same time as an application to vary the settlement. If it is just and equitable that the husband's powers of appointment should be accelerated, such acceleration will be inimical to the interests of the children. In my opinion, therefore, the children's position must be safeguarded.

H Would it be right for me for the purpose of providing such a safeguard to direct a settlement such as counsel for the husband invites me to order? If it is

just and equitable and reasonable and proper that the husband's powers should be accelerated, and if, consequently, it is essential that something should be done for the protection of the children's interests, it cannot be right that the innocent petitioner should provide that protection. If it is to be provided it can only be provided out of the funds of the wife, if she has any. It has not been disputed that she has funds which can be made available for that purpose, and, in my opinion, part of them ought to be so used.

I adopt, therefore, and make an order in this case in accordance with, the recommendations of the learned registrar, *viz.* (i) that the wife's rights, powers and interests in the husband's fund be extinguished as if she were dead; (ii) that the husband be permitted to exercise his powers under cl. 5 of the settlement during the lifetime of the wife; (iii) that the wife's powers under cl. 5 of the settlement be restricted to a husband married after the death of the husband (the petitioner) and such children or issue as may be born after his death. I also, as I have said, order the variation of the settlement in cl. 4 (b) by substituting the word "unmarried" for the word "widower" with the consequential variations in cl. 4 (c), and, indeed, in any other portions of the settlement which may be affected and be capable of misunderstanding and fail in effect unless variations be made. On the application of the husband I order that the wife do vest in trustees the sum of £5,000 or investments to that value to be held by the trustees in trust to pay the income to the wife during her life, and after her death in trust both as to capital and income for the children of the marriage; and that a deed giving effect to this trust and to any consequential trusts as to the regulation of the income and the disposition and final disposition of the capital be settled by one of the conveyancing counsel of the court in the event of the parties failing to agree as to its terms.

Order accordingly. Costs of the trustees and the infant children and of the husband to be paid by the wife, in default to be paid out of the wife's fund.

Solicitors: *Charles Russell & Co.* (for the husband); *Thompson, Quarrell & Megaw* (for the wife); *Pothecary & Barratt* (for the children); *Farrer & Co.* (for the trustees).

[Reported by R. HENDRY WHITE, Esq., Barrister-at-Law.]

CURTIS v. MALONEY.

[COURT OF APPEAL (Somervell, Cohen and Denning, L.JJ.), October 12, 13, 27, 1950.]

Execution—Sale by sheriff of goods seized—Title of purchaser—Rights of true owner—Bankruptcy and Deeds of Arrangement Act, 1913 (c. 34), s. 15.

A sheriff, in execution of a writ of *fieri facias*, seized a motor cabin cruiser in the possession of the execution debtor, and sold it by public auction. The sale had been advertised and no claim was made to the vessel before the sale. It subsequently appeared that the cabin cruiser had, in fact, belonged to C., who claimed from the purchaser the return of the vessel or its value and damages for its detention.

Held: the proviso to s. 15 of the Bankruptcy and Deeds of Arrangement Act, 1913, could not be read so as to contradict and render meaningless the operative words of the section that the purchaser should acquire a good title, and, therefore, the purchaser was entitled to retain the vessel as against the former owner.

Decision of FINNEMORE, J. (ante, p. 201), affirmed.

[AS TO TITLE OF PURCHASER FROM SHERIFF, see HALSBURY, Hailsham Edn., Vol. 14, p. 69, para. 116; and FOR CASES, see DIGEST, Vol. 21, pp. 515-518, Nos. 915-939.

FOR THE BANKRUPTCY AND DEEDS OF ARRANGEMENT ACT, 1913, see HALSBURY'S STATUTES, Second Edn., Vol. 2, p. 306.]

Case referred to:

- A (1) *Jennings v. Kelly*, [1939] 4 All E.R. 464; [1940] A.C. 206; 109 L.J.P.C. 38; 162 L.T. 1; 2nd Digest Supp.

APPEAL by the plaintiff from an order of FINNEMORE, J., dated May 24, 1950, and reported *ante*, p. 201, dismissing the plaintiff's claim for the return of goods, sold by the sheriff by public auction and bought by the defendant.

- B In 1948 the plaintiff left a motor cabin cruiser in the care of boatwrights who subsequently got into financial difficulties with the result that a judgment was obtained against them. In execution of a writ of *fieri facias* against the boatwrights the sheriff of Essex seized the boat, and on Jan. 25, 1949, by the sheriff's order it was sold by auction, no claim having been made to the sheriff by any third party in respect thereof. On Feb. 25, 1949, the plaintiff claimed the return of the boat from the defendant, the purchaser, who relied on the
- C Bankruptcy and Deeds of Arrangement Act, 1913, s. 15. FINNEMORE, J., held that, on the true construction of s. 15 of the Act of 1913, the defendant obtained a title good against the whole world, and that the terms of the proviso to the section were to be construed as subject to the enacting part of the section, thus preserving to the plaintiff whatever rights he had by action other than against the sheriff and the purchaser. On appeal, it was contended for the plaintiff that,
- D since he had a title to the goods at the time of the sale, and since, apart from the section, he would have had a remedy against the defendant, and since the defendant was a person "other than such sheriff, high bailiff, or other officer as aforesaid," the proviso preserved his rights.

Glyn-Jones, K.C., and *Chedlow* for the plaintiff.

- E *P. H. R. Bristow* for the defendant.

Cur. adv. vult.

Oct. 27. The following judgments were read.

- F **SOMERVELL, L.J.:** The plaintiff claims in detainee for a motor cruiser known as Seahawk or its value £450. The defence with which we are concerned is under s. 15 of the Bankruptcy and Deeds of Arrangement Act, 1913, which reads as follows:

- G "Where any goods in the possession of an execution debtor at the time of seizure by a sheriff, high bailiff, or other officer charged with the enforcement of a writ, warrant, or other process of execution, are sold by such sheriff, high bailiff, or other officer, without any claim having been made to the same, the purchaser of the goods so sold shall acquire a good title to the goods so sold, and no person shall be entitled to recover against the sheriff, high bailiff, or other officer, or anyone lawfully acting under the authority of either of them, except as provided by the Bankruptcy Acts, 1883 and 1890, for any sale of such goods or for paying over the proceeds thereof, prior to the receipt of a claim to the said goods unless it is proved that the person from whom recovery is sought had notice, or might by making reasonable inquiry have ascertained that the goods were not the property of the execution debtor: Provided that nothing in this section contained shall affect the right of any claimant who may prove that at the time of sale he had a title to any goods so seized and sold to any remedy to which he may be entitled against any person other than such sheriff, high bailiff, or other officer as aforesaid."
- H

It was not disputed before us that at the time of the sale the Seahawk was the property of the plaintiff, and that it had been seized by the sheriff while in the possession of an execution debtor and sold by him to the defendant without any claim having been made. FINNEMORE, J., decided that the section afforded a good defence and the plaintiff appeals. The section must, of course, be construed as a whole.

Words in a proviso may affect not only the range but the meaning of words which precede the proviso: *Jennings v. Kelly* (1). It is submitted by counsel for the plaintiff that, as he had a title to the goods at the time of the sale, and as, apart from the section, he would have had a remedy against the defendant, and as the defendant is a person other than "such sheriff, high bailiff, or other officer as aforesaid," the proviso preserves his rights. He submitted that, if it had been intended to take away his right against the purchaser, the word "purchaser" would have appeared in the proviso after the word "such." There is clearly force in this argument. It leads to the question whether any meaning can be given to the words conferring a good title on the purchaser if he is liable to surrender the goods or their value to the person who is the owner at the time of the sale. Counsel suggested a case in which the true owner affirmed the sale by suing the judgment creditor for money had and received. In those circumstances it seems to me neither the purchaser nor a sub-purchaser from him would need the protection of the words in question. I do not think that any case was suggested which would leave the words with any content. Even, however, if such a case could be imagined, the effect of the section contended for, so far as a purchaser is concerned, is as follows: "the purchaser of the goods shall acquire a good title to the goods so sold except as against the owner at the time of the sale." This seems to me not to cut down, or give a restricted but possible meaning to the words "shall acquire a good title," but to contradict them. Although I am not sure that it affects the construction, the addition of the epithet "good," emphasises the impossibility, to my mind, of reconciling the construction put on the proviso with the words used earlier.

It was suggested at one time that the proviso might be construed as limited to remedies which the owner at the time of the sale might have (other than against the sheriff) in respect of acts done before the sale. It was, however, pointed out that such remedies are plainly not affected by the words preceding the proviso. It was also suggested, and there is, I think, some force in this, that the proviso might have been inserted to remove the possibility of argument that the right of the owner at the time of the sale to proceed against the execution creditor for money had and received had been affected by the provisions validating the sale. I do not think this suggestion gets over the difficulty of the absence of the word purchaser after "such." The only possible explanation of this that occurred to me, and I doubt if it helps, is based on the view that the words preceding the proviso "destroy" the right as against the purchaser but "affect" the right as against the sheriff, in that in certain circumstances that right will be effective, *e.g.*, if reasonable inquiry might have disclosed that the goods were not the debtor's. On this basis the word "affect" is inapt to cover the purchaser who has been fully protected by being given a good title. I do not think one gets assistance from any known presumption of what Parliament may or may not have intended. Protection of purchasers for value without notice as against the legal owner is a principle well known in both law and equity. There is, I think, no presumption either for or against its extension.

I have come to the conclusion that the learned judge was right for the reasons which he gives. I agree with him that a good title can only mean a good title against everybody. I agree with him that the proviso cannot be read so as to contradict and make these express words meaningless by excluding from them the true owner at the time of the sale. It may be, as he held, that it is not necessary so to read it. If it is necessary, I would hold that the word "purchaser"

must have been omitted by inadvertence after "such." For this reason I think the appeal should be dismissed.

A **COHEN, L.J.:** This case has been very well argued and I have felt considerable doubt as to the proper construction of the section. Counsel for the defendant contended that no effect would be given to the provision in the operative part of the section—that the purchaser of the goods sold should have a good title thereto—if we were to accept the argument for the plaintiff and hold that under the proviso the true owner could sue the purchaser in detinue. Counsel for the plaintiff contended that the proviso would be meaningless unless we were to accept his argument, since, on the construction of counsel for the defendant, the only right that it was suggested that the proviso would cover would be a right of action for money had and received against the execution creditor, a right which counsel said would have subsisted equally well if the proviso had been omitted. Each counsel sought to cast doubt on the other's argument. Counsel for the plaintiff suggested that the operative part might assist the purchaser against a sub-purchaser alleging breach of warranty of title if the true owner had elected to affirm the sale and had sued the execution creditor for the proceeds of sale as money had and received. Counsel for the defendant suggested that doubt might have arisen from the operative part as to the right of the true owner to sue the execution creditor and that the proviso was inserted for removal of doubts.

D I cannot think that the draftsman was contemplating the event postulated by counsel for the plaintiff. The suggestion of counsel for the defendant is more probable, but ultimately we must abandon guesswork and return to the language of the statute and apply thereto the accepted rules of construction. Counsel for the plaintiff called our attention to *Jennings v. Kelly* (1) where the House of Lords considered the principles applicable to the construction of a section which contained a proviso. Counsel relied in particular on a passage from the speech of LORD RUSSELL OF KILLOWEN where he said ([1939] 4 All E.R. 471):

E "I do not agree with the contention of the appellants, which appears in the second reason in their case: '... it is not a right method of construction to use a proviso to control or alter the operative effect of the words preceding it.' That is frequently the very function of a proviso—namely, to include within the scope of the preceding words something which *prima facie* would not fall within it, or to exclude something which *prima facie* would so fall. Although a proviso may well be incapable of putting upon preceding words a construction which they cannot possibly bear, it may without doubt operate to explain which of two or more possible meanings is the right one to attribute to them."

G Applying those observations to the present case, counsel said the proviso was plainly intended to exclude from the operation of the preceding words something which would otherwise be affected thereby. That thing was the right of the true owner to sue in detinue anyone but the sheriff, high bailiff or other officer. If it had been the intention of the draftsman to extend the protection given to the true owner to the purchaser, it would have been easy to say so—so easy, indeed, that the omission must be taken to be intentional.

H Counsel for the defendant, on the other hand, relied on what was said by LORD WRIGHT (*ibid.*, 477):

"It is said that, where there is a proviso, the former part, which is described as the enacting part, must be construed without reference to the proviso. No doubt there may be cases in which the first part is so clear and unambiguous as not to admit in regard to the matters which are there clear any reference to any other part of the section. The proviso may simply be an exception out of what is clearly defined in the first part, or it may be some qualification not inconsistent with what is expressed in the first part. In the

present case, however, not only is the first part of the section deficient in express definition, but also the second part is complementary and necessary in order to ascertain the full intention of the legislature. The proper course is to apply the broad general rule of construction, which is that a section or enactment must be construed as a whole, each portion throwing light, if need be, on the rest. I do not think that there is any other rule, even in the case of a proviso in the strictest or narrowest sense, and still less where, as here, the introduction of the second part by the word 'provided' is, in a strict sense, inapt."

Here, says counsel, the proviso is not an exception of what is clearly defined in the operative part, but merely a qualification not inconsistent with the first part. The first part gives the purchaser a good title and the qualification removes any doubt as to the preservation of the true owner's right against the execution creditor, a qualification not inconsistent with the good title remaining in the purchaser.

On the whole, though not without doubt, I think the argument of counsel for the defendant should prevail. It seems to me impossible on the construction of counsel for the plaintiff to give any real meaning to the provision that the purchaser shall acquire a good title. On the other hand, it might have been arguable but for the proviso that, as the purchaser had acquired a good title, an action by someone else as true owner, being a person from or through whom the purchaser did not derive title, must fail. I do not think that argument would have succeeded, but it seems to me more likely that the proviso was inserted to remove any doubts as to the rights of the true owner to sue the execution creditor for money he had received, than that it was intended not merely to cut down the protection given to the purchaser but to render it illusory. In the result I think the conclusions of the learned judge were right and the appeal should be dismissed.

DENNING, L.J.: This is yet another instance of a contest between the common law rule that no man can give a better title than he has got and the statutory exceptions in favour of innocent purchasers. I do not think we ought to whittle down the protection which Parliament has given to innocent purchasers. In a commercial community it is very important that their title should be protected.

The words of this section are clear beyond peradventure—"the purchaser shall acquire a good title", and I think they should be given their full effect. The proviso is to be explained by the anxiety of the draftsman not to deprive the original owner of his remedy against the execution creditor, or against any wrongdoer who had converted the goods prior to the sale. If it were not for the proviso, the execution creditor might have argued that the original owner's claim for money had and received was not preserved because the action for money had and received is only sustainable by a true owner who is claiming the proceeds in lieu of the goods themselves, and that it failed when he ceased to be the true owner. Any such argument, good or bad, is defeated in advance by the proviso. In my opinion, the section gives a good title to the innocent purchaser, and this appeal should fail.

Appeal dismissed with costs.

Solicitors: *R. I. Lewis & Co.* (for the plaintiff); *White & Leonard*, agents for *H. M. Pinney*, Hornchurch (for the defendant).

[*Reported by C. N. BEATTIE, Esq., Barrister-at-Law.*]

BURNS v. JOSEPH TERRY & SONS, LTD.

[COURT OF APPEAL (Somervell, Cohen and Denning, L.J.J.), October 4, 9, 27, 1950.]

Factory—Fencing—“Securely fenced”—Test—Fencing giving security from reasonably expected dangers—Factories Act, 1937 (c. 67), s. 13 (1).

A By the Factories Act, 1937, s. 13 (1): “Every part of the transmission machinery shall be securely fenced unless it is in such a position or of such construction as to be as safe to every person employed or working on the premises as it would be if securely fenced.”

B A machine was guarded by a rail about four feet above the floor of a factory occupied by the defendants, but a pulley wheel, shaft and pinion were above this rail. A circular wire mesh guarded the pulley wheel, shaft and pinion, but only from a frontal approach, leaving the sides open, and there was a shelf about nine inches above the top of the pulley wheel. The plaintiff, a boy of seventeen employed by the defendants, placed a ladder against a rotating shaft which was at the top of the machine and above the shelf, and climbed up it to collect any material there might be on the shelf. The ladder began to slip sideways, and, in trying to clutch some means of support, the plaintiff received injury owing to his hand being crushed between the pulley wheel and the pinion. He claimed damages from his employers for breach of their statutory duty under s. 13 (1) to fence securely.

C HELD (DENNING, L.J., *dissentiente*): the test whether machinery was “securely fenced” within the meaning of s. 13 (1) was whether it was so fenced as to give security from such dangers as might be reasonably be expected. In the present case the machinery was securely fenced according to that test.

D *Dicta* of LORD DU PARCQ in *Carroll v. Andrew Barclay & Sons, Ltd.* ([1948] 2 All E.R. 391) and LORD NORMAND in *Lyon v. Don Brothers, Buist & Co., Ltd.* (1944 S.C. (J.) 5), *applied*.

E [AS TO FENCING OF MACHINERY, see HALSBURY, Hailsham Edn., Vol. 14, pp. 594, 595, paras. 1130, 1131; and FOR CASES, see DIGEST, Vol. 24, pp. 908-910, Nos. 65-76, Digest Supp., and 2nd Digest Supp.]

Cases referred to:

- F (1) *Walker v. Bletchley Flettons, Ltd.*, [1937] 1 All E.R. 170; Digest Supp.
 (2) *Vowles v. Armstrong-Siddeley Motors, Ltd.*, [1938] 4 All E.R. 796; Digest Supp.
 (3) *Carroll v. Andrew Barclay & Sons, Ltd.*, [1948] 2 All E.R. 386; [1948] A.C. 477; [1948] L.J.R. 1490; 2nd Digest Supp.
 (4) *Lyon v. Don Brothers, Buist & Co., Ltd.*, 1944 S.C. (J.) 1; 2nd Digest Supp.
 (5) *Sowter v. Steel Barrel Co., Ltd.*, (1935), 154 L.T. 85; 99 J.P. 379; Digest Supp.
 G (6) *Chasteney v. Nairn (Michael) & Co., Ltd.*, [1937] 1 All E.R. 376; Digest Supp.
 (7) *Findley v. Newman, Hender & Co., Ltd.*, [1937] 4 All E.R. 58; Digest Supp.
 (8) *Franklin v. Gramophone Co., Ltd.*, [1948] 1 All E.R. 353; [1948] 1 K.B. 542; [1948] L.J.R. 870; 2nd Digest Supp.
 H (9) *London & North Eastern Ry. Co. v. Berriman*, [1946] 1 All E.R. 255; [1946] A.C. 278; 115 L.J.K.B. 124; 174 L.T. 151; 38 B.W.C.C. 109; 2nd Digest Supp.
 (10) *Tuck & Sons v. Priestler*, (1887), 19 Q.B.D. 629; 56 L.J.Q.B. 553; 52 J.P. 213; 42 Digest 729, 1516.
 (11) *Chalmers v. Speedwell Wire Co.*, 1942 S.C. (J.) 42; 2nd Digest Supp.
 (12) *Nash v. High Duty Alloys, Ltd.*, [1947] 1 All E.R. 363; [1947] K.B. 377; 2nd Digest Supp.

- (13) *Smithwick v. National Coal Board*, [1950] W.N. 238.
- (14) *Davies v. Owen (Thomas) & Co., Ltd.*, [1919] 2 K.B. 39; 88 L.J.K.B. 887; 121 L.T. 156; 83 J.P. 193; 24 Digest 908, 68.
- (15) *Miller v. Boothman (William) & Sons, Ltd.*, [1944] 1 All E.R. 333; [1944] K.B. 337; 113 L.J.K.B. 206; 170 L.T. 187; 2nd Digest Supp.
- (16) *Lotinga v. North Eastern Marine Engineering Co. (1938), Ltd.*, [1941] 3 All E.R. 1; [1941] 2 K.B. 399; 111 L.J.K.B. 65; 106 J.P. 1; 2nd Digest Supp.

A

APPEAL by the plaintiff from a judgment of HILBERY, J., dated Apr. 17, 1950, dismissing the plaintiff's claim for damages for breach of statutory duty. The facts are set out in the judgment of SOMERVELL, L.J.

Hylton-Foster, K.C., and *Denis H. Robson* for the plaintiff.
Rawden-Smith for the defendants.

B

Cur. adv. vult.

Oct. 27. The following judgments were read.

SOMERVELL, L.J.: The plaintiff, who was seventeen years old at the time of the accident, claimed damages for breach by the defendants of statutory duty under the Factories Act, 1937. HILBERY, J., decided against the plaintiff, who put his case in various alternative ways in his statement of claim. He alleged, first, that his injury was due to a breach of s. 13 (1) of the Factories Act, 1937, which provides:

C

"Every part of the transmission machinery shall be securely fenced unless it is in such a position or of such construction as to be as safe to every person employed or working on the premises as it would be if securely fenced."

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On the basis that the machinery by which the plaintiff was injured was transmission machinery, HILBERY, J., held that it was securely fenced, and there was, therefore, no breach of the defendants' duty under the Act.

The facts can be summarised shortly. The machine in question was one for cleaning chocolate beans. The plaintiff's every day duties were to keep the floor round the machine clean and in the process collect any beans which had been spilled in the course of operating the machine, to wheel sacks of beans to a hole and shoot them into it, and to steady a ladder by standing on the foot when the charge hand required to go up the ladder. He was told to keep clear of the machine when it was in motion, and he understood this. On Friday afternoons when the machine was stopped he assisted in the cleaning, and, *inter alia*, went up a ladder and collected any beans that had spilt over on to a shelf. At the back end of the machine there was a cogged pulley wheel twenty-six inches in diameter. This wheel performed about eighteen revolutions a minute and engaged through a cogged pinion a horizontal shaft which was five feet, ten and a half inches, from the ground. The pinion was five and a half inches in diameter. The ledge to which I have referred was seven feet, eight inches, above the floor, so there was about nine inches between the top of the pulley wheel and the shelf. There was a rail about four feet high round the flooring below and immediately outside this apparatus. In front of the pulley wheel and shaft and the pinion was a circular wire mesh. This cleared the pinion, but by how much was not proved.

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The accident happened in this way. The plaintiff had had impressed on him the importance of sweeping up beans before they were damaged. He had noticed that some of the beans fell from the ledge I have mentioned. When no one was about the plaintiff took a ladder and leant it against a rotating shaft which was at the top of the machine above the shelf. With no one to steady the ladder the plaintiff climbed up it to collect any beans there might be on the shelf. The ladder, owing to its being supported by a rotating shaft, started to slip sideways. The plaintiff must have put out his hand to try and clutch on to something, got hold of the pulley wheel over and behind the mesh, and the moving wheel took his

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hand downwards till it came between the pulley wheel and the pinion. The machine with the mesh had been there without any accident for over twenty years, and no complaint had been made by factory inspectors who had seen it from time to time.

A In considering the question whether it was securely fenced, HILBERY, J., applied what I may describe as the test of reasonable foreseeability. Was the machinery securely fenced having regard to circumstances which could reasonably be foreseen? It was not disputed that that was the proper test in deciding whether machinery is dangerous under s. 14 of the Factories Act, 1937. The principle in relation to s. 14 is formulated in a sentence by DU PARCQ, J., in *Walker v. Bletchley Flettons, Ltd.* (1) ([1937] 1 All E.R. 175):

B “In considering whether machinery is dangerous you must not assume that everybody will always be careful . . . a part of machinery is dangerous if it is a possible cause of injury to anybody acting in a way in which a human being may be reasonably expected to act in circumstances which may be reasonably expected to occur.”

C The learned judge referred to a note in REDGRAVE'S FACTORIES, TRUCK AND SHOPS ACTS, 17th ed., p. 34, as in his opinion correct. The note is as follows:

D “The part is, it is submitted, securely fenced if the fencing, though it has not prevented the accident under consideration, was such fencing as removed the possibility of injury to anybody acting in a way a human being might be reasonably expected to act in circumstances that might reasonably be expected to occur.”

E The note is directed to the words “securely fenced” as they occur in s. 14, but it seems clear that they must have the same meaning in the two sections. Counsel for the appellant submitted that this was wrong. He submitted that machinery is not securely fenced unless it is so fenced as to prevent any accident, however improbable and unforeseeable the circumstances in which it happens, saving only a case where a man deliberately breaks the fencing. It must be as secure as any fencing can make it. If this is right, then the appeal must succeed as the fencing could have been carried on up to the ledge, or there could have been a circular return guard, as it was called, going from the edges of the circular mesh all round the pulley wheel.

F A number of authorities were referred to, and I will deal with them first. The facts in *Vowles v. Armstrong-Siddeley Motors, Ltd.* (2) are the nearest to the present case. It is a decision of this court. The case was tried with a jury, and judgment entered for the defendants. There was, as here, a fence, but also a part unfenced, and it was by putting his hand through the unfenced part that the plaintiff's injury had occurred. The jury found that the machinery was securely fenced. If this had stood alone I think the court would have accepted it on the basis that no one could have reasonably anticipated anyone putting a hand in through this unfenced area. The jury went on to find that the plaintiff had not materially contributed to the cause of the accident. The court regarded these two findings as inconsistent, and ordered a new trial on the basis that on the facts as proved they could not enter judgment for the plaintiff. If counsel for the plaintiff is right, it seems to me judgment must have been entered for the plaintiff, and there was no need for a new trial. The machinery, admittedly, was not as safe as fencing could make it.

H In *Carroll v. Andrew Barclay & Sons, Ltd.* (3) the question was whether the fencing must be such as to prevent broken machinery from flying out. The actual decision does not, therefore, assist, but in the course of his speech LORD DU PARCQ said of the words “securely fenced” ([1948] 2 All E.R. 391):

“ . . . I think that they may well mean ‘so fenced as to give security from such dangers as may be reasonably expected’.”

In *Lyon v. Don Brothers, Buist & Co., Ltd.* (4), the sheriff substitute had acquitted the employers on the ground that the machine was not dangerous. I think it is clear on the facts that the machine was not fenced at all, and if that is so the actual issue we have to decide was not necessary for the decision, but LORD NORMAND, in the course of his opinion, said this (1944 S.C. (J.) 5):

"If his work, for example, required him to stand more or less with his back towards the gear wheels and to use his hands in front of him, then of course it is true that the gear wheels were beyond his reach while he was doing his work, but under different conditions the gear wheels were well within his reach, and I think that the learned sheriff substitute has misdirected himself, for he appears to me to have applied the test whether the boy was protected by the fence while he was carrying on his work in an ordinary way. But in my opinion that is not the test which should be applied to determine what fencing is necessary under the Act. It can be appositely said that the standard to be observed is a fence which will prevent accidents from occurring in circumstances which may be reasonably anticipated, but the circumstances which may be reasonably anticipated include a great deal more than the staid, prudent, well-regulated conduct of men diligently attentive to their work, and the occupiers of factories are bound to reckon on the possibility of conduct very different from that. They are bound to take into account the possibility of negligent, ill-advised or indolent conduct on the part of their employees, and even of frivolous conduct, especially where young workers are employed. If the fencing is to secure operatives against injury which may reasonably be anticipated in that sense, then I am of opinion that there was a contravention of the section of the Act."

The two other learned lords agreed.

On the other side, counsel for the plaintiff relied on observations in three cases: *Sowter v. Steel Barrel Co., Ltd.* (5), *Chasteney v. Nairn (Michael) & Co., Ltd.* (6), and *Findley v. Newman, Hender & Co., Ltd.* (7). In all these there was, in fact, no fencing at all round the machinery, so that the point before us did not arise for decision. In the first case which was regarded, I think, as the leading case, it is plain that an accident of the kind that had happened had been foreseen, as, for a time, a guard which would have prevented the accident had been used. This is equally clear in the last case, where words were used by LORD HEWART, C.J. ([1937] 4 All E.R. 60) which seem to indicate the test contended for by counsel for the plaintiff. In that case the accident happened while two men were repairing a belt while certain mill gearing was in motion. There was an express prohibition of this which showed that its possibility had been realised. Counsel for the plaintiff relied on the statement by LORD HEWART, C.J., in that case that the purpose of s. 10 of the Factory and Workshop Act, 1901, was to provide absolute safety so far as fencing could provide it.

I do not think there is any decision on the point binding on this court. I think the balance of *dicta* is slightly against the plaintiff. On the face of them the words used by LORD HEWART, C.J., are in his favour, but LORD HEWART, C.J., did not, I think, have in mind the issue whether the "absolute safety" was to be against foreseeable risks. LORD DU PARCQ and LORD NORMAND were clearly addressing their minds to the point in issue, and *Vowles v. Armstrong-Siddeley Motors, Ltd.* (2) is very nearly a direct authority against the argument. I will, however, consider the question of construction on principle. In the first place, I think that in this group of sections the same test should be applied in deciding whether machinery is "securely fenced" as is applied in deciding whether it is "dangerous." To an allegation that machinery which has, in fact, caused injury is dangerous it is admittedly a good answer to prove that it was not dangerous in any reasonably foreseeable circumstances. I see no difficulty in applying the same test to the question whether machinery is securely fenced, and would respectfully adopt the form in which the question is formulated on

this basis by LORD DU PARCQ and LORD NORMAND. I think also that this construction fits in with the later words of sub-s. (1) of s. 13 of the Factories Act, 1937. They contemplate that the position of the transmission machinery may be such that there is no necessity to fence at all. If, no accident having happened, one imagines a prosecution based on these words, I would have thought the prosecution would have to establish that in reasonably foreseeable circumstances the machinery was not as safe as it would be if securely fenced. If one has to consider unforeseeable circumstances the legislature should and would, in my opinion, have provided that all transmission machinery must be completely encased. It also fits in with the later words from another angle. The later words contemplate that the position may make any fencing unnecessary. That being so, the "position" might well be such as to make fencing, for example, on one side only necessary. The argument for the plaintiff, I think, negatives this possibility.

Further, if the construction placed on the words by HILBERY, J., is a reasonably possible construction, then, this being a statute imposing penalties, it should, in my opinion, be adopted. I think myself that it is the natural construction. Having regard to the view taken by LORD DU PARCQ and LORD NORMAND and that taken by the learned judge in this case, it seems to me impossible to suggest that it is not a reasonable construction. In *Franklin v. Gramophone Co., Ltd.* (8) ([1948] 1 All E.R. 359) I expressed my respectful agreement with what LORD SIMONDS had said in *London & North Eastern Ry. Co. v. Berriman* (9). LORD SIMONDS cited with approval ([1946] 1 All E.R. 270) the following passage from the judgment of LORD ESHER, M.R., in *Tuck & Sons v. Priester* (10) (19 Q.B.D. 638):

"We must be very careful in construing that section, because it imposes a penalty. If there is a reasonable interpretation which will avoid the penalty in any particular case we must adopt that construction. If there are two reasonable constructions we must give the more lenient one. That is the settled rule for the construction of penal sections."

LORD WRIGHT, who dissented, had suggested that that principle did not apply to Acts such as the Factory Acts and to the Act being considered in that case, which was the Railway Employment (Prevention of Accidents) Act, 1900. LORD SIMONDS regarded the principle as applicable to all provisions imposing penalties, including those where the object of the Act, as here, was the protection of the life and limb of certain workers. He said ([1946] 1 All E.R. 270):

"A man is not to be put in peril upon an ambiguity, however much or little the purpose of the Act appeals to the predilection of the court."

Therefore, I think HILBERY, J., applied the right test. Counsel for the plaintiff argued in the alternative that on this basis the judge came to the wrong conclusion. He submitted that HILBERY, J., concentrated on the plaintiff's conduct, and, holding, as he did, that that was not reasonably foreseeable, regarded that as concluding the issue. Counsel for the plaintiff submitted that that was not the right approach. The question was not whether what the plaintiff actually did was reasonably foreseeable, but whether the occupier should have reasonably foreseen the possibility of an accident. I agree with that. The question is whether a prosecution would have succeeded before the accident which leads to the claim has happened. On the other hand, if, an accident having happened, no one can suggest other circumstances which would have led to an accident, the issue may, in fact, narrow itself to the question whether the circumstances which led to the accident were reasonably foreseeable. I think that this criticism of the judgment fails. I do not think HILBERY, J., confined himself to considering the foreseeability of the plaintiff's conduct. He referred to the fact that the factory inspector had seen this fencing many times, and that there was evidence

of no previous accident over the twenty years or so of its life. He considered the possibility of someone putting a hand up underneath the mesh. He said:

"I personally cannot see, if you test the question by what was reasonably foreseeable, that it can be said that the lack of a return guard over it from the face guard rendered this insecure fencing."

It is only after this that he proceeds to consider whether the employers could have foreseen what the plaintiff actually did. A

Counsel for the plaintiff further submitted that in any event HILBERY, J., came to the wrong conclusion. On this basis the question is one of fact. The judge in a careful judgment seems to me to have considered all the relevant circumstances, and I agree with the conclusion to which he came for the reasons which he gave. I would, therefore, dismiss the appeal. B

COHEN, L.J.: I have had the opportunity of reading the judgment of SOMERVELL, L.J. I agree entirely with the conclusion to which he has come, and I do not desire to add any observations of mine in agreeing that the appeal should be dismissed. B

DENNING, L.J.: The rotating gear wheel was clearly transmission machinery which had to be "securely fenced." Fencing means the erection of a barricade to prevent any employee from making contact with the machine: see *per* LORD PORTER in *Carroll v. Andrew Barclay & Sons, Ltd.* (3) ([1948] 2 All E.R. 389), and a machine is "securely fenced" if the barricade is such as to prevent any employee from moving into contact with it: see LORD MORTON's opinion, *ibid.*, 394. Applying this test, the wire mesh was clearly insufficient, for it barricaded the wheel only from a frontal approach and not from the flanks which were left wide open, and any employee could put his hand or arm through them, accidentally or deliberately, and reach the wheel. C D

I wish I could end my judgment there, for it is really all that is necessary, but I must go on because it is said that, in considering whether a machine is "securely fenced," the court must consider whether the action of the employee in getting caught by it could be foreseen. I cannot see what that has to do with it. It seems to me that foreseeability only arises at the next stage if and when it is said by the occupier that the machine was "in such a position that it was as safe as it would be if securely fenced." The primary obligation on the occupier is to see that the machine is "securely fenced." Once the prosecution proves the absence of fencing, then, if the occupier relies on the exception "as safe as if securely fenced," the burden is on him to prove it, not on the prosecution to negative it: see *Chalmers v. Speedwell Wire Co.* (11), and *Carroll v. Andrew Barclay & Sons, Ltd.* (3). The test of the exception is foreseeability. If you can foresee the possibility of a man moving into contact with the machinery when unfenced, it is clearly not as safe as if securely fenced, but, if you cannot foresee anyone coming into contact with it, then it is as safe as if securely fenced. A good illustration is given by *Carroll v. Andrew Barclay & Sons, Ltd.* (3) where twenty feet of the belt was not fenced, but that twenty feet was in such a position that no one could anticipate that a man could move into contact with it, and no man did, so it was held to be as safe as it would be if securely fenced: see *per* LORD PORTER ([1948] 2 All E.R. 388). E F G

Once foreseeability is accepted as the test of the exception it cannot also be the test of the primary obligation. Section 13 of the Factories Act, 1937, enjoins the court to make a comparison between machinery which is unfenced and the same machinery as it would be if it was securely fenced. That comparison can only be made by first visualising an effective barricade in position, and then asking whether the machinery is as safe as if the barricade was there. To make the comparison by asking what could be foreseen leads nowhere, because foreseeability would be both the test of "securely fenced" and also the test of "as safe as if securely fenced," so that no comparison would be possible. H

The view which I have expressed is strongly supported by s. 15, which shows that, when considering whether machinery is "as safe" as if securely fenced, the persons who might move into contact with it must be considered—that is, foreseeability, but there is no such provision in seeing whether it is "securely fenced." The effect of s. 15, is, I think, this. If it can be foreseen that someone might unnecessarily examine an unfenced machine while in motion and thus come into contact with it, it is obviously not as safe as if securely fenced, but, if
A the only person that can be foreseen as coming into contact with it is an examiner over eighteen years of age making a necessary examination, then the machinery need not be fenced so long as the various conditions of s. 15 are complied with, but the employee must at his peril make sure that they are complied with. If
B a boy of seventeen, for instance, should do the examining, or if a workman should make an examination which it is unnecessary to carry out while the machinery is in motion, the employer is liable whether he could have foreseen his action or not, and the reason is because the machine is not "securely fenced" and the employer cannot avail himself of s. 15 to say it is "as safe" as if securely fenced: see s. 130 (3) of the Act and *Nash v. High Duty Alloys, Ltd.* (12). This shows that the question of "secure fencing" depends, not on foreseeability, but only on
C whether there is an effective barricade round the machine.

The cases on s. 14 do not present any difficulty to my mind. The question whether machinery is "dangerous" when unfenced is, of course, a question of degree and depends on the foreseeable contingencies. So, also, is the question whether it is "as safe" as if securely fenced. Those two questions normally stand or fall together, because once a machine is found to be dangerous it must
D be securely fenced, and the occupier can only avoid fencing by showing that it is "as safe" as if securely fenced, a thing he cannot do in the case of a dangerous machine unless he can avail himself of s. 15. It is apparent, therefore, that in cases under s. 14, unless s. 15 applies, the only inquiries are: (i) Is the machine dangerous, and, (ii) If so, is it securely fenced? The answer to the first question depends on foreseeability, and the courts apply the test laid down by
E *PARCQ, J.*, in *Walker v. Bletchley Flettons, Ltd.* (1), recently approved by this court in *Smithwick v. National Coal Board* (13).

The answer to the second question depends on the effectiveness of the barricade and on compliance with s. 16, and the courts apply the test laid down by
F *SALTER, J.*, in *Davies v. Owen (Thomas) & Co., Ltd.* (14), as approved by this court in *Miller v. Boothman (William) & Sons, Ltd.* (15): see also *TUCKER, J.*, in *Lotinga v. North Eastern Marine Engineering Co. (1938), Ltd.* (16).

The reference to s. 14 prompts the reflection that, if the test whether machinery is "securely fenced" were to depend on foreseeability of danger, then it would be the same as the test whether the machinery is "dangerous" or not, and there would be no distinction between ss. 12 and 13, on the one hand, and s. 14, on the other hand. Prime movers and transmission machinery would only have to
G be fenced if they were dangerous, whereas the statute makes it clear that they must be fenced whether they are dangerous or not: see *Carroll v. Andrew Barclay & Sons, Ltd.* (3), per *LORD PORTER* ([1948] 2 All E.R. 389). I recognise that the words of *LORD NORMAND* in *Lyon v. Don* (4), and of *LORD DU PARCQ* in *Carroll v. Andrew Barclay & Sons, Ltd.* (3) appear to be contrary to the view I am here expressing of the meaning of "securely fenced," but
H I do not think they were directing their minds to the point that arises here. My conclusion is, therefore, that foreseeability is not the test whether a machine is "securely fenced." The true test is whether there was an effective barricade to prevent any employee from making contact with the machine. Applying that test, I think that this machinery was not securely fenced. It was not suggested either at the trial or before us that it was in such a position, or of such a construction, that it was as safe as it would be if securely fenced. There was, therefore, in my opinion, a breach of s. 13 of the Factories Act, 1937.

The only remaining question is one of contributory negligence. This boy was only seventeen, and he was cleaning the machine in motion on a Friday morning whereas he ought to have waited till the Friday afternoon when it was stationary. That is just the sort of thing, carelessness of that kind by boys of that age, that the Factory Acts are especially intended to provide against: see s. 15 of the Act. In these circumstances I am not much disposed to allow the occupier to throw all his responsibility off on to this boy by the plea of contributory negligence. I should myself put much the greater responsibility on the occupier. The Law Reform (Contributory Negligence) Act, 1945, gives ample scope for a just and equitable award, and I should have made the occupier bear at least two-thirds of the damage. I know that this court does not normally interfere with the judge's assessment of responsibility, but I think we should do so here because he does not seem to have had sufficient regard to the fact that the accident was to a boy of only seventeen. I would, therefore, be in favour of allowing the appeal.

Appeal dismissed with costs.

Solicitors: *Gibson & Weldon*, agents for *John Whittle, Robinson & Bailey*, Manchester (for the plaintiff); *Haslewood, Hare & Co.*, agents for *Bromley & Walker*, Leeds (for the defendants).

[Reported by C. N. BEATTIE, Esq., Barrister-at-Law.]

Re PRATT. *Ex parte* INLAND REVENUE COMMISSIONERS v. PHILLIPS (TRUSTEE IN BANKRUPTCY).

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Asquith and Jenkins, L.JJ.),
October 20, 23, 1950.]

Bankruptcy—Preferential claim—Assessed tax—Excess profits tax in respect of a chargeable accounting period other than last completed period before bankruptcy—Bankruptcy Act, 1914 (c. 59), s. 33 (1) (a).

On Apr. 23, 1948, a receiving order was made against the debtor, and he was adjudicated bankrupt on May 3. On July 27, 1949, an assessment of £5,000 was made on him in respect of excess profits tax for the chargeable accounting period of twelve months ended Dec. 31, 1944, and on Sept. 7, 1949, the Crown claimed preferential payment of this sum under the Bankruptcy Act, 1914, s. 33 (1) (a). The trustee in bankruptcy rejected the claim.

HELD: on the true construction of s. 33 (1) (a) of the Act the Crown's right to priority in respect of assessed taxes was not limited to the tax assessed in respect of the last fiscal year before the bankruptcy, but extended to all taxes assessed in respect of the period up to Apr. 5 next before the date of the receiving order, subject to the qualification, imposed by the final phrase of s. 33 (1) (a), that the priority was limited to one year's assessment, and, therefore, the priority covered the assessment of £5,000 in respect of excess profits tax for the chargeable accounting period of twelve months ended Dec. 31, 1944, and the Crown was entitled to preferential payment of this sum.

Gowers v. Walker ([1930] 1 Ch. 262), and *Re Campbell* (1923) (10 Tax Cas. 585), applied.

Decision of the Divisional Court of the Chancery Division (ante, p. 540), reversed.

[AS TO PREFERRED DEBTS, see HALSBURY, Hailsham Edn., Vol. 2, pp. 289-291, para. 385; and FOR CASES, see DIGEST, Vol. 4, p. 474, Nos. 4277-4283.]

Cases referred to:

- (1) *New South Wales Taxation Comrs. v. Palmer*, [1907] A.C. 179; 76 L.J.P.C. 41; 96 L.T. 278; 30 Digest 183, 507.
- (2) *Gowers v. Walker*, [1930] 1 Ch. 262; 99 L.J.Ch. 138; 142 L.T. 404; 15 Tax Cas. 165; Digest Supp.
- (3) *A.-G. v. Jackson*, [1932] A.C. 365; *sub nom.*, *Re Cockell*, 101 L.J.Ch. 186; 146 L.T. 450; 16 Tax Cas. 681; subsequent proceedings, *sub nom.*, *Re Cockell*, [1932] W.N. 172; 16 Tax Cas. 681, 721; Digest Supp.
- (4) *A.-G. v. Irish Steel, Ltd.*, (1948), Irish Tax Cases, No. 67.
- (5) *Re Campbell*, (1923), 10 Tax Cas. 585; Digest Supp.
- (6) *Ex parte Fox, Re Smith*, (1886), 17 Q.B.D. 4; 55 L.J.Q.B. 288; 54 L.T. 307; 4 Digest 477, 4315.

B APPEAL by the Crown from an order of the Divisional Court of the Chancery Division (ROMER and HARMAN, JJ.), dated July 17, 1950, and reported *ante*, p. 540, dismissing an appeal by the Crown from an order of His Honour JUDGE TUDOR REES, made at Brentford County Court on Apr. 26, 1950, on a motion by the Crown asking for the reversal of a decision of the debtor's trustee in bankruptcy rejecting the Crown's claim to rank as a preferential creditor in respect of the sum of £5,000 excess profits tax for the chargeable accounting period of twelve months ended Dec. 31, 1944.

C A receiving order was made against the debtor on Apr. 23, 1948. On May 3, 1948, he was adjudicated bankrupt. On July 27, 1949, an assessment of £5,000 in respect of excess profits tax for the chargeable accounting period of twelve months ended Dec. 31, 1944, was made on him. On Aug. 13, 1949, it was issued. **D** On Sept. 7 the Crown claimed preferential payment under the Bankruptcy Act, 1914, s. 33 (1) (a), in respect of this sum and also in respect of income tax and sur-tax to which the debtor had been assessed for the year 1944/1945. The trustee in bankruptcy admitted the claim in respect of the income tax and sur-tax, but rejected the claim in respect of the excess profits tax on the ground that the Crown's preferential claim in respect of income tax, sur-tax and excess profits tax should be limited to precisely the same period in each case. The learned county court judge upheld the trustee's decision and dismissed the motion. **E** The Crown appealed, and, during the hearing of the appeal, it appeared to the Divisional Court sitting in bankruptcy that the real question in the case was whether the Crown was entitled to claim preference for an assessed tax in respect of a period other than the last completed period before the bankruptcy. After argument on this question, the Divisional Court held (i) that, on the true construction of s. 33 (1) (a) of the Act of 1914, the Crown's right to priority in respect of an assessed tax was confined to the year of assessment which immediately preceded the bankruptcy, and, therefore, the Crown was not entitled to preferential payment of the £5,000 in respect of excess profits tax for the chargeable accounting period ended Dec. 31, 1944; (ii) that the reference to Apr. 5 in s. 33 (1) (a) merely denoted the end of a period, *i.e.*, the fiscal year, and, therefore, in cases of excess profits tax there should be substituted for "Apr. 5" whatever might be the date which marked the end of the chargeable accounting period of any particular trade or business.

F *Sir Andrew Clark, K.C.*, and *J. H. Stamp* for the Crown.

Salmon, K.C., and *C. H. Duveen* for the trustee in bankruptcy.

H **SIR RAYMOND EVERSHERD, M.R.:** This appeal raises a question of the construction of the Bankruptcy Act, 1914, s. 33 (1) (a), which reads:

"(1) In the distribution of the property of a bankrupt there shall be paid in priority to all other debts (a) All parochial or other local rates due from the bankrupt at the date of the receiving order, and having become due and payable within twelve months next before that time, and all assessed taxes, land tax, property or income tax, assessed on the bankrupt up to Apr. 5

next before the date of the receiving order, and not exceeding in the whole one year's assessment."

The appeal relates to the second part of the paragraph. Put in the briefest form, the question is whether the words there used entitle the Crown to claim priority in regard to unpaid tax assessed, not in respect of the fiscal year immediately before the receiving order, but in respect of any earlier year. In a reserved judgment, ROMER, J., and HARMAN, J., came to the conclusion in favour of the trustee in bankruptcy that, on the true construction of that paragraph, the Crown's right was limited to the tax assessed in respect only of the last fiscal year before the bankruptcy, and held that the Crown could not claim priority in regard to tax assessed in respect of an earlier year, the assessment for the earlier year being, as may be regarded as natural in the circumstances, for a much larger sum. I have said that it was a reserved judgment, and I have considered whether it would not be proper that this court should also reserve its judgment, but, having reached a clear conclusion on what is after all a short point of construction of a few words in the statute, I feel that I can properly and without disrespect to the learned judges below deliver my judgment now, though, as will appear, I have reached a different conclusion from that which they entertained.

The facts of the case are fully set out in the report of the case before the Divisional Court (*ante*, p. 540), and I need not relate them all again. The bankrupt had a receiving order made against him on Apr. 23, 1948, and was subsequently adjudicated bankrupt. At the time of the receiving order there had been no assessments made in respect of various taxes for a number of years, but in July, 1949, assessments were made, not only in respect to income tax and sur-tax, but also for excess profits tax. It is well known that, for the purposes of income tax and sur-tax, the fiscal year in respect of which the subject is from time to time assessed goes from April to April, and there can be no doubt that the reference to "Apr. 5" in s. 33 (1) (a) of the Act of 1914 is connected with that fact. It is otherwise, however, in regard to excess profits tax, where the actual year for assessment will vary according to the business practice of the individual or firm concerned. In the present case, the bankrupt's trading year and accounting year, and, therefore, the fiscal year from the point of view of excess profits tax, was from Jan. 1 to Dec. 31. That fact has a bearing on the earlier history of this case to which I will allude in a moment, but, to complete what it is necessary to say on the facts, the assessments which I have mentioned included assessments to income tax and sur-tax for the two income tax years 1943/44 and 1944/45 and also the excess profits tax assessments for the two years ended Dec. 31, 1944, and Dec. 31, 1945. As regards sur-tax and income tax, the latter of the two years gave the greater figure for tax due. In this court, and in the court below, there has been no question about the propriety of the Crown's claim, under s. 33 (1) (a) of the Act of 1914, to priority in respect of the sums assessed for sur-tax and income tax for the latter of the two fiscal years, although, as will be observed, that year was not in fact the last income tax year before the receiving order. As regards excess profits tax, the figures worked out differently, for of the two years I have mentioned the tax due is far larger in the earlier of the two years. The assessment is for £5,000 for that year, whereas for the year ended Dec. 31, 1945, it is £222.

The question is whether the Crown can claim priority in respect of the £5,000 excess profits tax assessed for the year ended Dec. 31, 1944. When the matter first came before the county court, and also when it came before the Divisional Court, the question at issue was whether, having regard to the final words of s. 33 (1) (a) of the Act of 1914, a claim could be made in respect of that amount of excess profits tax, though the tax claimed was in respect of a different year from that in reference to which sur-tax and income tax were claimed. It was suggested that, if for income tax and sur-tax purposes the fiscal year ending

Apr. 5, 1945, was taken, then all that the Crown could claim in priority by way of excess profits tax would be a proportion for the same fiscal year of the excess profits tax for the calendar year ended Dec. 31, 1944. I will say at once that that argument has not been put to this court at all. In other words, it is conceded for the purposes of this appeal (though I am not to be taken as hinting that the concession is not properly made) that, where there are taxes differing in that they are assessed with regard to different fiscal years, the Crown is not bound to squeeze all the taxes, by apportionments where necessary, into a single fiscal year. When the matter came before the two learned judges in the Divisional Court, however, those judges drew attention to the language of s. 33 (1) (a) and suggested that, on the true view of it, the only right to priority conferred on the Crown in respect of any assessed taxes was in respect of the last appropriate fiscal year immediately before the receiving order, a point which had not in actual fact been taken either in the county court or before the Divisional Court. But, the point having been taken, the matter was debated, and, as already indicated, the learned judges maintained the view which they had earlier indicated and expressed it in their judgment.

The point being taken in that way and neither side having come prepared to argue it, there was no such investigation (as we have had) of the earlier history of this piece of legislation. That, I think, had a very important bearing on the result. For my part, I agree with the argument of counsel for the trustee in bankruptcy that, whichever be the right view of this paragraph, the language selected is not the happiest which could have been chosen. That may have to do with the history of the paragraph to which I shall have to make some reference later. I feel no doubt, however, having carefully read the judgments given in the court below, that, as a background to the solution of the problem, the learned judges were influenced by the consideration that, as a matter of policy, and reading the whole of s. 33 (1) and not merely para. (a) thereof, it appeared to them that the section was designed to give priority in respect only of claims which, in the nature of events, the claimants could not have got in by ordinary means before the debtor became overwhelmed. Pursuing that a stage further, counsel for the trustee pressed on us this consideration with no little cogency. He said that, if the Crown's right to select the most fruitful of the tax years preceding the receiving order is upheld, then it will remove from the general pool for distribution among the whole body of creditors an unfairly large share of the bankrupt's assets. ROMER, J., and HARMAN, J., approached the section in the light of considerations of that kind, and, noting, as is natural enough, the imperfections of language, felt themselves constrained, if they could, to arrive at a conclusion which was in keeping with the scheme which they envisaged and which they felt would do most justice to all the various creditors concerned.

The advantage, however, which this court has had is that an investigation of the earlier history of this legislation has made plain beyond doubt that, until the statutory and limited priority in respect of taxes was first introduced 101 years ago, the Crown, in right of the Royal prerogative, was entitled to priority in respect of all assessed taxes. Therefore, the statutory provisions now found in s. 33, having their remotest ancestry in the Bankrupt Law Consolidation Act, 1849, s. 166, operated as a limitation on the Crown's prerogative right, a limitation to be observed in the final words of s. 33 (1) (a) of the Act of 1914, "not exceeding in the whole one year's assessment." Counsel for the Crown was, therefore, fully justified in urging us to approach this problem of construction on the footing that, since the common law right was being cut down, it must not be treated as cut down more than was required by the language used. On that view I approach the matter from a somewhat different standpoint from that taken by the Divisional Court. I think that the problems of construction, which are certainly not free from difficulty, should be considered bearing in mind always that s. 33 (1) (a) has the effect, *quoad* the Crown, of limiting what would

otherwise be the much wider right that the Crown would have. So far as the pre-existing prerogative right is concerned, it is, I think, only necessary to refer to the judgment of the Privy Council delivered by LORD MACNAGHTEN in *New South Wales Taxation Comrs. v. Palmer* (1).

I would like to make one other general observation by way of preface. True it is that only during the last generation or so has the size of the income tax and the general burden of taxation become such as to make the particular problem in such a case as the present of great significance as between the Crown, on the one hand, and the rest of the creditors, on the other. Still, we have been told that it has always been the view of those responsible for the collection of these taxes that the priority given was not limited to what I may call the last fiscal year, but gave a right to the Crown to select the most favourable year available. Because that view has been taken and accepted for years and years, it does not, of course, follow that we must give to the paragraph a construction in conformity with it. There has, however, also been some expression of judicial opinion which is to the same effect. The point has never come for direct decision before the court until the present case, in the sense that it never seems, in any of the cases cited, to have been argued. There has, however, been a number of cases in which, had the point been thought of, it would inevitably have been argued.

The cases are summarised in the judgment of the court below, and I should be adding nothing to what is there said if I went through them all again, but I think I must mention three or four of them briefly. The one most alluded to is *Gowers v. Walker* (2), which came before EVE, J., in 1929. In that case no assessments to income tax had been made on the defendant company for a number of years before the appointment of a receiver under a power contained in an instrument of charge which the company had effected. After the receiver took possession, assessments were made covering the five previous years. The question which came before the learned judge was whether the Crown was entitled to priority under the Companies (Consolidation) Act, 1908, s. 209 (1) (a) [which is in substantially the same terms as s. 33 (1) (a) of the Bankruptcy Act, 1914], in respect of the second of those five years, which was four years before the appointment of the receiver. The argument against the Crown's right was of a different character from that now put forward. It was suggested that the words "assessed on the company up to Apr. 5 next before" the date of the appointment of the receiver meant that the date of the assessment must precede Apr. 5 next before the appointment of the receiver. Since, in that case, there had been no relevant assessment at all before the appointment of the receiver, it followed, if that argument were right, that no priority could be claimed for any of the assessments. The learned judge rejected that contention, holding that the words "up to" were not synonymous with "before" but were used in the sense in which those words are used in accountancy matters, so that the formula "assessed on the company up to Apr. 5 next before the date of the appointment of the receiver" meant "assessed in respect of the period up to Apr. 5 next before the appointment of the receiver." Having reached that conclusion, the learned judge answered in the affirmative the particular question raised, and, of course, in so doing, incidentally answered the present question, for the year selected was not the last of the five years before the appointment of the receiver or before that Apr. 5 which came immediately before the receiver's appointment. It is quite true that the point was not argued, but in his judgment the learned judge used this language ([1930] 1 Ch. 267):

"The priority is given in the case of rates only to so much as remains unpaid, on the date fixed by sub-s. 5, of rates which become due and payable within twelve months next before that date and in the case of income tax to not more than one year's assessment of the tax assessed on the company up to the end of the financial year next before that date."

That statement and that conclusion have been treated as determining this particular matter by, for example, BENNETT, J. (16 Tax Cas. 722), in *Re Cockell* (3), and by the Supreme Court in Eire in *A.-G. v. Irish Steel, Ltd.* (4). It is said that, in so far as that statement by EVE, J., has been treated as authoritative, it should now be reviewed. It was not based on argument and was made, as counsel for the trustee in bankruptcy says, *per incuriam*.

- A In *Re Campbell* (5), which came before ROMER, J., in 1923, an insolvent person, who died on Oct. 4, 1920, owed sums for super-tax in respect of each of the years 1916/1917 to 1919/1920 inclusive. The question before ROMER, J., related to a sum which the trustees of a settlement (under which the debtor had a life interest) had raised during the debtor's lifetime as an advancement for payment of his debts, including his arrears of super-tax. The amount raised had been, in part, applied, before his death, in payment of his other debts, but not in payment of the super-tax, and his administratrix claimed to be entitled to appropriate the unapplied balance to payment of the super-tax owing for the year 1919/1920. It is apparent from the facts and figures given that it was a material consideration, assuming that she had this right to appropriate, in respect of what particular unpaid tax it would be exercised, because the Crown would naturally wish to claim priority in respect of the most fruitful of the assessments remaining undischarged. Again, as in *Gowers v. Walker* (2), the point was there and was a material point to be argued if it had been thought of. The counsel appearing before ROMER, J., were counsel of experience, but there is no trace of this particular point having been debated. Nevertheless, ROMER, J., clearly expressed his view of the construction of s. 33 (1) (a) of the Act of 1914, because he said (10 Tax Cas. 588):

- E “Now it appears that under s. 33 of the Bankruptcy Act, 1914, where there is an insolvent estate being administered by the court the Commissioners of Inland Revenue are entitled to claim priority in respect of income tax, which would include super-tax, in respect of any one year ending on Apr. 5, before the death of the testator.”

- F At the end of the judgment, there was some debate about the form of order, and the learned judge, in the course of that debate, again alluded to the view which he had already expressed in regard to the construction of the section. It is fair again to observe that the point had not, so far as one can see, been raised before the learned judge. Still, the judicial opinion (*obiter* though it may be) to which I have referred, cannot be ignored, being in line with what we are told has been the regular practice for a great many years. At the least, I have ventured to suggest, this unanimity supports the view that intelligent men, applying themselves to the reading of s. 33 (1) (a) of the Act of 1914, have found the view for which counsel for the Crown now contend to be the understanding they have of the words used. Undoubtedly, however, ROMER, J., and HARMAN, J., in the Divisional Court in this case, were well entitled to regard the matter as free from authority binding on them.

- G I must make some further reference to the legislation because, as I have said, the present case is concerned with excess profits tax, whereas the cases to which I have been alluding referred to income tax. I have already pointed out that the reference to “Apr. 5 next” is particularly appropriate for income tax and sur-tax, but may not be appropriate at all to excess profits tax. The first enactment in regard to the payment of assessed taxes out of the estate of a bankrupt was in 1849 [the Bankrupt Law Consolidation Act, 1849, s. 166]. The language then was different. It was a much briefer section. So far as relevant, it provided that the court:

- H “... out of the estate and effects of the bankrupt, shall order payment of all duties of assessed taxes assessed on the bankrupt at the time of his

bankruptcy up to Apr. 5 next after the same shall have happened (such payment not exceeding in the whole one year's assessment) . . . ”

Whether with that form of words the same answer should be given to the question: What is the meaning of “up to Apr. 5,” as was given by *EVE, J.*, in *Gowers v. Walker* (2), to a similar question founded on the Companies (Consolidation) Act, 1908, s. 209 (1) (a), which is substantially similar to the language of s. 33 (1) (a) of the Bankruptcy Act, 1914, it is unnecessary for me to consider. It will, however, be noticed that the limitation “such payment not exceeding in the whole one year's assessment” appears in parenthesis in s. 166 of the Act of 1849, and, if I may say so, in a rather more natural context than in s. 33 (1) (a) of the Act of 1914. Section 166 of the Act of 1849 is stating that the court is to order prior payment of all duties of assessed taxes, such payment not, however, to exceed in the whole one year's assessment. It is unnecessary to take up further time considering the true meaning of that section, because, from 1869 onwards, the relevant legislation has taken substantially the form that it takes to-day. The Bankruptcy Act, 1869, s. 32 (1), as regards the meaning to be given to the words “up to,” might be regarded as differing from the existing legislation, but, at any rate from 1883, the paragraph has followed the same form—the Bankruptcy Act, 1883, s. 40 (1) (a), is almost identical with s. 33 (1) (a) of the present Act, and, so far as relevant, it may be treated as identical. Therefore, ever since 1883 the problem which is now before the court has, so to speak, appeared on the face of the statute. In the later Acts, as in the present Act, provision is also made for giving priority to various other items of indebtedness. Since some argument has been rested on this, I should observe that since 1883, in all the cases other than the tax cases, there appear words which do have the effect of limiting the right to priority to sums which have accrued due within a definite limited period immediately preceding the receiving order. In *Ex parte Fox, Re Smith* (6), to which counsel for the trustee referred, it was suggested that there was not such uniformity, and that, in the case of wages or salary to a clerk, the expression, “during four months before the date of the receiving order” [in s. 40 (1) (b) of the Act of 1883], did not necessarily mean next immediately before, but *CAVE, J.*, decided that it did. I should state, as regards that particular matter, that, until 1883 [e.g., in s. 32 (2) of the Act of 1869], the language was such that the four months' period might have been at any time previous to the receiving order, but a change was then made limiting it in the way in which it is now limited.

I must add one final reference to the statutes. The excess profits tax with which we are concerned was introduced at one remove, so to speak, into the bankruptcy provisions by the combined effect of the Finance Act, 1937, sched. V, Part III, para. 5, and the Finance (No. 2) Act, 1939, s. 21. The joint effect of those Acts is to give to excess profits tax the same priority, whatever that priority may be, as s. 33 (1) (a) of the Bankruptcy Act, 1914, gives to income tax. That way of introducing the priority has added complexity to the matter, because, as I have said, the date mentioned “Apr. 5 next before the date of the receiving order” would not, save in some cases by accident, be a relevant or proper or, indeed, a sensible date to mention in respect of excess profits tax.

The question, like all questions of construction, may be capable of great elaboration and analysis in argument, but in the end it comes down to the question: What do these few relevant words mean as a matter of English language? If I may read them again, the words are:

“ . . . and all assessed taxes, land tax, property or income tax, assessed on the bankrupt up to Apr. 5 next before the date of the receiving order, and not exceeding in the whole one year's assessment.”

Approaching the matter from the premise which I have indicated, the learned judges came to the conclusion that the proper and fair meaning of those words

was to limit the taxes to taxes assessed in respect of the financial year ended on Apr. 5 next before the date of the receiving order. In arriving at that conclusion, they were not dissenting from the conclusion at which EVE, J., had arrived in *Gowers v. Walker* (2), on the use of the words "up to", but they thought—I am putting it in the way it was put to us by counsel for the trustee—that, if one is asked the question: What are the assessed taxes of the bankrupt up to Apr. 5, 1948 (which is the relevant date here)?, one would, in answering, allude only to the taxes for the one fiscal year which ended on that date. I think that that way of putting it ignores the significance of the word "all." The phrase is "and all assessed taxes" assessed up to Apr. 5 next before the receiving order. I think if the question were asked, not: What is the income tax assessed up to Apr. 5, 1948?, but: What are *all* the taxes assessed up to Apr. 5, 1948?, it would not be natural, without at least asking for further explanation, to give by way of answer a reference only to the last fiscal year up to Apr. 5, 1948. Counsel for the trustee accepted below, and accepts in this court, the validity of the decision of EVE, J., in *Gowers v. Walker* (2), that "assessed up to Apr. 5," etc., is a reference to the accounting practice and means assessed in respect of the year or period ending Apr. 5 next before the date of the receiving order. Though a successful challenge of the decision of EVE, J., would in this case in fact dispose of the Crown's claim, yet it would be much more difficult for counsel for the trustee to sustain his present argument on construction if the words "up to Apr. 5," etc., were an allusion to the date of assessment. But we are proceeding (and I am casting no doubt on its soundness, having heard no argument on it) on the view that the words "up to Apr. 5" mean what EVE, J., said that they mean. And I am not persuaded that the conclusion which counsel for the trustee invites us to reach does sufficient justice, or, indeed, any justice, to the use of the word "all" in s. 33 (1) (a).

The next point which I think is significant is this. If it be true that the meaning of the words in s. 33 (1) (a) is to confine the priority to the income tax assessed in respect of the year ended Apr. 5 next before the date of the receiving order—I take that by way of example—*prima facie*, there would appear no need to add the words at the end of the paragraph, "and not exceeding in the whole one year's assessment." Counsel for the trustee avoids that difficulty, as the learned judges did, by saying: "Circumstances might arise in which the assessment in respect of that last period might be for more than one year, e.g., a trader might change his financial year so that, as a result, the assessment for excess profits tax following the change would be, not for a year, but, say, for a period of fifteen months." That, I agree, is a possibility. On the view contended for it seems to be the only case which can be thought of requiring (it is said) some limiting words so that the priority would be in respect of twelve months and not fifteen months. Assuming, however, that that is right, I think that the words "and not exceeding in the whole one year's assessment" are not then really appropriate, because, in the case supposed, assuming a fifteen months' period, one would have to make an apportionment giving priority, not to one year's assessment, but to four-fifths of a fifteen months' assessment. Going back to the history of this legislation in the context in which this particular limitation has constantly appeared, it seems to me that these words, "and not exceeding in the whole one year's assessment," are not properly consistent with the trustee's view, but form an extremely powerful indication that what the legislature is doing is to secure that (though what has gone before is expressed to give priority for all taxes) the priority is limited, nevertheless, to one year. That seems to me the natural sense to give to these words.

Then the learned judges thought that the copulative "and" was inappropriate on the view for which the Crown contends. I have observed that all the other debts given priority are, by their language, limited to specific periods immediately prior to the receiving order. Therefore, this particular item of taxes is, on this

view, distinct from the others. The learned judges thought that, if that were right, one would expect the word "but" to appear in the paragraph. I think, with all respect, that that argument cannot prevail and is sufficiently demonstrated as unsound if one inserts the word "but" and then attempts to read the paragraph, which is seen to be grammatically impossible.

This part of the argument is, no doubt, nicely balanced. I appreciate the argument of those on whose banner is the inscription: "*Noscitur a sociis.*" The banner on the other side may be said to bear the device: "*Expressio unius exclusio alterius.*" I find that the second banner provides in this context the more persuasive motto.

Finally, there arises the particular matter with which we are concerned namely, the application of this paragraph, not to income tax, but to excess profits tax, which, as in this case and in the vast majority of cases, is not assessed in respect of a period ending Apr. 5. If the view of the trustee is correct, one has not only to construe the material words of s. 33 (1) (a) as being equivalent to "assessed in respect of the fiscal year ended next before the date of the receiving order," but one has to assume that those words are, in fact, used. For it is the result of the argument and the conclusion below that, where as regards any tax the fiscal year ends, not on Apr. 5, but on some other date, one has to substitute that other date for Apr. 5. In other words, one has (as regards excess profits tax in the present case) to read it as "assessed on the bankrupt in respect of the year ended Dec. 31 next before the receiving order." That seems to me to be a difficult operation. If, however, the words are construed as I think they should be construed, namely, to give priority (subject to the prescribed limitation) to all taxes assessed in respect of the period prior to the relevant Apr. 5, then the priority will cover one year's assessment of excess profits tax provided that the assessment relates to a year ended prior to Apr. 5 next before the receiving order.

It would not generally be legitimate to place reliance on statutes passed in 1937 and 1939 as influencing the construction of statutes passed in 1883 and in 1914. We have been informed, however, that, even in early times, the taxes referred to in s. 33 (1) (a) cannot be treated as confined either to income tax or similar taxes related to the fiscal year ending Apr. 5 in any year. We were told that at relevant dates there were taxes, such as the window tax, for which the fiscal year was different from the fiscal year relating to income tax. I think, therefore, that the argument which emerges from excess profits tax could legitimately be used when applied to other taxes known or contemplated when the provision was first enacted.

For the reasons I have indicated, I think that the more natural construction is that for which the Crown has argued, and I regretfully, but clearly, come to a different conclusion from that at which the learned judges below arrived. I am much influenced to that end by the consideration about the earlier common law right which was a matter not considered by the learned judges below. If more general considerations are permissible, I also think that the suggestions which counsel for the Crown put forward are more persuasive on the whole than those which counsel for the trustee indicated and to which I have already alluded, namely, the presumption that fairness and justice would be done by giving a much more limited right to the Crown and by proceeding on the view that there should only be priority in respect of debts which, in the nature of the events, the creditor had been unable to collect. I think that there is great force in another view of it. Matters like wages, and such like, accrue regularly and probably at a regular rate. Taxes, as we know, are different. They are the subject of assessments which may be postponed by argument and other events for years and years, so that at any particular date it may be a wholly uncertain matter what will be the debts due when the taxes have been finally assessed. It is likely, indeed, that at the date of the receiving order there will be more than one year's taxes to be accounted for. It is common knowledge that, as a trader—and, as

counsel for the Crown observed, these bankruptcy provisions originally applied exclusively to traders—approaches his financial doom, he becomes less likely than ever to pay taxes, and, indeed, less likely than ever to get his taxes assessed. Finally, there is this consideration to be remembered. As a trader approaches insolvency, it is obvious that the profits in respect of which taxes would be assessed may be falling off, so that, if the last year were the one for which alone the Crown could claim priority, it would be likely to be getting a prior claim for the smallest of many years' taxes which we will assume as likely to be in arrear. No such considerations, however, apply, for instance, to wages and other matters which are dealt with in s. 33 (1) (b) and s. 33 (1) (c) of the Act of 1914. I do not wish to place any undue emphasis on this point, but at least it provides, as I think, a sensible argument supporting the view that there is a valid distinction between State taxes, on the one hand, and other matters for which priority is given, on the other hand. I think those considerations may be fairly balanced against the points which counsel for the trustee urged. However that may be, as a matter of construction, I have formed a different view from that formed by the court below, and I think that the Crown succeeds, and that this appeal should be, accordingly, allowed.

ASQUITH, L.J.: I agree. In nearly forty years preceding the decision now under appeal the construction of s. 33 (1) (a) put forward by the Revenue has not been challenged, and the soundness of that construction is assumed or is implicit in a number of decisions which are not directed to the precise point. Such considerations are, of course, not conclusive, but they are not without significance. Section 33 (1) (a) is one which, as **SIR RAYMOND EVERSHERD, M.R.**, has pointed out, so far from conferring additional powers on the Crown, curtails its prerogative. Hence there is no room in this case for the presumption that any ambiguity which the section may present should be resolved against the Crown. The phrase to be construed is:

“... all assessed taxes ... assessed on the bankrupt up to Apr. 5 next before the date of the receiving order ...”

That is in this case up to Apr. 5, 1948. If the bankrupt has been assessed to, and has failed to pay (for that is what “assessed” means at this point), the assessed taxes in respect of a whole series of years, all of them being years anterior to Apr. 5, 1948, the words I have read, if they stood alone, would, as it seems to me, be apt in their plain and grammatical meaning to cover the whole of the years in question, and, but for the words which follow, the Crown could make its preferential claim in respect of all of those years. There is, however, the final phrase in s. 33 (1) (a) to be considered. The effect of those final words is to limit the Crown's priority to taxes assessed in respect of any one of the series of years. On the construction contended for by counsel for the trustee, those final words, “and not exceeding in the whole one year's assessment,” seem to me to be functionless. Counsel for the trustee suggested one state of facts in which they would have some meaning or operation, but it appears to me that the answer of counsel for the Crown to that suggestion was convincing. On the other hand, on the construction contended for by counsel for the Crown, the meaning of these concluding words is clear and their presence makes a vital difference. For these reasons, and those given by **SIR RAYMOND EVERSHERD, M.R.**, I agree that the appeal should be allowed.

JENKINS, L.J.: I also agree that the appeal should be allowed. As a matter of language, I entirely agree that taxes assessed for a series of financial years ending, as all such years do, on Apr. 5, can properly be described as assessed up to the last day of the last of those years. Moreover, the material part of s. 33 (1) (a) deals with the indebtedness of the bankrupt in respect of assessed taxes. Assuming a bankrupt who had had tax assessed on him for each of the first four of

the five financial years preceding the date of the bankruptcy, and assuming that he had a final year's trading down to Apr. 5 next before that date in respect of which no liability to tax was attracted, the amount of the assessments for the four productive years being, shall we say, £1,000 a year, and none of them paid, and supposing the question was asked after the receiving order: "What is the indebtedness of the bankrupt in respect of taxes assessed on him up to Apr. 5 last?" I venture to think that the answer: "He owes nothing," would be an extremely surprising one, and yet it would be the true and correct answer on the argument of counsel for the trustee. That argument turns, and turns entirely, on the reference to "Apr. 5 next before the date of the receiving order" which s. 33 (1) (a) contains. Supposing the paragraph had read: "assessed on the bankrupt up to the date of the receiving order," it seems to me that there would not have been a vestige of support for this argument. For obvious reasons of convenience, which were pointed out by EVE, J., in *Gowers v. Walker* (2), Apr. 5 was selected as the date on which the line should be drawn because that is the end of the financial year. It is, no doubt, true that, by a process of association of ideas, Apr. 5 suggests the preceding Apr. 6, and all the painful associations connected with the period so measured, but, in my judgment, that association affords no real justification for holding that the phrase, "assessed on the bankrupt up to Apr. 5 next before the date of the receiving order," means "assessed on the bankrupt for the twelve months ended on that Apr. 5."

Therefore, on a question which, in the end, as SIR RAYMOND EVERSHED, M.R., has said, is a short question of construction, treating it purely as a matter of interpreting language, I come to the same conclusion as the other members of the court. I also think that on the whole the other considerations tending to support that conclusion outweigh those which the learned judges in the Divisional Court held to be decisive in the opposite sense. I think that it would be an unreasonable result if, where a bankrupt with a diminishing income incurred large tax liabilities, say, two or three years before the date of the receiving order, and incurred no such liability in the financial year immediately preceding that date, there was no priority for any of that tax because (although it was unpaid tax which had been duly assessed on the bankrupt) it all related to a year or years earlier than the last complete fiscal year preceding the date of the receiving order. I think that this result of the construction placed on s. 33 (1) (a) by the Divisional Court would really contradict the primary provision to the effect that all assessed taxes are to rank for priority subject to the qualifications later imposed. I also agree that, if there were any doubt as to the meaning of the words preceding them, the final words, "and not exceeding in the whole one year's assessment," are really decisive of the construction we are now adopting. Counsel for the trustee sought to show that in certain cases they might not, on his construction, be wholly otiose, but I think they really must be so, because his construction, as I understand it, involves nothing short of construing the reference to the assessment up to Apr. 5 next before the date of the receiving order as a reference to an assessment in respect of twelve months ending on that date, and that in itself must necessarily limit the claim to one year's assessment.

Finally, I agree that the way in which other cases of preferential debts are dealt with in s. 33 (1) reinforces the conclusion to which we have come. That seems to me to be particularly striking in para. (a) itself, in which two types of debt are dealt with. The first is parochial or local rates, the second is assessed taxes. The first branch of para. (a) provides that "all parochial or other local rates" are to have priority subject to two conditions. First, they must be due from the bankrupt at the date of the receiving order, and, secondly, they must have "become due and payable within twelve months next before that time." The second branch of para. (a) deals with "all assessed taxes, land tax, property or income tax," and in the like manner gives these claims priority subject to two conditions—(i) that they must have been assessed on the bankrupt up to

Apr. 5 next before the date of the receiving order, as opposed to being actually due at the date of the receiving order, which is the requirement in the case of parochial or other local rates, and (ii) that they must not exceed in the whole one year's assessment. The two conditions in the second branch of s. 33 (1) (a) are of an entirely different order and expressed in entirely different language from those in the first part. In particular, there is a conspicuous absence of any requirement to the effect that the tax must relate to some particular limited period preceding the date of the receiving order. For the reasons given by SIR RAYMOND EVERSHED, M.R., and ASQUITH, L.J., with the additional considerations which I have endeavoured to express, I agree that the appeal should be allowed.

Appeal allowed with costs here and in the court below, the trustee being empowered to recoup himself out of the estate.

Solicitors: *Solicitor of Inland Revenue* (for the Crown); *M. A. Jacobs & Sons* (for the trustee in bankruptcy).

[*Reported by F. GUTTMAN, Esq., Barrister-at-Law.*]

HARLOW v. MINISTER OF TRANSPORT AND ANOTHER.

[COURT OF APPEAL (Somervell and Denning, L.JJ., and Vaisey, J.), October 18, 19, 20, 1950.]

Town and Country Planning—Highway—Stopping up—Power of Minister of Transport—Town and Country Planning Act, 1947 (c. 51), s. 49 (1).

By the Regulation and Inclosure (Totternhoe) Provisional Orders Confirmation Act, 1886, the provisional order of regulation and provisional order of inclosure set forth in the schedule to the Act were confirmed. The schedule provided, *inter alia*, that, "so far as may be practicable, the ancient roads or tracks respectively known as 'the Drovers Way' and 'the Icknield Way' [shall] be preserved in their present condition." The schedule also provided that there should be reserved to the inhabitants of Totternhoe and the public generally at all times a right of walking over certain land (which land included a public right of way known as the "Wheelbarrow Green Highway"). The Act was an inclosure Act, and thereafter a valuer made an award to carry into effect the provisions of the Act.

Prior to 1947 a cement company applied for development permission for the obtaining of chalk from land in the vicinity of the Drovers Way and the Wheelbarrow Green Highway, and on the coming into force of the Town and Country Planning Act, 1947, the application fell to be treated, by virtue of s. 77 (1) of the Act, as an application for planning permission under Part III of the Act. Planning permission was granted, and, to enable the development to be carried out under that permission, the Minister of Transport made the Stopping Up of Highways (Bedfordshire) (No. 1) Order, 1949, under s. 49 (1) of the Act, for the stopping up and diversion of the said highways. H., as a person aggrieved, applied under s. 11 (2) of the Act to quash the order on the ground that it was *ultra vires* the Minister since it overrode the provisions of the Act of 1886.

HELD: the provisions in the schedule to the Act of 1886 did not so deal with the highways in question as to exclude the application thereto of general words in a later Act, but were merely directions to the valuer making his award under that Act, and, therefore, the Minister was authorised by s. 49 of the Act of 1947 to make the order.

Decision of BIRKETT, J. ([1950] 1 All E.R. 898), reversed.

[FOR THE TOWN AND COUNTRY PLANNING ACT, 1947, s. 49, see HALSBURY'S STATUTES, Vol. 40, pp. 793, 794.]

Case referred to:

- (1) *Seward v. Vera Cruz, The Vera Cruz*, (1884), 10 App. Cas. 59; 54 L.J.P. 9; 52 L.T. 474; 49 J.P. 324; 42 Digest 769, 1959.

APPEALS by the defendants, the Ministry of Transport and the Rugby Portland Cement Co., Ltd., from an order of BIRKETT, J., dated Mar. 8, 1950, and reported [1950] 1 All E.R. 898, quashing the Stopping Up of Highways (Bedfordshire) (No. 1) Order, 1949 (S.I. 1949, No. 2130), made under the Town and Country Planning Act, 1947, s. 49 (1).

BIRKETT, J., held that the Regulation and Inclosure (Totternhoe) Provisional Orders Confirmation Act, 1886 (which, it was argued, gave to local inhabitants the right at all times to have certain highways preserved in their then condition) did not regulate any "development" of land, as defined by s. 12 (1) of the Act of 1947, but merely confirmed the existing use, and, therefore, s. 118 (1) of the Act of 1947 did not empower the Minister to override the Act of 1886, and the order must be quashed. The Court of Appeal did not find it necessary to decide that question, but decided the appeals on the ground stated in the headnote.

Rowe, K.C., and *J. P. Ashworth* for the Minister of Transport.

H. B. Williams, K.C., and *W. B. Harris* for the Rugby Portland Cement Co., Ltd., which was authorised by the Minister of Transport to provide new highways in place of those stopped up.

Simes, K.C., and *Steer* for the applicant for the order quashing the Minister's order.

SOMERVELL, L.J.: These are appeals from a decision of BIRKETT, J., by which he quashed an order made by the Minister of Transport under the Town and Country Planning Act, 1947, s. 49 (1). The sub-section provides:

"Without prejudice to the provisions of s. 23 of the [Town and Country Planning Act, 1944], as incorporated with this Act, or s. 3 of the Acquisition of Land (Authorisation Procedure) Act, 1946, the Minister of Transport may, if he is satisfied that it is necessary so to do in order to enable development to be carried out in accordance with planning permission granted under Part III of this Act or to be carried out by a government department, by order made in accordance with the provisions of sched. VI to this Act authorise the stopping up or diversion of any highway."

Section 49 (4) (a) provides that an order made under this section may include *inter alia* provisions requiring any persons specified in the order

"... to pay, or to make contributions in respect of, the cost of doing any work provided for by the order ..."

The order in question in this case is the Stopping Up of Highways (Bedfordshire) (No. 1) Order, 1949 (S.I. 1949, No. 2130). It recites the relevant parts of s. 49, and that the Minister is so satisfied

"... as regards the highways consisting of the greenways and footpaths in the rural district of Luton in the county of Bedford ... which are specified in Part I of the schedule to this order."

After a reference to s. 49 (2) and s. 49 (4), the order continues:

"It appears to the Minister to be expedient that provision should be made for the provision of the highways consisting of the greenways (hereinafter referred to as 'the new highways') which are specified in Part II of the schedule to this order. And whereas the provisions of sched. VI to the Act ... have been complied with,"

the Minister orders that certain old highways shall be stopped up and that new highways are to be provided by the Rugby Portland Cement Co., Ltd., who, with

the Ministry of Transport, were respondents to the application before BIRKETT, J. Part I of the schedule to the order deals with the highways to be stopped up. There is the Drovers Way and the Wheelbarrow Green Highway and other ways with which we are not concerned. Part II of the schedule deals with the new, alternative, highways.

A The application for the development permission which led to this action was for the obtaining of chalk, and was made before the Act of 1947 was passed. However, under s. 77 (1) the permission has to be treated as having been given under Part III of the Act of 1947. The motion by the applicant, a Mr. Harlow, is made under s. 11 (2) of the Act, which provides that within a period of six weeks after the making of an order of this kind persons aggrieved can challenge its validity before the courts. The grounds on which the applicant contends that he is aggrieved and that the said order is not within the powers are:

B "that the said highway order deprives the applicant of his right to walk over the highways set out in Part I of the schedule thereof and that the said highway order is bad in law in that it is contrary to the provisions of the Regulation and Inclosure (Totternhoe) Provisional Orders Confirmation Act, 1886, and the award made thereunder and that the Minister has no power under the Town and Country Planning Act, 1947, or otherwise to override the aforesaid statutory provisions."

C The first question, therefore, is whether the Act of 1886 is overridden by the Minister's order. The principle invoked is a familiar one and the learned judge set it out ([1950] 1 All E.R. 901) in a citation from the speech of the EARL OF SELBORNE, L.C., in *Seward v. Vera Cruz* (1) (10 App. Cas. 68):

D " ' Now if anything be certain it is this, that where there are general words in a later Act capable of reasonable and sensible application without extending them to subjects specially dealt with by earlier legislation, you are not to hold that earlier and special legislation indirectly repealed, altered, or derogated from merely by force of such general words, without any indication of a particular intention to do so '."

E The main argument, as it would seem from the judgment below and the greater part of the argument here, proceeded on the basis that the Minister's order repealed or derogated from the Act of 1886. On that basis the question arose whether the Town and Country Planning Act, 1947, s. 118 (1), was a good answer. That sub-section provides:

F "For the avoidance of doubt it is hereby declared that the provisions of this Act, and any restrictions or powers thereby imposed or conferred in relation to land, apply and may be exercised in relation to any land notwithstanding that provision is made by any enactment in force at the passing of this Act, or by any local Act passed at any time during the present session of Parliament, for authorising or regulating any development of the land."

G The definition of "enactment" in s. 119 (1) is:

" 'enactment' includes an enactment in any local or private Act of Parliament and an order, rule, regulation, bye-law or scheme made under an Act of Parliament."

H We are dealing, as will appear, with an Act confirming a provisional order under the Commons Act, 1876, which led, in accordance with the familiar procedure, to a valuer's award which is referred to in the notice of motion I have read. It was conceded on behalf of the applicant that he could not rely on anything except what was in the confirmed provisional order. *i.e.*, that, if the only conflict was between the Minister's order and something in the award, he could not invoke with regard to that the principle formulated by the EARL OF SELBORNE, L.C., in *Seward's* case (1), which I have quoted. The award would not have been seen

and approved by Parliament, and the basis of the principle is that, as, in the earlier Act, Parliament expressed a special intention, the general intention in the later Act ought not to be regarded as overriding that special intention.

In considering what enactments authorise or regulate any development of the land we are sent to s. 12 (2) of the Act of 1947 which provides:

"In this Act, except where the context otherwise requires, the expression 'development' means the carrying out of building, engineering, mining or other operations in, on, over or under land, or the making of any material change in the use of any buildings or other land: Provided that the following operations or uses of land shall not be deemed for the purposes of this Act to involve development of the land ... (b) the carrying out by a local highway authority of any works required for the maintenance or improvement of a road, being works carried out on land within the boundaries of the road ..."

That proviso, I think, confirms the conclusion to which I would otherwise have come—that the making of a new road would be development. By proviso (e), the use of any land for the purposes of agriculture or forestry (including afforestation), and the use for any of those purposes of any building occupied together with land so used also is not to constitute development.

The first question, therefore, is whether the Act of 1886 entitles the applicant to invoke the principle that a later general Act does not override an earlier special Act. I have come to the conclusion that the applicant does not get over this, his first, difficulty. The Act of 1886 is:

"An Act to confirm the provisional order for the regulation of the commons, and the provisional order for the inclosure of the common fields, situated in the parish of Totternhoe ..."

The land with which we are concerned is that part of the area which was regulated as a common and not that part of the area which was inclosed. The Act recites that the Land Commissioners, in pursuance of the Inclosure Acts, 1845-1878, issued a provisional order in respect of inclosures and that the committee of the House of Commons recommended that the same should be confirmed, and it goes on:

"And whereas the said regulation and inclosure cannot be proceeded with without the previous authority of Parliament, [it is enacted that:] 1. The provisional order of regulation and the provisional order of inclosure set forth in the schedule to this Act are hereby confirmed."

In the schedule, there are the ordinary recitals, and a reference to a map which was deposited. The schedule provides:

"That the part of the said common to be regulated be the tracts known as the Dunstable Downs, Whipsnade Heath (so far as the same lies within the said parish), the cow common (except as hereinafter mentioned), and the Castle Hill, all of which are coloured light green on the map hereinbefore referred to, and also the several pieces of land, baulks, and driftways which are coloured dark green on the said map, and also, as part of the cow common, the three pieces of common field land which are severed by and lie to the north of the London and North-Western Railway, and are coloured yellow on the said map, in lieu of which that portion of the cow common which is severed by and lies to the south of the said railway, and is coloured pink on the said map, together with so much of the cow common at its eastern end as with the said portion shall, in the judgment of the said commissioners, be equal in value to the three pieces of common field land aforesaid, shall be included in the provisional order for inclosure as part of the common field land."

Before I come to the provisions of the order on which the matter turns, I should mention that there is no suggestion that anything in it is *ultra vires* the Commons Act, 1876. It is, perhaps, worth referring to the fact that the Commons Act, 1876, in setting out what can be done in the regulation of a common, by s. 5, which deals with improvements, provides:

A “The improvement of a common comprises for the purposes of this Act all or any of the following things; that is to say, (1) The draining, manuring, or levelling of the common . . .”

Section 7 provides:

B “In any provisional order in relation to a common, the Inclosure Commissioners shall, in considering the expediency of the application, take into consideration the question whether such application will be for the benefit of the neighbourhood, and shall, with a view to such benefit, insert in any such order such of the following terms and conditions (in this Act referred to as statutory provisions for the benefit of the neighbourhood) as are applicable to the case; that is to say, . . . (4) That carriage roads, bridle paths, and footpaths over such common are to be set out in such directions as may appear most commodious . . .”

C That would appear to give the commissioners power with regard to highways. I now come back to the Act of 1886. The schedule further provides:

“That, for ‘improvement’ the following provisions be put in force; that is to say, provisions for—The draining, manuring, and levelling of such part of the said common as may be found necessary,”

D and continues to deal with other matters, such as the planting of trees and so on, which are not material. Further on the schedule provides:

E “That, with a view to the benefit of the neighbourhood, the following provisions be made part of the terms and conditions of this order, that is to say: That Totternhoe Castle, and the ancient earthworks connected therewith, and the five tumuli on the Dunstable Downs, be preserved and maintained in their present state: That, so far as may be practicable, the ancient roads or tracks respectively known as ‘The Drovers Way’ and ‘The Icknield Way’ be preserved in their present condition . . .”

F In respect of the Drovers Way, which is one of the ways mentioned in Part I of sched. I to the order, that is the provision which is relied on. I myself think that the proper construction of that provision and the proper intention which the words convey is only to limit the power of the valuer when he comes to make his award. He has the general powers with regard to carriageways and so on which I have read from the Act, but this is to tell him that, though he has those powers, so far as practicable these ancient ways are to be preserved in their present condition. I can find no indication in these words to take the Drovers

G Way out of the general law as to highways as it existed at the time or as it might thereafter be enacted by Parliament. I do not myself think that that provision in this order would have precluded anybody from making an application to quarter sessions to stop up the Drovers Way under the procedure of the Highway Act, 1835. It is a short point and I do not know that I can elaborate it, but this would seem to me its effect and its intent. It is intended to limit what is to be done

H in the award, though even on that basis it is not categorical—it is only “so far as may be practicable.” It is a direction to the valuer as to how he is to exercise his powers, and in no sense purports to, nor does it, take these highways out of the general law.

The Wheelbarrow Greenway is not mentioned by name in the schedule, but it comes in under the following words:

“That there be reserved to the inhabitants of Totternhoe, and of the neighbouring towns and villages, and the public generally, at all times, a

right of walking over all that part of the said common which is to be regulated, with the exception of the cow common, and that, in addition, there be reserved as aforesaid a right of playing games . . . ”

That brings in the definition which I have already read. The pieces in question are “ the several pieces of land, baulks and driftways which are coloured dark green.” Whereas if one reads this with the map, the words, I think, rather suggest that the public were to have a general right of walking in any direction over a considerable area, when one looks at the parts marked dark green in certain cases the right was over a way or footpath. The same conclusion which I have expressed in regard to the Drovers Way would also, in my opinion, apply to the Wheelbarrow Greenway, *i.e.*, again it is a direction or an indication to the valuer how he is to exercise his powers, and I can find no words there which would take any of the ways or the places where there is a right of walking referred to in that paragraph out of the general law as to highways.

On this view the point decided by the learned judge does not arise, but I think it is right, as I am not satisfied that, if that point had arisen, I would have come to the same conclusion as the learned judge, that I should refer to what he says about it. He says ([1950] 1 All E.R. 903):

“ I have come to the conclusion that the order of the Minister ought not to have been made in respect of these matters. I am satisfied that ‘ development ’ in s. 118, as defined by s. 12, must be strictly construed, and I cannot think that in this Act of 1886 the ‘ development ’ was in any sense the ‘ carrying out of building, engineering, mining or other operations in, on, over or under land ’—which is the first head of the matter, or ‘ the making of any material change in the use of any land ’—which is the second head, and the head with which I am concerned. On the evidence before me, it would not appear that any material change had been made, or, indeed, any change at all, but that, so far as the Drovers Way, the Wheelbarrow Green highway, and the Quarry Green highway, the three highways specified in the Minister’s order, are concerned, it would appear, not that there had been any development within the meaning of s. 12, but that there has merely been a maintenance of the existing use.”

The map, I understand, only appeared at the last moment, and it may be that in this court we were rather more fully informed than was the learned judge with regard to what exactly had happened. I personally was satisfied that these ways, or parts of them, were, under the directions in this order, diverted, and, possibly, in one place continued, and, I think, there would be a forcible argument that, if this authorised the making of a way in a new place and if it was shown that that was done, that would be development. There were other and wider arguments put forward suggesting that this order fell within s. 118 of the Act of 1947, even if there had been no alteration in the ancient way. I do not propose to deal with them, because, they are complicated and no decision on them is necessary in this case. For the reasons which I have given I think these appeals should be allowed.

DENNING, L.J.: In the old days, in order to stop up or divert a highway it was necessary to go through the procedure laid down in the Highway Act, 1835, and most of us remember the rather complicated set of documents which an application to quarter sessions entailed. Nowadays, the Minister of Transport can do it, so long as he goes through the procedure laid down by the Town and Country Planning Act, 1947. He can override any previous Acts of Parliament which have authorised or regulated the “ development ” of the land, but he cannot override the specific provisions of any other Acts. If he desires to stop up or divert an ancient highway, such as a Roman road, which has been left untouched by Parliament, he can do so by going through the necessary procedure. If he desires to stop up or divert a modern highway, such as a trunk

road made under the authority of Parliament, he can likewise do so, because the Acts which authorise the making of new roads are, undoubtedly, Acts which authorise the development of the land on which they are made. It is, however, said that he cannot stop up or divert this ancient Drovers Way because Parliament has ordered it to be preserved "so far as practicable."

A I wish to confine what I have to say to the small strip which is part of the old Drovers Way. If the Act of 1886 had specifically and imperatively provided that the Drovers Way should be preserved in its existing condition without any diversion or stopping up, I do not think the Minister could have overruled it, because I quite agree with BIRKETT, J., that the Act of 1886 was not an enactment for authorising or regulating the development of the land within s. 118 of the Act of 1947. I think that "the land" in that section means the particular
B piece of land over which the Minister desires to exercise his powers, that is, in this case, the soil of the old Drovers Way. I do not think that any part of the Act of 1886 or the schedule thereto authorised or regulated the development of that piece of soil. It simply preserved its existing use as a public way. The order did, no doubt, contain a general power to drain and level land which would include the soil of the Drovers Way, but that would only be maintenance, not
C development.

I think, however, that this appeal should be allowed on a point which was not specifically argued before BIRKETT, J. In my opinion, the Act of 1886 was not so precise and definite about the Drovers Way that it took precedence over any general Act. I am quite sure that Parliament did not intend that the Drovers Way should be exempt from diversion under the Highway Act, 1835. All that
D it intended was that "so far as practicable" it should be preserved. That left it subject to the general legislation for the stopping up or diversion of highways. If this special Act did not override the existing general legislation it cannot be supposed to override subsequent general legislation. In my opinion, therefore, the powers of the Minister to stop up or divert highways extend not only to ancient common law highways and to new statutory highways, but also to high-
E ways set out or confirmed under the Commons and Inclosures Acts. The appeals should be allowed.

VAISEY, J.: I agree that these appeals succeed. As we are differing from the learned judge in the court below, I ought, perhaps, to try to add a few words of my own, but, finding myself in complete accord with everything that has
F fallen from my Lords, and being fully satisfied that there is no part of the ground which they have not completely covered, I content myself with expressing my concurrence in the order proposed.

Appeals allowed with costs.

Solicitors: *Treasury Solicitor; Braby & Waller, agents for M. K. Smith, Rugby (for the Rugby Portland Cement Co., Ltd.); Dixon, Martell & Co. (for the applicant).*

[Reported by C. N. BEATTIE, ESQ., Barrister-at-Law.]

NOTE.

SHARP v. MINISTER OF PENSIONS.

[KING'S BENCH DIVISION (Ormerod, J.), October 13, 1950.]

War Pension—Tribunal requiring report of specialist—Report favourable to claimant—Minister obtaining report of independent medical expert—Tribunal's rejection of claim based on report to Minister—Validity of procedure—Pensions Appeal Tribunals (England and Wales) Rules, 1946 (S.R. & O., 1946, No. 1708/L.22), r. 15 (2), (3)—Royal Warrant concerning Retired Pay, Pensions, etc., 1949 (Cmd. 7699), art. 4 (2).

APPLICATION for leave to appeal against the decision of a pensions appeal tribunal sitting at Leeds on Dec. 19, 1949. The tribunal disallowed the applicant's appeal from the rejection by the Minister of his claim to a pension on the ground that the condition from which the applicant was suffering, viz., diabetes, was not caused, or aggravated, by war service.

The tribunal, being in doubt at the conclusion of the evidence, called for further examination of the applicant by a medical specialist and for a report on his condition. A copy of the report, which was favourable to the applicant, was sent to the Minister. The Minister then obtained an independent report from another specialist, and included this second report in his notes and comments on the first report. The tribunal accepted the second report and dismissed the appeal. On the question whether the Minister was entitled to ask for an independent report at that particular stage of the case, THE COURT now held that the Minister, by attaching the opinion of an independent medical specialist, had made comment in accordance with the terms of r. 15 (3) of the Pensions Appeal Tribunals (England and Wales) Rules, 1946, and there was nothing in the Royal Warrant concerning Retired Pay, Pensions, etc., 1949 (Cmd. 7699), which limited the right of the Minister to seek the opinion of an independent medical specialist before the stage of certification.

[AS TO PENSIONS APPEAL TRIBUNALS, see HALSBURY, Hailsham Edn., Vol. 34, pp. 788, 789, paras. 1117-1119; and FOR CASES, see Second Digest Supp.]

Crispin for the applicant.

J. P. Ashworth for the Minister of Pensions.

Per ORMEROD, J. : It may very well be that, having referred a question of this kind to a medical specialist for a report under r. 15 (2) of the rules of 1946, an applicant may feel that, if a further report, contrary to the earlier one, is produced by the Minister which appears to influence the tribunal in a way which is adverse to the applicant, he has not been fairly treated. It is advisable that that state of affairs should not arise if possible . . . I am anxious, as everyone is, that the impression should be given that these matters are conducted in a way which gives the applicant for a pension every chance of putting his case as fully and as fairly as possible before the various tribunals before which he has a right to have his case heard.

Solicitors: *Culross & Trelawny* (for the applicant); *Treasury Solicitor* (for the Minister of Pensions).

H.McL.M.

Re DULLES' SETTLEMENT TRUSTS. DULLES v. VIDLER.

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Asquith and Jenkins, L.JJ.), October 23, 24, 25, 1950.]

Infant—Maintenance—Father foreign citizen resident abroad—Submission of father to jurisdiction of High Court.

Practice—Originating summons—Guardianship of infant—Form—Parties—Condition of making order for maintenance that mother should have applied for custody—Guardianship of Infants Act, 1886 (c. 27), s. 5—Guardianship of Infants Act, 1925 (c. 45), s. 3 (2)—R.S.C., Ord. 55A, r. 2, r. 3.

The mother of an infant applied by summons for custody of the infant (a ward of court) under the Guardianship of Infants Act, 1886, s. 5, and for an order against the father for maintenance under the Guardianship of Infants Act, 1925, s. 3 (2). The father, an American citizen, was at all material times resident outside the jurisdiction. The court made an order for custody, but made no order for maintenance on the ground that the father had never submitted to the jurisdiction because he had never resided in England. On appeal,

HELD: as a general rule and apart from any special statutory provision, it was not necessary that submission to the jurisdiction should be by personal presence in England, but submission could be effected by the party in question becoming an active party to litigation before the English courts; there was no such special provision in the Acts of 1886 and 1925 as would prevent a submission otherwise than by actual physical presence in England; and, therefore, the court had jurisdiction to consider whether, on the facts, the husband had submitted.

Forsyth v. Forsyth ([1947] 2 All E.R. 623), distinguished and explained.

The summons was entitled in the matter of a settlement made between the mother, of the one part, and two other persons (trustees), of the other part. The parties referred to in the title were the infant (plaintiff) and the trustees (defendants). The summons was further entitled in the matter of an infant and in the matter of the Guardianship of Infants Acts, 1886 and 1925. Neither the mother nor the father was a party to the action. The body of the summons read: "Let all parties concerned attend before the learned master on the hearing of an application on the part of the infant by the mother, his next friend, for an order (i) that the mother may be appointed guardian, and that custody of the infant may be given to the mother; (ii) that such provision may be made for the maintenance of the infant as to the court may seem fit." The summons was addressed to the father. The order made on the summons recited the summons, referred to counsel, the writ and the affidavit, and ordered "that the custody of the infant plaintiff be committed to the mother until further order." No order was made as to costs. It was argued for the husband that it was a condition precedent to an order under s. 3 (2) of the Act of 1925 that an order should have been made for custody on the mother's application under s. 5 of the Act of 1886, and, having regard to the form of the summons, that condition had not been complied with.

HELD: for procedural purposes R.S.C., Ord. 55A, r. 2 and r. 3, contemplated that an application in the name of the infant by its mother as next friend was to be treated as an application by the mother under s. 5, and, therefore, the condition must be considered to have been performed.

[AS TO GUARDIANSHIP AND MAINTENANCE OF INFANTS, see HALSBURY, Hailsham Edn., Vol. 17, pp. 658-674, paras. 1377-1395; and FOR CASES, see DIGEST, Vol. 28, pp. 216-222, 286-292, Nos. 756-811, 1396-1479.]

Cases referred to:

- (1) *Ex p. Blain, Re Sawers*, (1879), 12 Ch.D. 522; 41 L.T. 46; 42 Digest 687, 1012.

- (2) *Cooke v. Vogeler (Charles A.) Co.*, [1901] A.C. 102; 70 L.J.K.B. 181; 84 L.T. 10; *affg.*, *Re A.B. & Co.*, [1900] 1 Q.B. 541; 69 L.J.Q.B. 375; 82 L.T. 169; 4 Digest 25, 199.
- (3) *Forsyth v. Forsyth*, [1947] 2 All E.R. 623; [1948] P. 125; [1948] L.J.R. 487; 177 L.T. 617; 112 J.P. 60; 2nd Digest Supp.
- (4) *Duff Development Co. v. Kelantan Government*, [1924] A.C. 797; 93 L.J. Ch. 343; 131 L.T. 676; Digest Supp.

APPEAL by an infant from an order of ROMER, J., dated July 28, 1950, made on a summons by which it was asked that the infant's mother be appointed guardian of the infant, and that provision might be made for the maintenance of the infant. ROMER, J., made an order committing the infant to the custody of the mother, but held that he had no jurisdiction to order the husband, who was an American citizen not residing in England, to maintain the infant. The relevant facts appear in the judgment of SIR RAYMOND EVERSHERD, M.R.

M. J. Albery for the infant.

Bonner and C. P. Hutchinson for the father.

SIR RAYMOND EVERSHERD, M.R.: It is not open to doubt as a matter of principle that English statutes will be treated as not intended, in the absence of language to the contrary, to assert any jurisdiction beyond English territory. The general principle is stated in *Ex p. Blain, Re Savers* (1), and later in the House of Lords in *Cooke v. Vogeler (Charles A.) Co.* (2). Both were cases arising under the then bankruptcy legislation, and in both the question was whether certain foreign individuals were "debtors" within the meaning of the Bankruptcy Acts so as to be liable to bankruptcy proceedings. In both cases the foreign individual had been served with proceedings, and had appeared to protest. It appears that in the second case, according to the report in the court below ([1900] 1 Q.B. 541), he had also challenged the allegations in the petition, but from the opinions in the House it does not appear that any point was taken that he had by appearance or taking steps in the proceedings purported to submit to the jurisdiction. I should like to read a passage from the judgment of JAMES, L.J., in *Ex p. Blain* (1) which has been cited many times, and by the EARL OF HALSBURY, L.C., in *Cooke v. Vogeler (Charles A.) Co.* (2). JAMES, L.J., said (12 Ch.D. 526):

"It appears to me that the whole question is governed by the broad, general, universal principle that English legislation, unless the contrary is expressly enacted or so plainly implied as to make it the duty of an English court to give effect to an English statute, is applicable only to English subjects or to foreigners who by coming into this country, whether for a long or a short time, have made themselves during that time subject to English jurisdiction. Every foreigner who comes into this country, for however limited a time, is, during his residence here within the allegiance of the Sovereign, entitled to the protection of the Sovereign and subject to all the laws of the Sovereign. But, if a foreigner remains abroad, if he has never come into this country at all, it seems to me impossible to imagine that the English legislature could have ever intended to make such a man subject to particular English legislation."

BRETT, L.J., gave judgment to the same effect, and similarly COTTON, L.J. I only observe one short passage in the judgment of COTTON, L.J., where he says (*ibid.*, 532):

"Of course it is right that questions of title to such property should be adjudicated upon here, and there may well be English statutes giving our courts power to deal with suits relating to the title to real property in England as regards aliens, and for the purpose of serving them. But that is a very different thing from saying that you shall deal with a foreigner

who has never been here, and has never submitted himself to the English Act of Parliament, in the special subject of bankruptcy to which this Act refers."

I should add that, as also appears from the judgments in *Ex p. Blain* (1) and the opinions in the House of Lords in *Cooke v. Vogeler (Charles A.) Co.* (2), in dealing with a matter of bankruptcy there is, of course, a special reason
A for taking care not to assert a greater jurisdiction than the statute clearly justifies, since the bankruptcy procedure is intended to involve the administration of all the assets of the debtor for the benefit of all his creditors. Nothing that I propose to say is meant as any qualification of the passages I have read, or of the views expressed in those judgments, which are well established authority.

B There is, however, another principle (which involves no such qualification), *viz.*, that, generally speaking, an individual who ordinarily would be beyond the scope of the English legislation construed according to the first principle may, nevertheless, voluntarily submit himself to that jurisdiction and make himself amenable to the particular law. The obvious way in which that may be done is indicated in the passages from the judgments I have read, *viz.*, by

C coming to this country and being here, albeit for a short time, and thereby rendering himself amenable to the statute, but it seems to me that personal presence here is not, as a matter of good sense and principle, the only way whereby an individual may render himself amenable to the particular legislation. It would appear to be strange if a man, by coming and being physically here for a week, was amenable to the particular legislation, but if, while he
D stayed just outside these shores, he chose to be represented by solicitors and counsel and fought on its merits for a long period of time some piece of litigation, he must be held never to have effectually submitted himself to the jurisdiction. It does not seem to me that anything in the language I have read can be taken to have laid it down that effectual submission was only to be derived from actual physical presence or residence on English territory.

E On the other hand, it is, undoubtedly, also true that a particular statute may by its character and its terms make plain that it is intended to confer only a limited and circumscribed jurisdiction—limited and circumscribed either by reference to a particular subject-matter or subject-matters, or by reference to the categories of individuals who may be subject to the jurisdiction, or both. That kind of case is best illustrated by the position of what are called

F inferior courts. As ASQUITH, L.J., observed during the course of the argument, no kind of submission by the parties to a dispute could confer on a county court jurisdiction to decide a libel action. Judges are not entitled to become arbitrators, and, in the exercise of their judicial office, county court judges could not by any means determine a libel action. Again, our inferior courts, county courts and justices' courts, are limited by express language of relevant statutes

G as regards the persons over whom they may exercise jurisdiction. Thus, broadly speaking, a county court's jurisdiction is confined to persons who have a residence within a specified area, and the same is true of justices' courts. If, therefore, the person sought to be sued in those inferior courts does not fall within the category of persons over whom alone, by definition, the inferior court has jurisdiction, no amount of submission on the part of an individual
H will operate to extend the jurisdiction which Parliament has thought fit to limit.

That particular aspect of the matter came recently under the consideration of this court in *Forsyth v. Forsyth* (3). The question was whether a certain justices' court had had jurisdiction over a husband, defendant to a complaint by his wife, who appeared to have been at all material times domiciled and resident in Scotland. It was said that he had been represented by an advocate who, in the course of the proceedings, had cross-examined or asked questions

of the wife, and on that ground it was suggested that he must be taken to have submitted to the jurisdiction and so given power to the justices to hear and determine the case. In reference to that point, TUCKER, L.J., said ([1947] 2 All E.R. 624):

"Secondly, it was contended that, even if the husband was, in fact, domiciled and resident in Scotland, he had submitted to the jurisdiction of the justices by reason of the fact that his solicitor had appeared before the justices and cross-examined the wife, and that, accordingly, he could not now be heard to complain of lack of jurisdiction."

After referring to certain authorities relied on in support of that assertion the learned lord justice said (*ibid.*):

"Such cases have no application to courts of inferior jurisdiction in this country which derive their jurisdiction from statute. If such an inferior court lacks jurisdiction, parties cannot by agreement or otherwise confer jurisdiction on it."

The main question raised in the present appeal is whether (subject to what I shall say hereafter as to the form of the application), the principle that where a statute confers a limited and circumscribed jurisdiction it cannot be enlarged by the parties by agreement or otherwise applies in the present case which has arisen on an application to the High Court under the Guardianship of Infants Acts, 1886 and 1925. For the purposes of this part of my judgment I will assume that this application, which came before ROMER, J., was an application by the mother of the infant asking, first, for the custody of the infant pursuant to the Guardianship of Infants Act, 1886, s. 5, and also for an order against the father of the infant for maintenance under s. 3 (2) of the Act of 1925. The father is, and has at all material times been, resident outside the English jurisdiction. He is an American citizen, and he has never submitted to the jurisdiction in the sense of having come here personally and lived here. In those circumstances, though the judge made an order for custody, when the matter of maintenance came to be considered he said that, though he would have been disposed to make some order for the maintenance of the child, he felt himself bereft of the necessary jurisdiction, and he thought that the language which I have read from the judgment of TUCKER, L.J., was applicable to this case although we are here concerned, not with an inferior court, but with the High Court.

The question we have to consider (and I confess I have found it a difficult one) is whether that view ought to be supported. I have come to the conclusion, with all respect to the learned judge, that he had the jurisdiction, the absence of which he so regretted. If I have correctly stated the principles, the matter, I think, depends on the construction of the statutes I have mentioned. If on a fair reading of those statutes it appears that the jurisdiction to award maintenance is intended only to be exercised on fathers who either are English subjects or English residents strictly so called, then I conceive it would follow (apart, perhaps, from some matter of estoppel) that an individual who was not an English subject or not an English resident could not enlarge the Parliamentary jurisdiction, and I think counsel for the infant concedes as much.

I, therefore, turn to the Acts. I think it is unnecessary to go section by section through the whole of them. The first thing to note, as it seems to me, is that, as counsel for the father conceded, the infant concerned over whom, or in respect of whom, jurisdiction can properly be exercised may well not be the child of English parents. Plainly, the infant would have to be here if any effective order was going to be made in regard to its custody, but it may well be, and many cases must be known to all who practise in these matters, that the infant may not be an English subject. From that it will follow that the fathers and mothers

who are contemplated by the Act may not be English subjects. That does not answer the question whether the fathers or mothers must be otherwise amenable to the jurisdiction, but, if the scheme of the Act contemplates making orders in respect of the children of foreign parents in certain circumstances, there seems, at any rate from the scheme of the Act, no particular reason for confining its jurisdiction to parents who have either permanently or casually been resident in England. The matter can be taken a little further, because, by s. 9 of the Act of 1886, there is a definition of what is meant by "the court." It provides:

"... the expression 'the court' shall mean—in England the High Court or the county court of the district in which the respondent or respondents or any of them may reside."

That, of course, reflects the limited jurisdiction by reference to areas of the county courts, but still it is to be noted that the qualification of residence, expressed naturally and properly as regards the county court, does not appear in regard to the High Court. I should, therefore, *prima facie*, take it that this Act (and the same is true of the Act of 1925) was intended to have no less or more operation than any other Act of Parliament (where no express provisions are found in regard to this matter), namely, that it would be available against any person in the High Court who was, for any reason, amenable to the jurisdiction of the High Court.

On the other hand, attention was drawn (and the learned judge placed some reliance on this) to s. 8 (1) of the Act of 1925, which provides:

"Any person for the time being under an obligation to make payments in pursuance of any order for the payment of money under the Guardianship of Infants Act, 1886, as amended by this Act, shall give notice of any change of address to such person (if any) as may be specified in the order, and any person failing without reasonable excuse to give such a notice shall be liable on summary conviction to a fine . . ."

That, it is said, indicates that any person against whom an order is made to make payment—and that would plainly cover the case of a father ordered to make the payment mentioned in s. 3 (2) of the Act of 1925—has to be a person in regard to whom it would be sensible to make those provisions about notifying changes of address and imposing criminal liability in default. But s. 8 (1) is not, be it noted, of universal application. It simply provides that any person so ordered is to give notice of any change of address to such person, *if any*, as the order may specify. If the individual were not resident in England there would be no point, *prima facie*, in specifying such a person or making any such requirement. In the ordinary case of an English subject or an English resident, it would, no doubt, be usual and proper, but it is conceded that residence for quite a short time would bring a father within the scope of the Act, and in such a case it would be no more sensible to make an order under s. 8 than it would be to make it in regard to a person who, though not resident, was acting through-out by a solicitor. I, therefore, think that no great point can be made of s. 8 (1).

Reading the Act as a whole, I am unable to conclude that the intendment of these two statutes is such that only fathers who are either subjects of this country, or personally resident permanently or for a short time in this country, are intended to be covered by the jurisdiction. I think these statutes must be treated as any other statute (which contains no special provision in this regard), so that the jurisdiction will be properly enlarged to the extent that, if anyone chooses voluntarily to submit to the jurisdiction, there is nothing in principle in the Act which prevents a court exercising that jurisdiction. If the word "father" has to be qualified in s. 3 (2) of the Act of 1925, it seems to me it is sufficient qualification to say it means a father amenable by any means to the jurisdiction of the English court. I, therefore, with all respect

to the learned judge, think that there is no such limitation to be derived from the Act as prevents a submission otherwise than by actual physical presence here, and I do not think the matter is concluded by *Forsyth v. Forsyth* (3) for, in my opinion, the reference in the judgment of TUCKER, L.J., to "inferior court" was of the essence of his decision, which, accordingly, is applicable only in reference to inferior courts.

I think, therefore, that the learned judge had jurisdiction provided that he found that the father here had submitted to the jurisdiction. That last question may, however, be one of considerable difficulty. As may be imagined where, unhappily, husband and wife have fallen apart, the proceedings are of a somewhat hostile character. I gather that there were here considerable delays. It is said that the father, who throughout was represented by solicitors authorised to accept service of any proceedings, asked for an adjournment to enable him to file evidence. There is some divergence of recollection between learned counsel on some part of what occurred before ROMER, J.

There is further this difficulty. I have said that I should have to deal with the form of the application, and now I think is the proper time to do it. Under what I conceive to be the modern practice, the summons (issued as long ago as June, 1948) was entitled first in the matter of a settlement made between the mother, of the one part, and two persons, who I think are grandparents, or one of them is a grandparent, of the other part. That, as is clear from the evidence, was a settlement of a small sum of money, a common device in order that the child should become by the appropriate proceedings a ward of court. Then the parties to the action are stated as being, first, the infant, who is the plaintiff, and the two trustees, the defendants, neither mother nor father being parties to the action. The next heading is "In the matter of an infant," and then, finally, "In the matter of the Guardianship of Infants Acts, 1886 and 1925." The summons is of the kind known as not *inter partes* and runs thus:

"Let all parties concerned attend before the learned master on the hearing of an application on the part of the infant by the mother, his next friend, for an order () that the mother may be appointed guardian, and that custody of the infant may be given to the mother; (ii) that such provision may be made for the maintenance of the infant as to the court may seem fit."

By amendment some fortnight later, there is added at the foot "to the father," and the name of the father's solicitors. The summons was served on the father, and service was accepted by the solicitors named. Where matters of jurisdiction arise in an ordinary action by writ or by originating summons, there is an opportunity for the party seeking to dispute the jurisdiction to make a proper application appearing under protest for the purpose of raising the issue. On the form of proceeding in this case a foreign individual so served is in rather greater difficulty. In the first place, so far as the application was for custody, he, the father, desired to place before the English court, for reasons which it is not necessary for me to pursue, various considerations which he could only do effectively by putting in evidence and attending by representatives for argument. On the issue of custody the question of jurisdiction did not arise. It is said that the father was almost bound to take some steps in the matter if he had any kind of feeling for his own child, but under the Acts the right of the court to make an order against the father for maintenance is dependent on an order first being made for custody. The form of the summons, though headed in the matter of the Guardianship of Infants Acts, may be said to be somewhat general and vague as regards the relief sought, for it asks in para. 2 "that such provision shall be made for the maintenance of the infant as to the court may seem fit." It is said on behalf of the father: "Assuming that that was an application for maintenance under the Guardianship of Infants Acts, what was I to do and when was I to do it?" I do not think it is for this court

to suggest any answer to that question. I am relating these facts to show that the question whether, according to ordinary principles, there had, at this stage, been a submission is a difficult one which must depend on a review of the whole of the circumstances in this case. The infant's advisers very properly have limited the material which this court has to portions only of what appear to have been about fourteen affidavits, the exhibits to which extended, we are informed, to very many pages. In the last paragraph of the statement exhibited to the mother's first affidavit she says:

"I am willing to act as guardian to the infant and respectfully ask the court to appoint me his guardian or to give me custody. In addition I ask that an order for maintenance of the infant be made against the father for the sum of "

so much per annum, less certain other sums. It is said on the mother's behalf: "If you saw and read that evidence it must have been as plain to you as could be that the mother here was coming and asking for an order under the Act of 1925 for maintenance, and in face of that you litigated the whole question. Indeed, the whole matter was highly controversial from start to finish."

On those facts is the right inference to draw that the father did submit to the jurisdiction? Taking the view which the learned judge did, it was unnecessary for him to answer that question. I wondered at first whether the expression of his regret intimated that he would have held that there had been a submission, but I do not feel able to say from a reading of the note of his judgment whether that was so or not, and I think the question is primarily one with which the learned judge must deal. Both from the form of the proceedings and other matters, it certainly appears clear that counsel for the husband intimated at quite an early stage that on this aspect of it he wished to raise this jurisdiction point. It may well be there was no other convenient opportunity for him to do so. All that, however, as I think, is a matter pre-eminently for the learned judge who has all the materials available to him (including the assistance, if necessary, of the master) and who heard the argument. He is better able, in the circumstances, than this court to express a conclusion on the matter.

There remains, however, one final point which has been described as technical. I have said that by the terms of s. 3 (2) of the Act of 1925 an order for maintenance against the father can only be made when there has first been made an order for custody under s. 5 of the Act of 1886. That section, so far as material, provides:

"The court may, upon the application of the mother of any infant (who may apply without next friend), make such order as it may think fit regarding the custody of such infant . . ."

The point made is that this was not an application by the mother, nor was the order made an order under that section or on the application of the mother at all. I have read the summons and the order made followed the summons, and also followed the form which is now, I think, usual in these difficult infant cases. The titles are all reproduced in the order, though we are told (and it does appear) that in the course of filing the supporting affidavits, whether from economy, absent-mindedness, or other reasons, some of the titles appear to come and go. The order recites the summons, refers to counsel and the affidavits, and then says:

"It is ordered that the custody of the infant plaintiff be committed to the mother until further order,"

and the judge does not make any order as to costs. Now, has the condition precedent to a maintenance order been established, or is counsel for the husband right in saying that no order for custody under the statute of 1886 was made, and that, therefore, whatever the answer to the main point of jurisdiction may

be, the court cannot make a maintenance order against the husband? The matter is troublesome, and all the more so because I think the procedure which has now become well established in the Chancery Division and is derived from the present rules has, perhaps, somewhat lost sight of the original foundation for the jurisdiction. Under the Act of 1886 it was contemplated that application should be made by the mother. If the mother was dead, it was to be made by the guardian, and there was also, under s. 2, general jurisdiction, where there was no guardian, for the court to appoint guardians, and so on. Then power was given by rule to determine the procedure. We have seen the older precedents in DANIELS CHANCERY FORMS, 5th ed. I have also been able to refer to DANIELS CHANCERY PRACTICE, 8th ed. In the latter book it is stated (p. 1926) that the old rules provide that, where application was made under s. 2, it would be proper to make it by the infant through a next friend, but it states, following the terms of the section, that applications under s. 5 would be made, where proper, by the mother, and, if the mother were dead, by guardian, or if the application were pursuant to the last two lines of the section, by the infant, again through his next friend. There was, therefore, a distinction in the rules between applications under s. 2 and applications under s. 5. It is not, however, without significance that, if one looks at the old forms, the example given for an application under s. 5 is a summons by the mother, but the application is treated as having been headed not only in the matter of the Acts, but also in the matter of the infant by his next friend. If a mother were appointed next friend, the position would be that the summons was entitled in the matter of the infant by the mother as next friend, though the mother would make the application. When one comes to the modern rules which followed the making of the Act of 1925, it is clear that the practice of the Chancery Division had become more settled. R.S.C., Ord. 55A, r. 2, provides:

“Any application under either the Act of 1886 or the Act of 1925 may be disposed of in chambers by a judge of the Chancery Division and may be made”

by summons in the action where there is a pending action, and, where there is no pending action, by originating summons. Rule 3 provides:

“A summons under r. 2 of this order may be taken out by the infant (by a next friend) or by any other person interested in the relief sought and shall be served . . .”

It is to be observed, therefore, that no longer is any distinction drawn between summonses under s. 2 and s. 5. The rules seem to contemplate that any summons, including summonses under s. 5, may be taken out not only by the mother, but by an infant by a next friend, or by any other person interested. Fortunately, we are not concerned with what the position would be if an application were taken out under s. 5 of the Act of 1886 by some person interested other than the infant itself, or other than the infant's mother. There seems no doubt that for procedural purposes the rules contemplate that an application in the name of the infant by its mother as next friend is to be treated as an application by the mother within the terms of s. 5. I have referred to para. 9 of the mother's statement from which it is plain that she is herself asking for the relief (a) of custody, and (b) of maintenance. When the order was made it was expressed (at any rate according to the heading), among other things, to be made under the Acts, and, therefore, if properly made, must have been treated, so far as custody is concerned, as an order for custody on the application of the mother, which, of course, in substance it was. It may be that, at some time, consideration might be given to seeing to what extent the rules are strictly in conformity with the terms of the Acts, but for present purposes I have come to the conclusion that the present application ought to be treated

as being an application within the terms of s. 5 by the mother, although procedurally in accordance with the rules and modern practice it was made strictly by the infant acting through its mother as the infant's next friend. I, therefore, do not think that the objection which has been suggested on this head ought to be sustained.

A I come back for a moment to the original point, and one final consideration I would like to add. If the judge had no jurisdiction, then *prima facie* he had no jurisdiction to order the husband in any circumstances to pay any costs. He could only do that on the terms that he had submitted. His order did not make provision for costs, but it would seem to me a very startling thing if an individual can come, as this husband did, take part for two years or so in highly contentious litigation which is probably very costly, and then be in a position to say: "The court has no jurisdiction over me whatever. It cannot order me to give security for costs, and certainly it cannot order me to pay them." B I think that consideration is relevant to the point in hand. As a matter of principle, where a man has so acted as to make it plain that he does submit and renders himself amenable, that is sufficient to confer under this Act jurisdiction over him, although he does not ever set foot on these shores. I must C not, however, be taken to be pre-judging the question whether he has in this case submitted. That is a matter, as I have said, which ROMER, J., is far better able to decide, and I think, therefore, in allowing this appeal, we should refer the matter back, intimating our view that he has jurisdiction to deal with the matter if he thinks there was a submission.

D ASQUITH, L.J.: I agree. The proposition contended for on behalf of the father is that, where jurisdiction is conferred by a special statute on an English superior court, a foreigner resident abroad cannot submit to that jurisdiction effectively by any conduct other than coming to this country. That seems to me contrary to principle, and also to the reasoning on which the court proceeded in *Duff Development Co. v. Kelantan Government* (4). It is true that in that case the immunity was claimed by a foreign sovereign and E not merely by a foreigner resident abroad as such, but, in my view, the doctrine of submission, if it applies to the first must logically also apply to the second, and the court, though it found on the facts that the sovereign had not submitted, clearly held that he could have done so without coming to this country, and none the less so because the jurisdiction involved was that conferred by a special statute, namely, the Arbitration Act, 1889. Whether the conduct of F the father in this case did amount to submission is a question of fact which the learned judge, taking a different view of the law from that which my Lord has expressed, and which I share, found it unnecessary to decide and which on existing materials we cannot decide either. I agree that the case should be remitted to him for that issue to be determined.

G On the other point, that maintenance cannot be claimed under s. 3 (2) of the Act of 1925 because the condition precedent laid down by s. 5 of the Act of 1886, *viz.*, application by the mother, has not been satisfied, I also agree with my Lord and have nothing to add to his reasons. I agree that the appeal should be allowed.

JENKINS, L.J.: I also agree and do not desire to add anything.

H *Appeal allowed: costs of appeal and proceedings below to be in the discretion of the judge after trying the further question to be determined by him.*

Solicitors: *Herbert Oppenheimer, Nathan & Vandyk* (for the infant); *Landons* (for the father).

[*Reported by F. GUTTMAN, ESQ., Barrister-at-Law.*]

Affirmed. C.A. [1951] 1 All E.R. 1001.

PEARLBERG v. MAY.

[CHANCERY DIVISION (Harman, J.), October 13, November 1, 1950.]

Sale of Land—Interest on purchase price—Purchaser in possession before completion—Failure to complete—Payment of purchase money into court—Liability of purchaser to pay interest from date of lodgment until completion.

On Nov. 24, 1948, P. successfully bid at an auction for certain real property, and signed a memorandum of the purchase affixed to the auction particulars containing the special conditions of sale. The special conditions provided that the property was sold subject to the National Conditions of Sale, 14th ed., so far as not inconsistent with the special conditions, and that completion should take place on Jan. 12, 1949, when the balance of the purchase money was to be paid. If the balance was not so paid, the special conditions provided, it was to carry interest at five per cent. per annum until payment, with an option to the vendor to take the rents and profits in lieu. Clause 5 of the National Conditions provided that, on failure to complete on the day fixed, the balance of the purchase money was to bear interest at the rate provided by the special conditions, provided that a purchaser not in default and not in possession might avoid payment of interest by placing the purchase money on deposit. Clause 6 of the National Conditions provided that, if the purchaser be let into possession before actual completion, then, as from the date of his taking possession and until actual completion, or until he gave up possession to the vendor, he should pay interest on the remainder of the purchase money at the rate of four per cent. per annum. Completion was postponed by agreement until May 10, 1949, when the purchaser paid part only of the purchase money. The vendor gave notice of his intention to re-sell, and on May 16, 1949, the purchaser issued a writ claiming specific performance and an injunction restraining the re-sale. On June 9, 1949, by which date the purchaser had been let into possession, the vendor moved the court for an order that the purchaser pay into court the balance of the purchase money and interest or that the action be dismissed. The purchaser did not file any evidence or appear on the motion, and on June 21, 1949, the purchaser was ordered to pay the unpaid balance with interest at four per cent. from June 10, 1949, to the day of lodgment, and in default to deliver up possession of the property to the vendor on or before July 5, 1949. The purchaser remained in possession and paid the moneys into court as directed. The vendor now claimed that the purchaser was liable to pay interest at five per cent. per annum on the balance of the purchase money during the period for which the money was lodged in court.

HELD: the lodgment in court did not deprive the vendor of his right to interest at the contractual rate of five per cent. per annum although he must give credit for any interest received from the Paymaster-General in respect of the deposited sum.

Humphries v. Horne (1844) (3 Hare 276), *applied*.

[AS TO PAYMENT OF INTEREST, see HALSBURY, Hailsham Edn., Vol. 29, pp. 348-350, paras. 466-469; and FOR CASES, see DIGEST, Vol. 40, pp. 197-203, Nos. 1641-1697.]

Cases referred to:

- (1) *Clarke v. Wilson*, (1808), 15 Ves. 317; 33 E.R. 774; 42 Digest 560, 1249.
- (2) *Gibson v. Clarke*, (1813), 1 Ves. & B. 500; 35 E.R. 195; 40 Digest 183, 1528.
- (3) *Burroughs v. Oakley*, (1815), 1 Mer. 52; 35 E.R. 596; 42 Digest 560, 1253.
- (4) *Dixon v. Astley*, (1816), 19 Ves. 564; 34 E.R. 625; 42 Digest 560, 1254.
- (5) *Cutler v. Simons*, (1816), 2 Mer. 103; 35 E.R. 880; 42 Digest 561, 1266.

(6) *Bradshaw v. Bradshaw*, (1817), 2 Mer. 492; 35 E.R. 1028.

(7) *Crutchley v. Jerningham*, (1817), 2 Mer. 502; 35 E.R. 1032; 42 Digest 561, 1268.

(8) *Wickham v. Evered*, (1819), 4 Madd. 53; 56 E.R. 628; 42 Digest 560, 1256.

(9) *Lewis v. James*, (1886), 32 Ch.D. 326; 56 L.J.Ch. 163; 54 L.T. 260; 50 J.P. 423; 42 Digest 558, 1231.

A (10) *Greenwood v. Turner*, [1891] 2.Ch. 144; 60 L.J.Ch. 351; 64 L.T. 261; 42 Digest 559, 1239.

(11) *Re Cassano & Mackay's Contract*, [1920] W.N. 7; 42 Digest 559, 1240.

(12) *Humphries v. Horne*, (1844), 3 Harc 276; 67 E.R. 386; 42 Digest 454, 246.

B ACTION.

The purchaser of certain freehold property claimed specific performance of two contracts for sale appertaining thereto, and an injunction restraining the vendor from re-selling the property. After the delivery of the statement of claim, the vendor moved the court for an order that the purchaser pay into court the balance of the purchase money or that the action be dismissed.

C Pursuant to the order on motion the purchaser paid the balance into court, and the question arose whether, having regard to the provisions of the contract, the purchaser was bound to pay interest on the moneys paid into court from the date of lodgment until the date of completion.

Pennycuick, K.C., and *I. S. Warren* for the purchaser.

Cross, K.C., and *Collard* for the vendor.

D

Cur. adv. vult.

Nov. 1. **HARMAN, J.**, read the following judgment. This is a purchaser's action for specific performance arising out of two contracts entered into by the purchaser by virtue of bids at an auction held on Nov. 24, 1948, at which the property in question was put up for sale in two lots, on the vendor's (the defendant's) instructions. The property is described and special conditions of sale are contained in printed auction particulars at the end of which is a memorandum recording the purchase. The purchaser purchased both lots at the auction at a total price of £33,925 and she paid to the vendor's agents deposits amounting to £3,392 10s. 0d. The special conditions provided among other things that the property was sold subject to the National Conditions of Sale, 14th ed., so far as not varied by or inconsistent with the special conditions, and, by condition 3 (a), fixed completion for Jan. 12, 1949, when the balance of the purchase money was to be paid, and, if not so paid, was to carry interest at five per cent. until payment, with an option to the vendor to take the rents and profits in lieu.

E By cl. 5 of the National Conditions it is provided that, on failure to complete on the day fixed, the balance of the purchase money is to bear interest at the rate provided by the special conditions until the date of actual completion, with a proviso entitling a purchaser not in default and not having been let into possession to avoid the payment of interest by depositing his purchase money as there provided. Clause 6 of the National Conditions provides that, if the purchaser be let into possession before actual completion, then, as from the date of his taking possession and until actual completion, or until he gives up possession to the vendor, he shall pay interest on the remainder of the purchase money at the rate of four per cent. per annum.

H The purchase in the present case has never been brought to actual completion, and the rights and wrongs of the parties in that regard were in dispute until, at any rate, the delivery of the defence and counterclaim by the vendor, in June, 1949. Completion was postponed by agreement until May 10, 1949, the purchaser paying a further £10,000 of the purchase money. Thereafter, as a result of notice given by the vendor of his intention to re-sell, the writ was

issued on May 16, 1949, the purchaser asking for specific performance and an injunction to restrain a re-sale.

In her statement of claim the purchaser alleged that since May 10, 1949, she had always been ready to complete, but that the vendor was in default by reason of his failure to give vacant possession. By way of defence and counterclaim the vendor also asked for specific performance, alleging default on the part of the purchaser. On June 9, 1949, immediately after the delivery of the statement of claim, the vendor moved the court for an order on the purchaser to pay into court the balance of the purchase money and interest thereon, amounting to £20,832 7s. 0d., or, alternatively, that the action be dismissed. This motion was not in the ordinary form in such a case in that it did not ask that the purchaser should lodge the purchase money in court or go out of possession. The motion was, however, treated as though this had been its object. It was supported by an affidavit alleging that the purchaser had been let into possession of the property on Jan. 12, 1949, and had so remained ever since.

The purchaser did not choose to file any evidence in answer or to appear on the motion and on June 21, 1949, an order was made in these terms:

"Let the [purchaser] on or before July 5, 1949, lodge in court £20,832 7s. 0d., being the unpaid balance of the purchase money and interest to June 9, 1949 (together with interest on the principal sum of £20,532 10s. 0d. at four per cent. per annum from June 10, 1949, to the day of lodgment) for the freehold property known as Cams Hill, Fareham, in the county of Hampshire, and land adjoining thereto in the said writ mentioned. And in default of the plaintiff so lodging the said sum within the time aforesaid let the plaintiff on or before July 5, 1949, deliver up to the defendant possession of the said property."

The purchaser, by submitting to this order, must be taken to have admitted that she had been let into possession on Jan. 12, 1949, and she did, in fact, elect on that footing to retain possession and to lodge in court the sums directed by the order. The denials in her reply delivered on June 22, 1949, can make no difference.

It would appear that no further step has been taken in the action, and I need only record that on May 8, 1950, the purchaser, by her solicitors, agreed to pay the costs of both action and counterclaim, thus admitting the justice of the vendor's case and the failure of her own. It has since then been recognised that there is now no obstacle to an actual completion except the dispute on which I have to adjudicate, which is whether, having regard to the lodgment in court of the purchase money which I have mentioned, there has been any liability on the purchaser since that date to pay interest on the balance of the purchase money at the contractual rate of five per cent., or whether the vendor's rights in that respect are limited to receiving the fund in court together with whatever interest it may have earned on deposit in the Pay Office. It is the purchaser's contention that, the vendor having for his own security chosen to have the balance due lodged in court, the order in that behalf is equivalent to the payment of the purchase money by her, and that, she having been deprived of the money in this way, is not bound to pay interest on a sum that has not been in her hands. The vendor, on the other hand, relies on the terms of the contract which provide for payment of interest until the date of actual completion, a day which admittedly has not yet arrived, and he argues that the lodgment in court which the purchaser was compelled to make was merely a term on which she was allowed by the court to retain possession of the property before completion, and is no more than a security to the vendor for the ultimate payment of the purchase money, if he be right, or something in the nature of an occupation rent, if he be wrong.

The order of June 21, 1949, is, except in one respect, in a form well known

in this Division to every practitioner under the name of a "Greenwood and Turner" order, but, though such orders have been made by Chancery judges for close on one hundred and fifty years, it would appear that the present point has not hitherto been decided, or, at least, that no decision on the point has been reported. I must, therefore, look into the history of the matter to see if any light be thrown on it by the decisions. These seem to begin early in the nineteenth century, the earliest which I have found being a decision in 1808 of LORD ELDON, L.C., in *Clarke v. Wilson* (1). There the defendant was in possession and was objecting to the plaintiff's title, and the Lord Chancellor, on the plaintiff's motion, opined that he thought the plaintiff might require the defendant to pay the purchase money or give up possession of the estate. This practice appears to have become fixed within the next ten years and there are a number of reports on the subject, for instance, *Gibson v. Clarke* (2), where the side-note states that a purchaser cannot without express contract retain the possession while withholding the money. LORD ELDON, L.C., described the motion as of very great importance as a general precedent. Other cases about the same time are *Burroughs v. Oakley* (3), *Dixon v. Astley* (4), and *Cutler v. Simons* (5) where the side-note (2 Mer. 107) states that the orders made

"... appear to have settled the practice, partially adopted in some former cases, such as *Burroughs v. Oakley* (3), and *Dixon v. Astley* (4), as to payment into court of their purchase money, by purchasers in possession, by virtue of the agreement, and otherwise."

In *Bradshaw v. Bradshaw* (6), LORD ELDON, L.C., states the principle to be (2 Mer. 493): "you cannot keep the estate and money too," and a similar case is *Crutchley v. Jerningham* (7). To the same effect I find SIR JOHN LEACH, V.-C., in *Wickham v. Evered* (8), saying (4 Madd. 53):

"The defendant cannot keep possession of the estate and of his purchase-money too. If he elects to retain the possession, let the purchase-money be paid in within a month, without prejudice to any question in the cause."

COTTON, L.J., in *Lewis v. James* (9), refers to this type of order in these words (32 Ch.D. 330):

"This is in some respects like a case where a purchaser being in possession is required to pay into court, if he remain in possession, the purchase-money agreed upon, but it is well known that in such a case under ordinary circumstances an option is given to the purchaser to go out, and the order only is that if he continue in possession he must pay the price into court."

That is reported in 1886.

The modern form of order appears to have been settled in *Greenwood v. Turner* (10), where KEKEWICH, J., cited some of the cases. In that case an application was made by the plaintiff for interest on the purchase money and the judge is reported as directing the purchase money to be lodged in court with interest, or, alternatively, that the defendant do give up possession, and that, in that event, he pay to the plaintiff interest on the purchase money till the day he goes out of possession. When, however, one looks at the order made as set out in SEATON'S JUDGMENTS AND ORDERS, 7th ed., p. 2222, it was that, in the event of the defendant electing to vacate, interest should be paid, not to the vendor, but into court, and that form of order has been followed ever since, generally speaking, though ASTBURY, J., voiced his dislike of the last part of it in *Re Cassano & Mackay's Contract* (11). It is to be observed that the order in the present case makes no provision for interest if the purchaser deliver up possession as she was bound to do on July 5, 1949, in default of payment of the purchase money and interest into court on that day.

The cases, as it seems to me, throw no direct light on the subject. It is true

that the principle under which these orders are made is that it is unjust for the purchaser to have both the property and the purchase money, and it is argued from this that what is paid is, in fact, the unpaid balance of the purchase money, and that lodgment of this sum discharges the payer from all liability in that respect so that there is no balance of the purchase money on which interest is leviable. It is said that there is no hardship on the vendor who chose to take this course knowing that the money would only earn the court rate of interest henceforward. Further, that it would be an injustice if the purchaser, being out of her purchase money, must still pay interest on it. A

I find these arguments persuasive but not decisive. It seems to me that there is nothing in that which has happened to vary the contract which provides for interest at five per cent. on the purchase money until actual completion, an event which has not yet occurred. It is true that the money lodged in court was calculated by reference to, and is in the order described as, the balance of the purchase money, and it has been so described ever since these orders were made, but it appears to me that, in fact, the contractual amount of the purchase money and interest up to the date of lodgment is merely the measure by which the court judges the just obligation of a purchaser who wishes to retain possession pending settlement of his dispute. It is, in fact, I think, no more than a security to the vendor who is deprived of his contractual option to take the rents and profits of the property in lieu of interest. Counsel for the vendor drew my attention to *Humphries v. Horne* (12), which seems to me pertinent in this respect. In that case, the side-note reads (3 Hare 276): B C

"A purchaser, complaining that his conveyance did not comprise the whole of the property which he had contracted for, filed his bill for a conveyance of the remainder and obtained an injunction restraining the vendor from suing him for the purchase-money, part of which was afterwards ordered to be paid into court to abide the event of the suit. The bill was dismissed. *Held*, that the vendor was entitled to the residue of the purchase-money and the interest upon it, to the time of payment, although the purchase-money in court had not been laid out, and no interest therefore had accrued thereon." D E

In that case the defendant had obtained judgment for the purchase money. The plaintiff obtained an injunction, as was then usual in Chancery, for restraining proceedings on that judgment, but, having filed his bill, the defendant moved for a release from the injunction and the injunction was continued only on terms, namely, that the plaintiff remaining in possession, as he did, should pay £1,000 of the purchase money to the vendor and the balance he should lodge in court, pending the dispute. The plaintiff failed in his bill, which was a bill to have a conveyance of a larger plot of land than the vendor was willing to sell to him, and SIR JAMES WIGRAM, V.-C., having decided that matter, went on in these terms (*ibid.*, 279): F

"The question is what I ought to require the plaintiff to do. If the money were not in court the right of the vendor to interest would be determined by the contract for sale and purchase. Then what has taken place? The court, at the instance of the plaintiff, admitting that he had no defence at law in order that he might assert a right in this court which has turned out to be unfounded, has restrained the defendant from recovering his purchase-money. Common justice, and the principles of this court in accordance with it, require that the court should indemnify the defendant against the consequences of the act of the court done at the plaintiff's instance. In such a case, unless the defendant by some act or omission has prejudiced his right, he must be placed in the same situation as if the injunction had never been granted." G H

So, it seems to me, in this case, *prima facie*, the purchaser had no right to possession, not having completed. *Prima facie* he should have been ordered to go

out of possession, that is to say, in such a case the order could have been executed, probably, but the court says that, if the purchaser wants to have possession and yet maintain his dispute, he may be asked to lodge the purchase money in court as a security. It seems to me that the position is much the same here. There is one further point. It would be strange that a purchaser, admittedly in possession and in default, could stop interest running in this way, having regard to the proviso already alluded to in the National Conditions which only allows the avoidance of payment of interest to a purchaser who is neither in possession nor in default.

Accordingly, in my judgment, the lodgment in court of the purchase money has not deprived the vendor of his right to interest on £20,532 10s. 0d. at the contractual rate of five per cent. per annum from June 10, 1949, the date up to which interest at that rate has been added in the calculation of the money lodged in court. The vendor will give credit for interest included in the sum lodged at four per cent. from June 10, 1949, to July 5, 1949, and thereafter, if the whole sum in court be paid out to him, he will also give credit for any interest received from the Paymaster-General on the deposited sum and there will be a set off. If desired, there can be included in the order I make to-day an order directing the fund in court to be dealt with in accordance with a payment schedule which will provide for its payment out to the vendor. I gather that all apportionments have been made or agreed and that nothing stands in the way of actual completion but the dispute which I thus decide.

Action dismissed with costs. On the counterclaim, His Lordship ordered an account of the sums remaining due for unpaid purchase money and interest, and declared the vendor entitled to the excess of the sum found due over the moneys lodged in court and interest accrued on them. The purchaser was ordered to pay the costs of the counterclaim.

Solicitors: Warren & Warren (for the purchaser); Curwen, Carter & Evans, agents for Biscoe-Smith & Blagg, Portsmouth (for the vendor).

[Reported by R. D. H. OSBORNE, Esq., Barrister-at-Law.]

Pearson v Rose

Applied. DU JARDIN v. BEADMAN & YOUNG, LTD. (LITTLE, third party ;
BROS., LTD. [1952] 2 All E.R. 160. MARSHALL, fourth party).

[COURT OF APPEAL (Somervell and Denning, L.Js., and Vaisey, J.), October 17, 18, November 1, 1950.]

Factor—Mercantile agent—Possession of goods—Motor car—Consent given by owner to possession of car—Registration book obtained by a trick—Sale of car with registration book—Title of innocent purchaser—Factors Act, 1889 (c. 45), s. 2 (1).

The plaintiff gave possession of his motor car to H., a motor car dealer and a mercantile agent within the Factors Act, 1889, s. 2 (1), for the purpose of inviting offers to purchase it. By means of a trick H. induced the plaintiff to hand him the registration book relating to the car. Later the same day H., acting without the authority or knowledge of the plaintiff, sold the car and handed the registration book to the fourth party who acted in good faith without notice of any absence of authority. The fourth party subsequently sold the car to the third party, and the third party sold it to the defendants. In an action by the plaintiff against the defendants claiming damages for the conversion of the car,

HELD: though the plaintiff consented to H.'s having possession of the car as a mercantile agent, within the meaning of s. 2 (1), he did not consent

to his possession in that capacity of the registration book; the sale of a car without the registration book relating to it was not a sale of goods "in the ordinary course of business" within s. 2 (1), and the consent necessary to pass a good title to a purchaser under s. 2 (1) was a consent to possession of both the car and the registration book; and, therefore, H. was unable to pass a good title to the fourth party.

Folkes v. King ([1923] 1 K.B. 282), *applied*.

[AS TO DISPOSITIONS UNDER THE FACTORS ACT, 1889, see HALSBURY, Hailsham Edn., Vol. 1, pp. 276, 277, para. 458; and FOR CASES, see DIGEST, Vol. 1, pp. 330-337, Nos. 467-509, and Digest Supp.]

Cases referred to:

- (1) *Cole v. North Western Bank*, (1875), L.R. 10 C.P. 354; 44 L.J.C.P. 233; 32 L.T. 733; 41 Digest, 393, 2359.
- (2) *Folkes v. King*, [1923] 1 K.B. 282; 92 L.J.K.B. 125; 128 L.T. 405; Digest Supp.
- (3) *Oppenheimer v. Frazer & Wyatt*, [1907] 1 K.B. 519; 76 L.J.K.B. 276; *revsd.* C.A.; [1907] 2 K.B. 50; 76 L.J.K.B. 806; 97 L.T. 3; 1 Digest 335, 495.
- (4) *Lake v. Simmons*, [1926] 2 K.B. 51; 95 L.J.K.B. 586; 135 L.T. 129; *revsd.*, [1927] A.C. 487; 96 L.J.K.B. 621; 137 L.T. 233; 35 Digest 97, 64.
- (5) *Staffs Motor Guarantee, Ltd. v. British Wagon Co., Ltd.*, [1934] 2 K.B. 305; 103 L.J.K.B. 613; 151 L.T. 396; Digest Supp.
- (6) *Bishopsgate Motor Finance Corp'n., Ltd. v. Transport Brakes, Ltd.*, [1949] 1 All E.R. 37; [1949] 1 K.B. 322; [1949] L.J.R. 741; 2nd Digest Supp.

APPEAL by the plaintiff from a judgment of DEVLIN, J., given on Apr. 3, 1950, dismissing the plaintiff's claim for damages for conversion of a motor car. On Mar. 15, 1949, the plaintiff saw a Mr. Hunt, the managing director of a company called the Reliance Motor Haulage Contractors, Ltd., who told the plaintiff that he (Hunt) could get him a new motor car in six months for £467, but would require a deposit of £100. On Mar. 18 the plaintiff, having thought over the offer, drove the car which he then owned to Hunt's showroom. After some discussion whether the car could be sold in view of the covenant limiting his right to re-sell into which the plaintiff had entered with the vendors of the car, the plaintiff produced the registration book from his pocket to clear up this point and also to show other particulars regarding the car. While he was holding the registration book in his hand Hunt received a message, and, on his return ten minutes later, he asked the plaintiff to accompany Mrs. Hunt, whom the plaintiff knew, to a hospital. The plaintiff consented, and he was away some time and forgot about the registration book which he had left with Hunt. Later the same day Hunt sold the plaintiff's car to the fourth party to whom he handed the registration book. Later, Hunt was prosecuted and convicted of fraud in connection with this sale and other dealings with cars. DEVLIN, J., found that the plaintiff left the car with Hunt to see what offers for it were made on the basis that when the new car was available the old one would be sold through Hunt. He also found that Hunt tricked the plaintiff out of the possession of the registration book by the incident with Mrs. Hunt because he wanted to sell the car and misappropriate the money.

Cartwright Sharp, K.C., and *Mattar* for the plaintiff.

Weitzman for the defendants and the third and fourth parties.

Cur. adv. vult.

Nov. 1. The following judgments were read.

SOMERVELL, L.J.: This is an appeal from a decision of DEVLIN, J., who decided against the plaintiff. There is a third and a fourth party. The

claim is for damages for the conversion of a motor car, which admittedly up to Mar. 17, 1949, was the property of the plaintiff. The car came into the possession of a Mr. Hunt, admittedly a mercantile agent. The fourth party bought it from Mr. Hunt and claims a good title under s. 2 (1) of the Factors Act, 1889, which is as follows:

A (1) Where a mercantile agent is, with the consent of the owner, in possession of goods or of the documents of title to goods, any sale, pledge, or other disposition of the goods, made by him when acting in the ordinary course of business of a mercantile agent, shall, subject to the provisions of this Act, be as valid as if he were expressly authorised by the owner of the goods to make the same; provided that the person taking under the disposition acts in good faith, and has not at the time of the disposition
B notice that the person making the disposition has not authority to make the same."

The fourth party sold the car to the third party, who sold it to the defendants. The sole issue in the appeal is whether the fourth party did or did not get a good title under the Factors Act, 1889.

[HIS LORDSHIP set out the facts and said he agreed with the finding by
C DEVLIN, J., that the car was not left with Mr. Hunt wholly or mainly for repair, and continued:] On these findings counsel for the plaintiff submitted that the only possible conclusion was that the car was obtained by larceny by a trick. On that basis there are conflicting opinions whether s. 2 (1) of the Factors Act, 1889, can or cannot apply. Counsel for the plaintiff submitted it could not.
D I will refer to this later because I have come to the conclusion that the appeal succeeds on the judge's findings irrespective of that point. It is, I think, clear that on the sale of a second-hand car the vendor will ordinarily deliver and the purchaser require the delivery of the registration, or "log", book. Counsel for the plaintiff stated, and I accept it, that he did not contend that cars could not be sold without their log books, but the price would be substantially reduced thereby. This shows, and I so hold, that a sale of a car without its log book
E would not be a sale "in the ordinary course of business." The findings of DEVLIN, J., as to Mr. Hunt's reasons for getting hold of the log book support this view.

✓ The transaction which the fourth party seeks to uphold is the sale of a car with its log book, a more valuable subject-matter than a car without its log book. Mr. Hunt, it seems to me, was never in possession of the log book with
F the consent of the plaintiff. One can test it in this way. If immediately after the plaintiff had left the building he had been asked: "Did you mean to leave your car?" he would have answered "Yes." If he had been asked: "Did you mean to leave your log book?" he would have answered "No," and would have gone back and collected it. The ostensible authority which enabled Mr. Hunt to effect a sale "in the ordinary course of business" arose because of
G his possession of the log book without the consent of the owner. The relationship of the log book, which is, of course, not a document of title, to a motor car is one to which no useful analogy has occurred to me. I am, however, of opinion that on the conclusions as set out above the fourth party cannot claim the protection of the Factors Act, 1889. In cases of larceny by a trick, the person
H defrauded does in one sense consent to the possession of the thief, but, so far as the log book is concerned, for the reasons I have given, the plaintiff never consented to Mr. Hunt's having possession of it.

The issue with regard to larceny by a trick was fully argued before us. I will deal with it because, if there was larceny by a trick of the goods sold, and this prevents the Factors Act applying, the appeal would succeed in any event. I accept the submission of counsel for the plaintiff that, on the findings of DEVLIN, J., there is only one possible conclusion—that the possession of the car was obtained by larceny by a trick. The law as to larceny by a trick is fully

set out in the judgment of BANKES, L.J., in *Folkes v. King* (2) ([1923] 1 K.B. 291 to 293). It seems to me clear that Mr. Hunt had an *animus furandi* at the time he got possession of the car and that the other conditions are fulfilled. The plaintiff clearly did not intend to pass the property, nor on the judge's findings did he authorise Mr. Hunt to conclude a sale.

The question whether this necessarily excludes a purchaser from the protection of the Factors Act has been considered in more than one case, but there is no clear decision on the point. In *Folkes v. King* (2) BANKES, L.J., and SCRUTTON, L.J., considered the point. BANKES, L.J., said ([1923] 1 K.B. 296):

"The question is whether, assuming that Hudson was guilty of larceny of the car, that fact renders it impossible that anyone can have obtained a title to the car from Hudson under the Factors Act; the argument being that no one can under those circumstances prove the owner's consent to the car being in Hudson's possession. The argument against this view was admirably put by Mr. J. A. Hamilton (as he then was) in *Oppenheimer v. Frazer & Wyatt* (3), but it was expressly rejected by every member of the court. The view taken by the court in that case as to the want of *bona fides* on the part of the purchaser of the goods rendered it unnecessary to decide the point, and the opinions of the members of the court are therefore, I think, strictly speaking *obiter* and not binding upon us. They deserve however to be treated with the greatest respect, and it is only because I am unable after full consideration to agree with them that I venture to differ from the conclusion at which they arrived."

In *Oppenheimer v. Frazer & Wyatt* (3), FLETCHER MOULTON, L.J., said ([1907] 2 K.B. 71):

"A mercantile agent is as capable of stealing as any other man, and, if he has stolen the goods, there can be no question, in my opinion, that he must be taken to hold possession of them without the consent of the owner. One of the recognised methods of stealing at common law is distinguished from other types of larceny, and called larceny by a trick, but it is in the eye of the law pure stealing."

With regard to the consent required for the Factors Acts, BANKES, L.J., in *Folkes v. King* (2) said ([1923] 1 K.B. 297):

"What the section refers to is the consent of the owner. To establish a consent it is no doubt necessary to consider what the state of mind of the owner of the goods was with reference to the possession of them by the mercantile agent."

SCRUTTON, L.J., after referring to the earlier cases, said (*ibid.*, 305):

"First on the question whether to prove larceny by a trick is a defence to the Factors Act as excluding consent of the true owner. I can understand that where by a trick there is error in the person there is no true consent and the Factors Act is excluded. But where there is agreement on the person and the true owner intends to give him possession, it does not seem to me that the fact that the person apparently agreeing to accept an agency really means to disregard the agency, and act for his own benefit, destroys the consent of the true owner under the Factors Act. That Act intended to protect a purchaser in good faith carrying out an ordinary mercantile transaction with a person in the position of a mercantile agent. It does not do so completely, for it requires the purchaser to prove that the goods were in possession of the mercantile agent 'with the consent of the owner.' But it does not require the purchaser in addition to prove that the mercantile agent agreed both openly and secretly, ostensibly and really, to the terms on which the owner transferred possession to the mercantile agent. It appears to me to be enough to show that the true

owner did intentionally deposit in the hands of the mercantile agent the goods in question. It is admitted that if he was induced to deposit the goods by a fraudulent misrepresentation as to external facts, he has yet consented to give possession, and the Factors Act applies, but it is argued that if he deposits the goods in the possession of an agent who secretly intends to break his contract of agency the Factors Act does not apply.

A I do not think Parliament had any intention of applying the artificial distinctions of the criminal law to a commercial transaction, defeating it if there were larceny by a trick, but not if there were only larceny by a bailee, or possession obtained by false pretences."

I have set out these passages at some length because I agree with the conclusion and the reasons given for it and do not desire to add to them. ATKIN, L.J., in *Lake v. Simmons* (4), in a dissenting judgment ([1926] 2 K.B. 72) expressed his preference for the opinions expressed in *Oppenheimer v. Frazer & Wyatt* (3) as against those expressed by BANKES, L.J., and SCRUTTON, L.J., in *Folkes v. King* (2). The Court of Appeal were reversed in the House of Lords on a different point. VISCOUNT SUMNER referred to and set out the two divergent views without expressing an opinion ([1927] A.C. 509, 510). As the issue was

B fully argued before us, and as opinions have already been expressed, I thought it right to set out the conclusion to which I have come. For the reasons given above I think the appeal succeeds.

C

DENNING, L.J.: In the early days of the common law the governing principle of our law of property was that no person could give a better title than he himself had got, but the needs of commerce have led to a progressive

D modification of this principle so as to protect innocent purchasers. We have had cases in this court recently about sales in market overt and sales by a sheriff, and now we have the present case about sales by a mercantile agent. The cases show how difficult it is to strike the right balance between the claims of true owners and the claims of innocent purchasers. The way that Parliament has done it in the case of mercantile agents is this. Parliament has protected

E the true owner by making it clear that he does not lose his right to goods when they are taken from him without his consent, as, for instance, when they have been stolen from his house by a burglar who has handed them over to a mercantile agent. In that case the true owner can claim them back from any person into whose hands they come, even from an innocent purchaser who has bought from a mercantile agent. Parliament has not protected the true owner if he

F has himself consented to a mercantile agent having possession of them, because, by leaving them in the agent's possession, he has clothed the agent with apparent authority to sell them, and he should not, therefore, be allowed to claim them back from an innocent purchaser.

The critical question, therefore, in every case is whether the true owner consented to the mercantile agent having possession of the goods. This is

G often a very difficult question to decide. There are three points of principle which arise for consideration in the present case.

(i) If the goods are stolen from the true owner by the mercantile agent, does that mean that the owner does not consent to the mercantile agent having possession of them? At first sight the answer seems to be obvious. No man ever consents to the theft of his goods, but therein lurks a fallacy. There are

H many cases of larceny where the true owner consents to the thief having possession of the goods, but not to his stealing them. For instance, if the true owner allows the agent to have the goods on hire or for repair, and the agent later on makes up his mind to steal them and does so, either by breaking bulk (common law), or by converting them to his own use (statute), the agent is guilty of larceny as a bailee, but the true owner undoubtedly consented to his having possession of them. Take the same instance where the owner lets the agent have the goods on hire or for repair, but, with this difference, that the

agent from the very beginning intended to steal the goods, then on all the authorities the agent is guilty of larceny by a trick, but the owner undoubtedly consented to his having possession of them. His state of mind is the same in both instances. He consented to possession, but not to the theft of the goods. In my opinion, therefore, the fact that the agent is guilty of larceny by a trick does not prevent the operation of the Factors Act any more than the fact that he has been guilty of larceny as a bailee. I find myself in full agreement with the judgments of BANKES, L.J., and SCRUTTON, L.J., in *Folkes v. King* (2), and I see nothing to the contrary in the opinion of VISCOUNT SUMNER in *Lake v. Simmons* (4) ([1927] A.C. 510, 511).

(ii) If the true owner was induced to part with the goods by some fraud on the part of the mercantile agent, does that mean that he did not consent to the mercantile agent having possession of them? Again the answer at first sight seems obvious. A consent obtained by fraud is no consent at all, because fraud negatives consent. The effect of fraud, however, in this, as in other parts of the law, is as a rule only to make the transaction voidable and not void, and if, therefore, an innocent purchaser has bought the goods before the transaction is avoided the true owner cannot claim them back. For instance, if a mercantile agent should induce the owner to pass the property to him by some false pretence, as by giving him a worthless cheque, or should induce the owner to entrust the property to him for display purposes, by falsely pretending that he was in a large way of business when he was not, then the owner cannot claim the goods back from an innocent purchaser who has bought them in good faith from the mercantile agent. The agent's offence may in some cases be obtaining goods by false pretences, or in other cases larceny by a trick, the difference depending on whether as a result of the fraud the owner intended to pass to the agent the property or the power to pass the property (false pretences), or only to pass the possession (larceny by trick). In each case, whether the owner intended to pass the property or not, at any rate he consented to the agent having possession. The consent may have been obtained by fraud but, until avoided, it is a consent which enables the Factors Act to operate; see *per* SCRUTTON, L.J., in *Folkes v. King* (2) ([1923] 1 K.B. 301, 302).

(iii) If the true owner consents to the mercantile agent having the goods for repair but not for sale, is that a consent which enables the Factors Act to operate? The answer would seem at first sight to be "Yes," because it is undoubtedly a consent to the agent having possession, but this needs testing. Suppose, for instance, that the owner of furniture leaves it with a repairer for repair and that the repairer happens to be a dealer as well. Does that mean that the repairer can deprive the true owner of his goods by selling them to a buyer? Clearly not, if the owner did not know the repairer to be a dealer, and, even if he did, why should that incidental knowledge deprive the true owner of his goods? Such considerations have led the courts to the conclusion that the consent, which is to enable the Factors Act to operate, must be a consent to the possession of the goods by a mercantile agent as mercantile agent; see *per* CHANNELL, J., in *Oppenheimer v. Frazer & Wyatt* (3) ([1907] 1 K.B. 527) and *per* MACKINNON, J., in *Staffs Motor Guarantee, Ltd. v. British Wagon Co., Ltd.* (5) ([1934] 2 K.B. 313). That means that the owner must consent to the agent having them for a purpose which is in some way or other connected with his business as a mercantile agent. It may not actually be for sale. It may be for display or to get offers, or merely to put the goods in his showroom, but there must be a consent to something of that kind before the owner can be deprived of his goods.

If it were right to apply these considerations to the car taken by itself, without the registration book, I should find myself in full agreement with the judgment of DEVLIN, J. Hunt was a mercantile agent who got possession of the car with the consent of the plaintiff. It is true that Hunt was probably guilty of larceny

by a trick. The plaintiff did not intend to pass the property to him or even to give him the power to pass the property, and Hunt had the *animus furandi* from the beginning. That does not alter the fact that the plaintiff consented to his having possession of it. It is also true that he intended Hunt to repair it, but the plaintiff also intended that Hunt should act in some respects as a dealer by receiving offers from prospective purchasers. He did, therefore, consent to his having possession of the car as a mercantile agent.

A Where I do not agree with DEVLIN, J., is that he put the registration book on one side as if it was of no significance in law. He seems to have thought the Factors Act operated if the mercantile agent had possession of the car with the consent of the true owner, even though he did not have possession of the registration book. I cannot share that view. This court has recently had to consider the position of the registration book, or, as it is more commonly called,

B the "log book", of a car: see *Bishopsgate Motor Finance Corp'n., Ltd. v. Transport Brakes, Ltd.* (6) ([1949] 1 All E.R. 46). It is not a document of title, but it is the best evidence of title. Everyone who buys or sells a second-hand car knows that a clean title cannot be given or obtained without the log book. The instructions on every log book tell the owner to "keep this book in a safe place, not on the vehicle" and that "on transferring the vehicle to another person you must hand over this book to the person acquiring the vehicle."

C All sensible owners pay heed to these instructions. If the seller can produce the book showing that his title is in order, he will receive the proper market price, but no wise buyer pays his money except against delivery, not only of the car, but also of the log book. If the seller cannot produce it, he will receive as a rule only a fraction of the proper price, because its absence is of itself notice of a defect of title. This state of affairs was foreseen by SCRUTTON, L.J., twenty-seven years ago. In *Folkes v. King* (2) he said ([1923] 1 K.B. 300):

D "If the production of the book, or if it was said to be lost, of a new one, was required by every purchaser, it would be very difficult to find a market for the cars which have lately been stolen in such large numbers; and the courts may have to take adverse notice of the conduct of a purchaser who does not require the production of the book of registry."

E The courts have adopted that suggestion, and now view with suspicion any dealing in a second-hand car without a log book.

F When the significance of the log book is realised, it becomes plain that the consent of the owner, which is necessary for the Factors Act to operate, is a consent to the possession by the mercantile agent, not only of the car, but also of the log book that goes with it. So long as the owner retains the log book, the mercantile agent cannot dispose of the car in the ordinary course of his business, because it is not in the ordinary course of anyone's business to dispose of a second-hand car without a log book. The retention by the owner of the log book, therefore, effectually prevents the Factors Act from operating.

G The handing over of the log book with the car enables the Act to operate. The owner then clothes the agent with apparent authority to dispose of the car, and the agent is enabled to dispose of it in the ordinary course of his business, and the Factors Act operates to give a good title to an innocent purchaser. To put it shortly, in the case of a car, "goods" in the Act means the car together with the log book.

H This brings me to the critical question in this case: Did the plaintiff consent to Hunt having possession of the log book as well as the car? On the findings of fact by DEVLIN, J., the answer is clearly "No." On Mar. 18, 1949, the plaintiff simply let Hunt have the log book in his hands to inspect it for a few moments. The plaintiff gave Hunt the barest physical custody of it while he was still there himself. He never consented to Hunt having possession of it. Then Hunt, by a trick, managed to get the plaintiff called away while he, Hunt, still held the book. Armed thus with the log book, Hunt was able to sell the

car on the very same day to an innocent purchaser, which, without it, he could not have done. On those facts the plaintiff no more consented to Hunt having possession of the log book than if Hunt had stolen it from his pocket. The Factors Act does not operate, therefore, to give a good title to the dealer who bought from Hunt, nor to the buyers in succession from him.

I confess that I come to this conclusion with some reluctance, because I recognise that the legislature intended the courts to make every reasonable presumption in favour of the innocent purchaser: see s. 2 (4) of the Act, but my reluctance is tempered by the reflection that in this case the buyer, Mr. Marshall, was himself a motor car dealer, who bought the car from Hunt on Mar. 18, 1949, for £450 and sold it on Mar. 21, 1949, for £620. A dealer whose business enables him to make quick and large profits of that kind must not be surprised if he occasionally gets his fingers burnt. In my opinion, therefore, the appeal should be allowed.

VAISEY, J.: Where there are two innocent parties of whom one has to suffer for the criminal act of a third, no decision can be said to be satisfactory. This example of that familiar problem presents to my mind considerable difficulty. On the whole, having had the advantage of reading the judgments of my Lords which have just been delivered, I share their view that this appeal should succeed. What the relationship between a motor car and its registration book or log book really is, I find it extremely difficult to define. For many purposes the book ought not to be regarded as a part of the car in the same sense as one of the car's four wheels can be so regarded. What strikes me as decisive of the present case is the fact, already pointed out by my Lords, that a dealer in cars, being a mercantile agent, cannot be said to be "acting in the ordinary course of" his business as such when selling a car without its log book, any more, in my judgment, than he would be so acting if he sold a car with only three wheels. Suppose that a car with only three of its wheels had come into the dealer's possession with the owner's consent, and that the dealer had proceeded to steal the fourth wheel from the owner's garage, had placed it on the car, and had then sold the car. In such a case, I do not think that the totality of the four-wheeled vehicle could be said to have come into the dealer's possession with the owner's consent, so as to bring into operation s. 2 (1) of the Factors Act, 1889. When once it is admitted that the sale of a car without a log book is not an ordinary, but a quite extraordinary, transaction on the part of a dealer in cars, I think it must follow that the transaction here is not within the protection of the sub-section. In suggesting the imaginary case of the stolen wheel, I am well aware of the danger of analogies, and mine may be no better than most. The Act does modify and form an exception to the general law of property by conferring a title upon strangers in derogation of the rights of the true owner, and for myself I would be reluctant to extend its operation further than its terms necessitate. The appeal appears to me to be well-founded, and I have nothing further to add.

Appeal allowed with costs.

Solicitors: *Amery-Parkes & Co.* (for the plaintiff); *Rich & Hughes* (for the defendants); *Archibald C. Wood & Co.* (for the third party); *Sidney L. Samson* (for the fourth party).

[Reported by C. N. BEATTIE, Esq., Barrister-at-Law.]

HOPKINS v. HOPKINS.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Pilcher, J.), October 16, 17, 30, 1950.]

Divorce—Domicil—Petition by wife—Extent of onus on wife to prove husband's domicil in England—Husband domiciled in Canada at date of presentation of petition—Wife resident in England for thirty-one months, and in Canada for five months, of three years immediately preceding commencement of proceedings—"Ordinarily resident"—Law Reform (Miscellaneous Provisions) Act, 1949 (c. 100), s. 1 (1) (a).

- A The parties were married in England in September, 1943. The husband was born and educated in Eire, but his father's domicil was English. In May, 1939 (when he was between eighteen and nineteen years of age), the husband came to England and obtained a commission in the Fleet Air Arm. After returning from active service in 1945, he lived in England until 1949, when he visited Canada with the object of obtaining employment there. The wife lived in England until Apr. 15, 1949, when, the husband having returned to England in March, she accompanied him to Canada. While she was in Canada, the parties had no home of their own in England, but on obtaining employment in Canada, the husband contemplated settling there. On Sept. 22 the wife returned to England, and on Oct. 11 she filed a petition for divorce on the ground of the husband's cruelty, alleging that he was domiciled in England. The husband contended that the court had no jurisdiction to entertain the suit as he had acquired a domicil in Canada at the time of the presentation of the petition. The wife contended *inter alia* that, even if he had acquired a Canadian domicil at the time of the presentation of the petition, the court had jurisdiction to entertain the suit under the Law Reform (Miscellaneous Provisions) Act, 1949, s. 1 (1) (a), as she was resident in England and had been "ordinarily resident there for a period of three years immediately preceding the commencement of the proceedings," within the meaning of the section.
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HELD: (i) where a wife, in her petition for divorce, alleged that the husband was domiciled in England, the onus was on her to make out a *prima facie* case in support of the allegation, but if, through no fault of hers, the evidence was scanty, she had discharged her burden, provided that the facts proved tended rather to show that the court had jurisdiction than that it had not.

- F (ii) on the true construction of the words "ordinarily resident" in s. 1 (1) (a) of the Act of 1949, the qualifying adverb "ordinarily" added nothing to the adjective "resident"; during the five months that the wife was resident in Canada she was "ordinarily resident" there within the meaning of the section; and, therefore, she was not "ordinarily resident" in England during the three years immediately preceding the commencement of the proceedings, and the court had no jurisdiction to entertain the suit under s. 1 (1) (a).
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Observations of VISCOUNT CAVE, L.C., and LORD WARRINGTON OF CLYFFE in Levene v. Inland Revenue Comrs. ([1928] A.C. 225, 232), and of SOMERVELL, L.J., in Macrae v. Macrae ([1949] 2 All E.R. 37), applied.

- H [FOR THE LAW REFORM (MISCELLANEOUS PROVISIONS) ACT, 1949, s. 1 (1) (a), see HALSBURY'S STATUTES, Vol. 42, p. 572.]

Cases referred to:

- (1) *Levene v. Inland Revenue Comrs.*, [1928] A.C. 217; 97 L.J.K.B. 377; 139 L.T. 1; 13 Tax Cas. 486; Digest Supp.
- (2) *Macrae v. Macrae*, [1949] 2 All E.R. 34; [1949] P. 397; 113 J.P. 342; 2nd Digest Supp.

PETITION by the wife for divorce on the ground of the husband's cruelty and constructive desertion. The husband, by his answer, alleged that at the time of the presentation of the petition he was domiciled in Canada, and, therefore, the court had no jurisdiction to entertain the suit. By an amendment to her petition the wife alleged (*inter alia*) that, even if the husband had acquired a Canadian domicile at the time of the presentation of the petition, the court had jurisdiction to entertain the suit under the Law Reform (Miscellaneous Provisions) Act, 1949, s. 1 (1) (a), as she had been ordinarily resident in England for a period of three years immediately preceding the commencement of the proceedings. A

The husband's father was born in England in 1883, but lived in Eire and carried on a business there from before the birth of the husband, in 1920, until 1942, when the father retired from business, returned to England, bought a house in Sussex, and made a home there with his wife. The husband was born and brought up in Eire. In 1939 he came to England and obtained a commission in the Fleet Air Arm. He had an English passport, and regarded himself as English. In September, 1943, the parties were married. A week after the marriage, the husband went abroad on active service and returned to England in 1945. He remained in England until Feb. 2, 1949, when he flew to Canada with the object of trying to obtain employment there. He returned to England at the end of March, and on Apr. 15 he and the wife went to Canada together. In May he obtained employment in Canada, and on Sept. 1 the parties moved into a bungalow which they had taken on a yearly tenancy. On Sept. 20, 1949, the wife left Canada, arriving in England on Sept. 22, and on Oct. 11 she filed her petition for divorce. B C D

J. E. S. Simon for the wife.

Salkeld Green for the husband.

Cur. adv. vult.

Oct. 30. **PILCHER, J.**, read the following judgment. The petitioner, Mrs. Barbara Henden Hopkins, asks for the dissolution of her marriage with her husband, Mr. Richard Donald Buchanan Hopkins, on the ground of his alleged cruelty and constructive desertion. By his answer the husband alleges that at the time of the presentation of the petition he was domiciled out of the jurisdiction of this court, namely, in the province of Ontario, in the dominion of Canada. He also denies that he was guilty of the alleged cruelty or desertion. The parties were married on Sept. 11, 1943, and there are two children of the marriage, both girls, aged respectively six and four years. The husband did not attend the trial, and the wife's evidence, given in support of her allegations of cruelty and desertion, consequently stands unchallenged. At the trial the wife was cross-examined solely as to the issue of domicile. By an amendment to her petition, the wife alleged that, even if at the time of the presentation of the petition her husband had acquired a Canadian domicile, this court was none the less entitled to entertain her suit under the Matrimonial Causes Act, 1937, s. 13, because on a proper view of the facts and the law her husband deserted her immediately before he left this country for Canada on Feb. 2, 1949, and at a time when he still had an English domicile. In the further alternative, she alleged that the court had jurisdiction to entertain her suit under the Law Reform (Miscellaneous Provisions) Act, 1949, s. 1 (1) (a), because she had been ordinarily resident in England for a period of upwards of three years immediately preceding the presentation of her petition on Oct. 11, 1949. [His LORDSHIP stated the facts, found that the husband was guilty of cruelty, and continued:] The question whether this court has jurisdiction to entertain the wife's suit raises a number of points which are not easy to resolve, largely because of the very meagre evidence available for their determination. The matters to be decided can be stated shortly: (i) Was the husband's domicile of origin English or Irish? (ii) Did he before the presentation of the petition E F G H

lose his domicile of origin and acquire a domicile of choice in Canada? (iii) If the husband had at the material date a Canadian domicile of choice, (a) is it established that the wife was "ordinarily resident" in England for the three years preceding the commencement of these proceedings, and (b) if so, do the provisions of the Law Reform (Miscellaneous Provisions) Act, 1949, s. 1 (1), apply retrospectively so as to confer on the court the extended jurisdiction provided for in the section where the suit is instituted before the passing of the Act? (iv) If the husband had an English domicile when he first left for Canada on Feb. 2, 1949, but had lost it and acquired a Canadian domicile when the suit was instituted, was he, on Feb. 2, 1949, guilty of desertion or constructive desertion so as to enable the wife to rely on the provisions of the Matrimonial Causes Act, 1937, s. 13?

I will deal with these points in order. The material facts which bear on the question of the husband's domicile of origin are few and can be stated shortly. His father was born in 1883 in Somerset and lived in Ireland at least from the husband's birth in 1920 until he returned to England in 1942 and thereafter settled in Sussex. While in Ireland, the husband's father carried on a seedsman's business which his father had carried on before him. How often, and for what periods, the husband's father during his sojourn in Ireland was in the habit of visiting England or any other country, we do not know. In her petition the wife alleges, as she is bound to do, that the husband was domiciled in England, and, no doubt, as a technical matter the onus of substantiating this allegation rests in the first place on her. Having heard such evidence as she was able to give, I have only the scantiest information on which to arrive at any conclusion as to the husband's domicile of origin. In my view, in a case of this character, all that the wife has to do is to make out a *prima facie* case. If through no fault of the wife's the available evidence is scanty, the wife has discharged her burden, provided that the facts proved tend rather to show that the court has jurisdiction than that it has not. After a careful consideration not only of those facts which are proved, but of those which are not, and basing myself principally on the fact that the husband's father was born in this country, and that he returned to this country when his business life was over, I find that his domicile of origin was English, and that he never lost his English domicile. From this it follows that the husband's domicile of origin was English. He necessarily retained this English domicile of origin until he came of age, by which time he had been serving at least two years in the Fleet Air Arm.

[On the second point for consideration, HIS LORDSHIP, after reviewing the evidence, found that the husband had discharged the onus which was on him of proving that he had abandoned his domicile of origin and acquired a new domicile of choice in Canada before the wife presented her petition on Oct. 11, 1949.]

Finding, as I do, that at the material time the husband had acquired a domicile of choice in Canada, I now have to consider whether this court has jurisdiction to entertain the wife's suit under s. 1 (1) (a) of the Law Reform (Miscellaneous Provisions) Act, 1949. The material words of the sub-section are as follows:

"The High Court in England shall have jurisdiction in proceedings by a wife for divorce, notwithstanding that the husband is not domiciled in England, if (a) the wife is resident in England and has been ordinarily resident there for a period of three years immediately preceding the commencement of the proceedings."

The wife was clearly resident in England when she commenced these proceedings and the facts with regard to her residence during the three preceding years are not in doubt. Apart from a fortnight's holiday in Jersey in May, 1948, and one very short visit to the continent, the wife's residence during the material period, and, so far as I know, throughout her life, has been in England, except

when she went to Canada with her husband. She arrived in Canada on Apr. 15, 1949, and left Canada on Sept. 20, 1949. It would, I think, be impossible to say that during these five months she was resident anywhere other than in Canada. During this period she was living in Canada with her husband, and neither she nor her husband had any home of their own in England. It follows that for thirty-one months out of the material thirty-six months immediately preceding the commencement of the proceedings the wife was resident in England, and for the remaining five months she was resident in Canada. If this be so, it is clear that the wife cannot say that she was resident in England for the necessary three years preceding the commencement of the proceedings. Can she contend successfully, that, although in fact resident in Canada for five months out of the material thirty-six, she was none the less "ordinarily resident" throughout the whole period in England. This is not a case in which it can be, or is, contended that the wife had at the same time two physical residences, in either of which it was open to her to reside at will. In fact, on my findings she was, after her husband's determination to settle in Canada crystallised, not only resident but in law domiciled in Canada. On this state of facts, giving to the words "ordinarily resident . . . for a period of three years immediately preceding the commencement of the proceedings" what I conceive to be their ordinary and natural meaning, I should have found it difficult to hold that the petitioner had brought herself within the words of the section. A B C

The matter does not, however, rest there. The meaning of the words "residence" and "ordinarily resident" have frequently had to be considered in tax cases—the period in those cases during which the "residence" or "ordinary residence" was in question being, as a rule, the fiscal year. In *Levene v. Inland Revenue Comrs.* (1), VISCOUNT CAVE, L.C., said ([1928] A.C. 225): D

"It remains to be considered whether during the period in question the appellant 'ordinarily resided' in the United Kingdom for the purposes of s. 46 of [the Income Tax Act, 1918], and I think that there was material upon which the commissioners could answer this question in the affirmative. The suggestion that in order to determine whether a man ordinarily resides in this country you must count the days which he spends here and those which he spends elsewhere, and that it is only if in any year the former are more numerous than the latter that he can be held to be ordinarily resident here, appears to me to be without substance. The expression 'ordinary residence' is found in the Income Tax Act of 1806 and occurs again and again in the later Income Tax Acts, where it is contrasted with usual or occasional or temporary residence; and I think that it connotes residence in a place with some degree of continuity and apart from accidental or temporary absences. So understood the expression differs little in meaning from the word 'residence' as used in the Acts; and I find it difficult to imagine a case in which a man while not resident here is yet ordinarily resident here." E F G

In the same case LORD WARRINGTON OF CLYFFE said (*ibid.*, 232):

"I do not attempt to give any definition of the word 'resident.' In my opinion it has no technical or special meaning for the purposes of the Income Tax Act. 'Ordinarily resident' also seems to me to have no such technical or special meaning. In particular it is in my opinion impossible to restrict its connotation to its duration. A member of this House may well be said to be ordinarily resident in London during the Parliamentary session and in the country during the recess. If it has any definite meaning I should say it means according to the way in which a man's life is usually ordered." H

In view of these passages it is not surprising that it is now well recognised in inland revenue cases that there is no ground for applying a different meaning

to the words "resident" and "ordinarily resident" over a defined period where chargeability to tax is involved. While it does not necessarily follow that the same considerations apply when the words have to be considered in an Act of Parliament governing a totally different subject, I am, none the less, bound to pay, and do pay, respectful attention to the fact that VISCOUNT CAVE, L.C., in dealing with the meaning of words which have been the subject of frequent consideration in tax cases, concluded that the word "ordinary" lends no real added meaning to the word "residence."

In *Macrae v. Macrae* (2), where the question was whether a husband was ordinarily resident in Scotland so as to oust the jurisdiction of justices to entertain a summons for maintenance of his wife, SOMERVELL, L.J., said ([1949] 2 All E.R. 37):

"Where there are indications that the place to which he moves is the place which he intends to make his home for, at any rate, an indefinite period, as from that date he is ordinarily resident at that place."

My own view is that, on the facts of this case, and giving to the words "ordinarily resident" their natural meaning, the wife was, while physically present in Canada, "ordinarily resident" there. She was clearly resident there,

and to find that she was also, during the period of her stay, "ordinarily resident" there involves a conclusion that—on the facts of this particular case, at least—the qualifying adverb "ordinarily" adds nothing to the adjective "resident." Such a conclusion accords with the view taken by the highest tribunal in the country when called on to construe identical and similar words in the revenue Acts, and also accords with the view of the meaning of the words taken by SOMERVELL, L.J., in *Macrae v. Macrae* (2). It follows that, if the wife was ordinarily resident in Canada during her five months' sojourn, then she was not "ordinarily resident" in England during the three years preceding the commencement of the proceedings, and that this court has no jurisdiction to entertain her suit under the provisions of s. 1 (1) (a) of the Law Reform (Miscellaneous Provisions) Act, 1949. Having regard to my finding which I have just stated, it is unnecessary for me to deal with the submissions made on behalf of the husband that the provisions of s. 1 (1) of the Act of 1949 are not retrospective and cannot be invoked by a petitioner who commences proceedings before the Act came into force.

[HIS LORDSHIP then dealt with the wife's plea that the court had jurisdiction to entertain her suit under the Matrimonial Causes Act, 1937, s. 13, because the husband was guilty of constructive desertion immediately before he left this country for Canada on Feb. 2, 1949, and while he still had an English domicile. HIS LORDSHIP held that the evidence could not sustain the plea of constructive desertion, and, therefore, the court could not entertain the suit under s. 13 of the Act of 1937. Accordingly, he dismissed the petition.]

Petition dismissed.

Solicitors: *Lewis & Lewis and Gisborne & Co.* (for the wife); *H. D. B. Eaden* (for the husband).

[Reported by R. HENDRY WHITE, ESQ., Barrister-at-Law.]

Re YOUNG'S WILL TRUSTS. YOUNG AND OTHERS *v.*
YOUNG AND OTHERS.

[CHANCERY DIVISION (Harman, J.), October 25, 1950.]

Administration—Partial intestacy—Hotchpot—“Any beneficial interest acquired by any issue of the deceased”—Share of residue settled, subject to widow's life interest therein, on discretionary trusts for benefit of testator's son, C., or C.'s children during C.'s lifetime, and for C.'s children absolutely after his death—C. surviving testator, but predeceasing widow—Distribution of residue as to which partial intestacy—Need of C.'s personal representative to bring into account share settled by will—Administration of Estates Act, 1925 (c. 23), s. 49 (a). A

By his will, dated Feb. 25, 1938, the testator gave the income of his residuary estate on trust for his widow for life. On the death of the widow, five-sevenths of the residue were to be divided in equal shares between five of his children. The testator then settled a seventh share of the residue, subject to the widow's life interest therein, on discretionary trusts for the benefit of his son, C., or of C.'s children during the lifetime of C., and after C.'s death that seventh share was to be held on trust for C.'s children in equal shares. Another seventh share of the residue was settled on similar trusts for the benefit of the testator's son, H., and his children, but H. had died without issue on May 20, 1936. The testator died on Jan. 9, 1939, and C. died on Jan. 26, 1939, leaving two children who attained a vested interest in the one-seventh share settled on C. and his children. The testator's widow died in July, 1948. The question was how the seventh share of the residue, as to which, as from his widow's death, the testator had died intestate, was to be divided among the testator's next of kin. B

HELD: on the true construction of the Administration of Estates Act, 1925, s. 49 (a), the word “issue” was there used to mean “children or remoter issue,” and any beneficial interest which a child and his children together acquired under the will was a beneficial interest acquired by the “issue of the deceased” within the meaning of the section; therefore, on the distribution of one-seventh share of the residue as to which, as from the widow's death, the testator had died intestate, C.'s personal representative was liable to bring into account the capital of the one-seventh share settled by the will on C. and his children. C

[AS TO PARTIAL INTESTACY, see HALSBURY, Hailsham Edn., Vol. 10, pp. 589, 590, paras. 850, 851.] D

Cases referred to:

- (1) *Weyland v. Weyland*, (1742), 2 Atk. 632; 26 E.R. 777; 20 Digest 494, 2237. E
- (2) *Re Reeve*, [1935] Ch. 110; 104 L.J.Ch. 101; 152 L.T. 254; Digest Supp. F

ADJOURNED SUMMONS to determine questions arising in regard to the distribution of a one-seventh share of the testator's residuary estate as to which, as from and after the death of his widow, he had died intestate. G

By his will the testator had settled another one-seventh share of his residue, subject to the widow's life interest therein, on discretionary trusts for the benefit of his son, Charles, or Charles' children during Charles' life, and to be held on trust for Charles' children after Charles' death. Charles survived the testator by less than three weeks and predeceased the widow, leaving two children who took a vested interest in the share settled on him and his children. The question was whether Charles' estate was entitled, without bringing anything into hotchpot, to a share of the one-seventh share of residue as to which, as from the widow's death, the testator had died intestate, or whether Charles' legal personal representative was liable to bring into account the capital of H

the one-seventh share which had been settled on Charles and his children. The facts and the relevant provisions of the will appear in the judgment.

Winterbotham for the plaintiffs, trustees under the will.

Grove for the first defendant, legal personal representative of Charles.

Robert S. Lazarus for the second defendant, a daughter of the testator.

A *Harold Lightman* for the third and fourth defendants, legal personal representatives of a son of the testator.

B **HARMAN, J.:** The testator, George Robert Young, had seven children, of whom six survived, and one predeceased, him. Of the six who survived, three are Wilfrid George Young, Annie Amelia Moon, and Ethel Margaret Wood, who are the plaintiffs to this summons, being the present trustees of the will. The fourth was Charles Albert Young, whose widow and personal representative, is the first defendant. He died on Jan. 26, 1939, less than three weeks after the death of the testator, who died on Jan. 9, 1939. The fifth child is the defendant, Florence Mary Kay. The third and fourth defendants are the personal representatives of the sixth child, Ernest Robert Young, who survived the testator and died on Feb. 23, 1939. The seventh child, Herbert Henry Young, died *sine prole* on May 20, 1936, almost two years before the C testator made his will. It is a remarkable feature of the will that it makes provision for Herbert and his children, although one would have thought that it was within the testator's knowledge that he had already been dead nearly two years without leaving children.

D By his will, which was made on Feb. 25, 1938, the testator gave the income of his residuary estate on trust for his widow for life, or until her re-marriage, and, on the death of the widow on July 21, 1948, the estate became distributable. The will is plain. On the widow's death, the trust funds were to be divided "as to five-sevenths thereof" in equal shares between his children, Ernest, Wilfrid, Annie, Ethel, and Florence. There was a provision for substitution (which did not take effect) whereby the children of a child who had died during his lifetime were to take the parent's share. The trustees were E then directed to hold a further seventh share on trust, at their absolute discretion, to pay or apply the whole or part of the income or part of the capital thereof for the maintenance or support of Charles or any child or children of his during his life, or to keep up a home for him or them, or to make any other like application of such income or capital, and, if, during the life of Charles, the income of this one-seventh share was not applied by the trustees F for the benefit of Charles or his children under the discretionary power, the unapplied income was, from time to time, to be paid or applied to such other of the testator's child or children in such share or shares as the trustees should think fit. After the death of Charles, the trustees were to stand possessed

G " . . . of the said share or so much thereof as shall remain unapplied and the income thereof upon trust for the child or children of my said son and if more than one equally between them who shall attain the age of twenty-one years . . . "

Charles died leaving two children who, having attained the age of twenty-one, inherited his share on Jan. 26, 1939, subject to the life interest of the testator's widow.

H The testator then bequeathed:

" . . . the remaining one-seventh share of and in my trust funds and the investments for the time being representing the same to my trustees upon similar trusts for the benefit of my son Herbert Henry Young and his children as are hereinbefore provided and declared respecting the child or children of my said son Charles Albert Young."

As Herbert Henry had died without issue before the date of the will, the testator had failed to dispose effectively of one-seventh of his residuary estate except

for the widow's life interest therein. She having died, her estate gets £1,000 and interest on that sum.

The question before me is what is to happen to the remainder of that one-seventh. Under the old law there would not have been any difficulty. It would have been divided among the next-of-kin because it was decided by numerous authorities that the Statute of Distribution, 1670, s. 3, which involved the bringing in of portions, as they were called, on an intestacy, did not apply to a partial intestacy. The Administration of Estates Act, 1925, however, seeking, no doubt, to avoid some anomalies produced by the existing law, has, so far as I can see, produced a whole new crop of anomalies.

The Administration of Estates Act, 1925, s. 47 (1) (iii), provides:

"Where the property held on the statutory trusts for issue is divisible into shares, then any money or property which, by way of advancement or on the marriage of a child of the intestate, has been paid to such child by the intestate or settled by the intestate for the benefit of such child (including any life or less interest and including property covenanted to be paid or settled) shall, subject to any contrary intention expressed or appearing from the circumstances of the case, be taken as being so paid or settled in or towards satisfaction of the share of such child or the share which such child would have taken if living at the death of the intestate, and shall be brought into account, at a valuation . . ."

That applies, as it seems to me, to money or property either advanced direct to a child or settled on him. I should have thought that, in either event, it was the capital sum so dealt with which was to be brought into account, *i.e.*, either a sum given to a child or provided for him to set him up in life (a direct application for his benefit), or a sum provided for his marriage settlement. That is in line with the old cases, *e.g.*, *Weyland v. Weyland* (1), which decided that money settled on a son by way of marriage settlement was to be brought into hotchpot before the son could be entitled to a share of the intestate's personal estate. In *Re Reeve* (2), CLAUSON, J., decided ([1935] 1 Ch. 119) that this was also the case under s. 47 (1) (iii) of the Act of 1925.

So far, it is not difficult to understand what is meant, but s. 49 of the Act of 1925, which is intended, according to the side-note, to apply the same principle to cases of partial intestacy—in other words, to remedy what was thought to be a defect in the Statute of Distribution, 1670—provides:

"Where any person dies leaving a will effectively disposing of part of his property, this Part of this Act shall have effect as respects the part of his property not so disposed of subject to the provisions contained in the will and subject to the following modifications: (a) The requirements as to bringing property into account shall apply to any beneficial interests acquired by any issue of the deceased under the will of the deceased, but not to beneficial interests so acquired by any other persons . . ."

I do not think that there is anything in the will in this case which deals with this matter. It is contended by counsel for Charles' personal representative that only a person who has acquired a beneficial interest under the will has to bring anything into account under s. 49 (a), and, therefore, Charles, who, as one of the testator's children, is entitled to a share of the part of the residue which was not disposed of after the widow's death, has nothing to bring into account because, in the events which happened, not he, but his children, took the one-seventh share which was settled on him and his children, and he himself never had more than a very limited interest in the income of that share at the discretion of the trustees—or, at the most, all that needs to be brought into hotchpot by Charles' estate is the interest which he took, *viz.*, his life interest, which must be valued, and would, I suppose, be of very little value. The result would be that the whole fund would go to Charles's estate. The contrary

view is that s. 49 (a) of the Act of 1925 is meant to produce, as it were, a stirpital division which is as equal as possible, and that is why the word "issue" is used here, although the word "children" is used in s. 47 (1) (iii). Any member of the family belonging to a certain branch must bring in everything that has been taken or acquired under the will by that branch. Therefore, in taking his share under the intestacy, Charles should bring into account the one-seventh share in which his children have taken an absolute interest under the will.

- A On the whole, I prefer the view last stated. It seems to me that "issue" in the words, "any beneficial interests acquired by any issue of the deceased," must mean children or remoter issue, and, therefore, that what is to be brought into account is the beneficial interest which the issue acquired. Who are the issue in question? The father and the children,
- B the two generations between them, are the issue, and it seems to me, therefore, that anything that the father and children together acquired under the will is a beneficial interest acquired by the issue. I would add that, although there was a trust, in the event of the whole or part of the income of Charles' share not being applied during Charles' lifetime for the benefit of him or his children, to apply it to other members of the family, that trust never arose and I think it should be ignored. I think that, in effect, Charles and his children
- C between them had the one-seventh share which was settled on them by the testator, and that is what, in my judgment, ought to be brought into account. Accordingly, I declare that, in the events which have happened and on the distribution of the one-seventh share of the testator's residue as to which, as from the death of the widow, he died intestate, the first defendant, as personal representative of Charles, is liable to bring into account the capital of the one-seventh share of the residuary estate settled by the will of the testator after the death of his widow on Charles and his children.
- D

Declaration accordingly. Costs of all parties, as between solicitor and client, to be paid out of the one-seventh share of residue as to which the testator died intestate.

- E Solicitors: *Butt & Bowyer*, agents for *J. F. Latimer & Hinks*, Darlington (for the plaintiffs and the second defendant); *Torr & Co.*, agents for *A. R. Beavon & Littleford*, Wolverhampton (for the first defendant); *Wrinch & Fisher*, agents for *Freeman, Son & Curry*, Darlington (for the third and fourth defendants).

[Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.]

F

R. v. LONDON (COUNTY) QUARTER SESSIONS. *Ex parte* BOWES.

G

[KING'S BENCH DIVISION (Lord Goddard, C.J., Morris and Parker, JJ.), October 24, 25, 27, 1950.]

Customs—Illegal export—Condemnation of goods by magistrate—Claimants ordered to pay five guineas costs—Appeal by claimants to quarter sessions against order of condemnation—Competency—Metropolitan Police Courts Act, 1839 (c. 71), s. 50—Customs Consolidation Act, 1876 (c. 36), s. 226.

H

Diamond brokers took to the General Post Office, London, parcels of diamonds addressed to the International Bank of Tangier, a "prescribed territory" within s. 23 (1) of the Exchange Control Act, 1947. The parcels were seized by a Customs officer under the Customs Consolidation Act, 1876, s. 177, as goods the export of which was prohibited under s. 23 (1). Claims to the goods under s. 207 of the Act of 1876 were made by the

diamond brokers, by the International Bank of Tangier as consignees, and by two American companies claiming to be purchasers of the diamonds. The brokers were convicted by a metropolitan magistrate of having brought the goods to a place for the purpose of being exported. The magistrate also considered the claims of the several claimants under s. 226 of the Act of 1876, adjudged the diamonds to be liable to be forfeited, condemned them, and awarded the Commissioners of Customs and Excise five guineas costs. On appeal, quarter sessions quashed the conviction of the brokers, and, holding that they had jurisdiction to entertain the appeals of the claimants against the order of condemnation, allowed those appeals.

HELD: the five guineas costs ordered to be paid was not a "sum or penalty adjudged to be paid" of "more than £3" within the meaning of the Metropolitan Police Courts Act, 1839, s. 50, and, therefore, quarter sessions had no jurisdiction to entertain the claimants' appeals against the order of condemnation.

R. v. Warwickshire JJ. (1856) (6 E. & B. 837), *applied.*

Cockhill v. Davies ([1943] 1 All E.R. 638), *distinguished.*

[AS TO THE RIGHT OF APPEAL FROM COURTS OF SUMMARY JURISDICTION TO QUARTER SESSIONS, see HALSBURY, Hailsham Edn., Vol. 21, pp. 705, 706, paras. 1225-1227; and FOR CASES, see DIGEST, Vol. 33, pp. 390-407, Nos. 1011-1168, Digest Supp., and 2nd Digest Supp.]

Cases referred to:

- (1) *Cockhill v. Davies*, [1943] 1 All E.R. 638; [1943] K.B. 508; 112 L.J.K.B. 441; 169 L.T. 78; 107 J.P. 130; 2nd Digest Supp.
- (2) *R. v. Warwickshire JJ.*, (1856), 6 E. & B. 837; 25 L.J.M.C. 119; 27 L.T.O.S. 235; 20 J.P. 693; 119 E.R. 1075; 2 Digest 290, 608.
- (3) *Mittelman v. Denman*, [1920] 1 K.B. 519; 89 L.J.K.B. 310; 122 L.T. 426; 84 J.P. 39; 33 Digest 391, 1023.

MOTION for *certiorari*.

The applicants were the Commissioners of Customs and Excise, and the respondents were claimants to three parcels of diamonds which had been condemned as forfeited by a metropolitan magistrate under the Customs Consolidation Act, 1876, s. 226, as applied by the Exchange Control Act, 1947, sched. V, Part III, para. 1 (1). The magistrate awarded the applicants five guineas costs against the respondent claimants. The appeal committee of London Quarter Sessions held that they had jurisdiction to entertain appeals against the order of condemnation and allowed the appeals. For the applicants it was contended that there was no right of appeal against the orders since they were not convictions and so were not within the terms of any general enactment conferring a right of appeal. For the claimants it was contended that the five guineas costs was a "sum or penalty adjudged to be paid" exceeding £3 and that, therefore, they were entitled to appeal under the Metropolitan Police Courts Act, 1839, s. 50. The facts appear in the judgment of the court.

Roberts, K.C., Howard, K.C., and W. H. Hughes for the Commissioners of Customs and Excise.

Levy, K.C., and B. M. Goodman for I. Hennig & Co., Ltd.

Sir Godfrey Russell Vick, K.C., and T. G. Roche for A. G. Parser Inc., the International Bank, Tangier, and Harry Winston Inc., the claimants.

Cur. adv. vult.

Oct. 27. **LORD GODDARD, C.J.**, read the following judgment of the court. In this case the Commissioners of Customs move for an order of *certiorari* to bring up and quash certain orders of the appeal committee of the County of London Sessions whereby they allowed appeals from a metropolitan magistrate who made orders condemning three parcels of diamonds as forfeited under s. 177 of the Customs Consolidation Act, 1876, as applied by the Exchange

Control Act, 1947, sched. V, Part III. The history of the matter, so far as it is necessary to state it, is that Hennig & Co., Ltd., who are diamond brokers in this country, took to the General Post Office the parcels of diamonds in question. The parcels were addressed to the International Bank of Tangier. The diamonds were seized at the post office by an officer of Customs on the ground that, being goods the export of which was forbidden, they were brought to a place for the purpose of export.

- A Section 177 of the Customs Consolidation Act, 1876, so far as is material, provides that, if any goods which are prohibited to be exported shall be brought to any quay, wharf, or other place in the United Kingdom to be put on board any ship—which, by a subsequent amendment, includes an aircraft—for the purpose of being exported, all such goods shall be forfeited. Section 207 provides that whenever any seizure shall be made, unless in the possession or in the presence of the offender, master, or owner as forfeited under the Customs Acts, notice in writing of such seizure and of the grounds thereof shall be given. The section goes on to provide that, if any person gives notice that he claims or intends to claim the goods, proceedings shall be taken for the forfeiture and condemnation thereof either by information filed in the High Court or exhibited before any justice of the peace. By s. 226 it is provided that the justice shall
- C summon the owner of the goods to appear, and, on his appearance, due service of such summons being proved, such justice may proceed to the examination of the matter, and, on proof that the goods are liable to forfeiture under the Customs Acts, may condemn the same.

- So far as the provisions of this Act are concerned, it will be observed that the sections to which we have referred create no offence, and that condemnation
- D and forfeiture is decreed quite independently of any person being convicted of any offence under the Act. By s. 23 of the Exchange Control Act, 1947, the export of goods of any class from the United Kingdom is prohibited subject to certain exceptions or conditions which do not exist in this case, and by sched. V, Part III, para. 1, it is provided that the enactments relating to Customs shall apply in relation to anything prohibited to be imported or
- E exported by any of the provisions of Part IV of the Act. It is further provided by para. 3 of Part III of the schedule that, if anything prohibited to be exported by any provision of the Act is exported or brought to a quay or other place for the purpose of being exported, the exporter or his agent shall be liable to the same penalty as that to which a person is liable for an offence under s. 186 of the Customs Consolidation Act, 1876. The bringing of prohibited goods to
- F a place for the purpose of export is thus for the first time made an offence.

- Notice of the seizure was given, with the result that claims to the goods were made by Hennig & Co. and also by A. G. Parser Incorporated of New York and the International Bank of Tangier, and in one case by Harry Winston Incorporated also of New York, the two New York companies claiming to be the purchasers from Hennig & Co. of the goods, and the International Bank
- G of Tangier claiming as the consignees. Hennig & Co. were summoned as the exporters who had brought the goods to a place for the purpose of being exported, and of this offence they were convicted by the magistrate. At the same time he had before him the claims of the various claimants in the forfeiture proceedings, and he found the forfeiture duly proved and adjudged the goods to be forfeited, condemned them accordingly, and awarded to the Commissioners of
- H Customs five guineas costs. Hennig & Co. appealed against their conviction to the London Sessions and all the claimants appealed against the order of forfeiture and condemnation. The appeal committee quashed the conviction of Hennig & Co., and on the appeal by the claimants against the order of forfeiture and condemnation they held they had jurisdiction to entertain the appeal, and further held that, as they had allowed the appeal of Hennig & Co., it followed automatically that the orders for forfeiture fell with the conviction, and they, accordingly, allowed the appeals.

This order of *certiorari* is sought on the ground that the appeal committee had no jurisdiction to entertain an appeal against forfeiture. It is a commonplace of the law that no appeal lies against the order of any court unless one is given by statute. It is not contended here that the Summary Jurisdiction Acts or any of the Acts extending the right of appeal to quarter sessions conferred on the claimants any right of appeal. Orders of condemnation are not convictions. The orders of condemnation do not depend on conviction, but, it is contended, the claimants, having been ordered to pay five guineas costs, thereby acquired a right of appeal under s. 50 of the Metropolitan Police Courts Act, 1839. That section provides that in every case of summary order or conviction before any of the said magistrates (*i.e.*, magistrates of the metropolitan police courts) in which the sum or penalty adjudged to be paid shall be more than £3 or in which the penalty adjudged shall be imprisonment for any time more than one calendar month, any person who shall think himself aggrieved by the order or conviction may appeal to quarter sessions. It is contended for the claimants that, as they have been ordered to pay five guineas costs, this gives them a right of appeal, although no such right is to be found in the Customs Consolidation Act, 1876, or in the Summary Jurisdiction Acts in such a case. By s. 35 of the Inland Revenue Regulation Act, 1890, which replaces s. 209 of the Customs Consolidation Act, 1876, provision is made whereby the commissioners may in their discretion mitigate any fine or penalty incurred under the Acts and compound or restore the property seized and condemned, and that seems to be the only method provided in the Customs Acts for any review of proceedings for forfeiture which may successfully be taken before justices. It is admitted that, if there had been no order for costs, or if the order for costs had been for a sum not exceeding £3, no appeal would lie, and the question, therefore, for decision is whether the words in s. 50 "in which the sum or penalty adjudged to be paid" include a sum ordered to be paid for costs.

A perusal of the Act shows that it gives power to metropolitan magistrates not only to convict of indictable and other offences, but also in certain circumstances to order sums of money to be paid. For instance, under s. 38 there is power to order compensation for wilful damage by tenants. Under s. 28 power is given in the case where goods have been unlawfully pawned, pledged or exchanged to order the goods to be delivered up to the owner without compensation or with such compensation as the magistrate may think fit. Under s. 32 a magistrate may award a party informed against a sum of not more than £5 if the magistrate is of opinion that the information was frivolous. Section 31 enacts that it shall be lawful for any magistrate who shall hear and determine any complaint to award such costs as to him shall seem meet to be paid to or by either of the parties to the said complaint. There is no question here of any penalty having been adjudged, and we find it impossible to hold that the words "the sum adjudged to be paid" were intended to apply to costs. We think they clearly refer to cases in which the Act enables magistrates to make orders for sums of money such as those to which we have just referred. They would also, no doubt, include duties of Customs which later Acts have made recoverable summarily.

We have, however, been referred to certain cases and reliance is more especially placed on a decision of this court in *Cockhill v. Davies* (1). In that case a metropolitan magistrate adjudged a recognisance to be forfeited and ordered the defendant to pay the sum of £750, the amount thereof. The court held that, although no appeal lay under the Summary Jurisdiction Acts, an appeal would lie under s. 50 of the Act of 1839. VISCOUNT CALDECOTE, C.J., in giving judgment said ([1943] 1 All E.R. 640) there was there a summary order and that the words "summary order" were wide enough to include a direction by a magistrate that a recognisance be forfeited and the amount due

under it be paid. We cannot, however, hold that case to be an authority for the proposition that s. 50 includes an order for the payment of costs. The proceedings in that case were to obtain an order for a sum of money, namely, the amount of the recognisance, and the order of the court was that a sum of £750 should be paid. No question was before the court in that case which in any way related to costs.

A The case most nearly analogous to the present is *R. v. Warwickshire JJ.* (2) —a case under the Cruelty to Animals Act, 1849. Section 14 provides that a party convicted shall pay such penalty, damage or compensation as the justice shall adjudge, order or award, together with the costs of conviction to be settled by such justices. Section 25 gives an appeal to quarter sessions in all cases where the sum adjudged to be paid on any conviction shall exceed £2. B The justices had convicted the applicant for the rule and fined him 2s. 6d. as a penalty and ordered him to pay £2 7s. 6d. for costs, and it was contended that, as the total amount which the defendant had to pay, was, accordingly, £2 10s. 0d., he had the right of appeal. The court, however, held that the sum adjudged to be paid in s. 25 related to the sum which the party was to pay by way of penalty or compensation and not to the costs, and said that they thought C the meaning of the Act was that where the subject-matter was of a slight nature so that the penalty or compensation was under £2 the matter was to rest where it was and was not to be removed into another court. CROMPTON, J., went on to say (6 E. & B. 842):

D “The provision for an appeal, in every case where there is imprisonment, is in favour of this view. We think that the right to appeal is to depend on the comparative gravity of the offence, and not on the amount of the costs, which do not depend on the nature of the offence, but vary according to the distance of the residence of the parties, the number of witnesses . . .”

E It is true that the court pointed out that s. 14 of itself obliged the defendant to pay the costs and said that the justices did not adjudge or award the costs, but only acted as a taxing master in fixing the amount. In that respect, no doubt, the Act we are now considering differs from the one in question in that case, because under s. 31 of the Metropolitan Police Courts Act, 1839, it is a matter for the justice to decide whether he awards costs or not, and his award of costs is, therefore, an adjudication. In our opinion, however, that is not the real *ratio decidendi* of the case. We think that what underlies the judgment F is that the existence of the appeal depended on the amount of the money ordered to be paid as a penalty independent of the question of costs. As the court in *R. v. Warwickshire JJ.* (2) took the view that the meaning of the Act was that no appeal lay where the subject-matter was so trivial that the penalty or compensation was not more than £2, so here we think it is clear the intention of this Act is not to give an appeal where the penalty or compensation, etc., does not exceed £3.

G Counsel for the claimant purchasers and consignees contended that the order is one and entire and that, as it did require their clients to pay a sum exceeding £3, that gave them a right of appeal against the order as a whole. As, in our opinion, costs are outside the purview of the section altogether, we do not think that this contention avails them. The fact is that there is no appeal and an award of costs does not give one. To decide otherwise would H lead to the absurd result that an appeal in respect of condemnation of goods worth over £100,000 would depend on whether the magistrate gave costs to the amount of £3 or more. Another result would be that a right of appeal would be given to a person whose goods were the subject of an order of condemnation in a metropolitan police court and nowhere else. It is true that that same anomaly was noticed in *Cockhill v. Davies* (1), and in *Mittellmann v. Denman* (3), where the court said that, though there might be an anomaly, it was a matter for the legislature to correct and not the courts. At the same

time, such an anomalous result should be avoided unless the court feels constrained by the words of the Act to come to such a result.

We cannot part with this case without expressing some regret that in a matter of such magnitude the commissioners elected to go before a court of summary jurisdiction when the proceedings might have been brought in the High Court. We would call attention to the fact that citizens of another country were concerned in this case, and we cannot but suppose that it is a matter of considerable surprise and grievance to them to find that a case in which so much of their money was involved was brought before a police court, with no right of appeal, and that there was no power for them to insist on the matter being heard by a judge of the High Court. Had proceedings been taken by way of information, the matter could certainly have gone to the Court of Appeal, and, with leave, to the House of Lords. It should be borne in mind that conditions in 1876 were very different from those which prevail to-day, more especially since the provisions of the Customs Consolidation Act, 1876, have been applied to offences and proceedings under the Exchange Control Act, 1947. It does seem to us desirable that where the goods are claimed by persons against whom no proceedings are taken for a Customs offence, and, more especially, where those persons are foreigners, proceedings should be taken for condemnation in the High Court unless, indeed, the value of the goods is so low that proceedings in the High Court would not ordinarily be considered appropriate. There will be an order for *certiorari* and the orders of the appeal committee will be brought up and quashed.

Order for certiorari granted. No order as to costs.

Solicitors: *Solicitor for Customs and Excise* (for the Commissioners of Customs and Excise); *William Easton & Sons* (for I. Hennig & Co., Ltd.); *William Charles Crocker* (for the claimant purchasers and consignees).

[Reported by F. A. AMIES, Esq., Barrister-at-Law].

BARRATT v. GOUGH-THOMAS.

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Asquith and Jenkins, L.JJ.), October 4, 5, 6, 24, 1950.]

Solicitor—Lien—Title deed and mortgage deed—Solicitor acting for mortgagor and mortgagee—Deeds in custody of solicitor—Death of mortgagee—Solicitor co-executor—Transfer of mortgage to solicitor—Redemption—Right of solicitor to retain deeds.

A solicitor can claim a lien on title deeds in his custody against a person demanding their delivery if, but not unless, at the date of such demand his possession of them is referable to the relationship of solicitor and client between himself and the claimant. If this condition is not satisfied, the solicitor cannot make good his lien by showing that he originally received the deeds from the claimant as his client and subsequently retained physical possession of them down to some past date in the right and on behalf of the claimant, but that thereafter and at the date of the demand he retains them in the right and on behalf of some other person through whom the claimant now makes title.

In 1919 the plaintiff purchased certain freehold property, and the documents of title were left by him in the custody of the defendant as his solicitor. Later in the same year the plaintiff mortgaged the property to R. The defendant acted as solicitor for both parties, and, on completion of the mortgage, continued to retain the original documents of title together

with the mortgage deed, and these documents of title were never removed from his custody. R. died in February, 1941, and in the following year his will was proved by the defendant and others, executors thereby appointed, and the documents were thenceforth held by the defendant on behalf of himself and his co-executors as joint mortgagees. On June 12, 1943, the plaintiff served on the defendant and his co-executors notice to redeem the mortgage. In redemption proceedings which ensued the defendant claimed to be entitled to a lien on the deeds of the property in respect of solicitor's costs incurred by the plaintiff both before and after the original deposit of the deeds in 1919, and asserted a right to withhold the deeds from the plaintiff on the redemption date unless, in addition to the payment of the mortgage debt and interest, the amount due to him for costs was paid. In January, 1946, the defendant took a transfer of the mortgage from the mortgagee's executors to himself alone and thenceforth held the documents in question as sole mortgagee, the redemption proceedings, accordingly, being stayed against the other executors. On Feb. 3, 1948, an order for redemption was made which left open the question of the defendant's claim to a lien, and, in February, 1949, the defendant applied by summons in the redemption proceedings, under the liberty to apply reserved by the order, for a declaration as to his right to a lien on the documents of title.

HELD: (i) the defendant's possession of the mortgage deed and the right to demand it from him which the plaintiff now had as a redeeming mortgagor were referable solely to the relationship of mortgagee and mortgagor, and not to that of solicitor and client, and, therefore, the defendant was not entitled to any lien against the plaintiff so far as the mortgage deed was concerned.

Sheffield v. Eden (1878) (10 Ch.D. 291), *applied*.

(ii) when a client for whom a solicitor held title deeds mortgaged the property comprised in them to another client of the same solicitor, then, even though the deeds before and after the mortgage remained continuously in the solicitor's possession, the solicitor held them after completion of the mortgage exclusively in the right and on behalf of the mortgagee. By this change in the character of the solicitor's possession of the deeds the solicitor's lien against the mortgagor was destroyed, since the conditions necessary to support it, namely, the mortgagor's right or title to the documents, had ceased to exist. Consequently, the defendant was not entitled to any lien on the documents.

Barratt v. Gough-Thomas ([1945] 2 All E.R. 414) and *Re Nicholson, Ex p. Quinn* (1883) (53 L.J.Ch. 302), *approved*.

Re Messenger, Ex p. Calvert (1876) (3 Ch.D. 317) and *Colmer v. Ede* (1870) (40 L.J.Ch. 185), *overruled*.

Drummond v. Muirhead & Guthrie Smith (1900) (2 F. (Ct. of Sess.) 585), *not followed*.

[AS TO SOLICITOR'S RETAINING LIEN, see HALSBURY, Hailsham Edn., Vol. 31, pp. 238-247, paras. 265-270; and FOR CASES, see DIGEST, Vol. 42, pp. 259-273, Nos. 2925-3065.]

Cases referred to:

- (1) *Sheffield v. Eden*, (1878), 10 Ch.D. 291; 40 L.T. 283; 42 Digest 263, 2980.
- (2) *Blunden v. Desart*, (1842), 2 Dr. & War. 405; 42 Digest 269, f.
- (3) *Pelly v. Wathen*, (1849), 7 Hare, 351; 18 L.J.Ch. 281; 13 L.T.O.S. 43; 68 E.R. 144; *affd.*, (1851), 1 De G.M. & G. 16; 21 L.J.Ch. 105; 18 L.T.O.S. 129; 42 E.R. 457; 42 Digest 266, 3004.
- (4) *Re Llewellyn*, [1891] 3 Ch. 145; 60 L.J.Ch. 732; 65 L.T. 249; 42 Digest 268, 3021.
- (5) *Colmer v. Ede*, (1870), 40 L.J.Ch. 185; 23 L.T. 884; 42 Digest 260, 2944.

- (6) *Re Messenger, Ex p. Calvert*, (1876), 3 Ch.D. 317; 45 L.J. Bey. 134; 34 L.T. 920; 42 Digest 268, 3023.
- (7) *Re Nicholson, Ex p. Quinn*, (1883), 53 L.J.Ch. 302; 49 L.T. 811; 42 Digest 269, 3027.
- (8) *Re Walker, Meredith v. Walker*, (1893), 68 L.T. 517; 42 Digest 263, 2981.
- (9) *Re Mosely*, (1867), 15 W.R. 975; 42 Digest 268, 3020.
- (10) *Re Snell*, (1877), 6 Ch.D. 105; 46 L.J.Ch. 627; 37 L.T. 350; 42 Digest 268, 3024.
- (11) *Ex p. Fuller, Re Long*, (1881), 16 Ch.D. 617; 50 L.J.Ch. 448; 44 L.T. 63; 42 Digest 261, 2957.
- (12) *Graham v. Seal*, (1918), 88 L.J.Ch. 31; 119 L.T. 526; 35 Digest 609, 3459.
- (13) *Re Harvey's Estate*, (1886), 17 L.R.Ir. 65; 42 Digest 272, 3056i.
- (14) *Re Stannard's Estate*, [1897] 1 I.R. 415; 42 Digest 269, 3032ii.
- (15) *Drummond v. Muirhead & Guthrie Smith*, (1900), 2 F. (Ct. of Sess.) 585; 37 Sc.L.R. 433; 7 S.L.T. 401; 42 Digest 268, 3023iii.
- (16) *Barratt v. Gough-Thomas*, [1945] 2 All E.R. 414, 650; 174 L.T. 329; 2nd Digest Supp.
- (17) *Re Mason & Taylor*, (1878), 10 Ch.D. 729; 48 L.J.Ch. 193; 42 Digest 268, 3025.

APPEAL by the defendant from an order of ROMER, J., dated Mar. 21, 1950, whereby he held that the defendant, a solicitor, was not entitled to a lien on the documents of title of certain property belonging to the plaintiff.

The property in question was purchased by the plaintiff in June, 1919, and the documents of title were left in the custody of the defendant as his solicitor. In December, 1919, the plaintiff mortgaged the property to one Reece to secure a sum of £5,000. The defendant acted for both parties in this matter, and the documents of title were never removed from his custody. In February, 1941, Reece died and by his will appointed the defendant and three others as executors. In March, 1944, having previously given six months' notice to pay off the mortgage, the plaintiff instituted redemption proceedings against the executors, and these proceedings were adjourned into court for argument on the defendant's claim to a lien on the documents of title held by him. VAISEY, J., held ([1945] 2 All E.R. 414) that since the defendant had, by operation of law, become joint owner, subject to redemption, of the mortgaged property and the title deeds, the deeds must be regarded as having passed out of his custody as solicitor, and, since redemption involved the return, by the mortgagee, not only of the estate, but also of the *indicia* of the title to the estate, he was not entitled to any lien on the documents. The Court of Appeal reversed this order (*ibid.*, 650) on the ground that it was premature. In January, 1946, the defendant took a transfer of the mortgage from the mortgagee's executors to himself alone and thenceforth held the documents in question as sole mortgagee. The redemption proceedings were, consequently, stayed as against the other three executors. In February, 1948, a redemption order was made. The question of the defendant's claim to a lien was expressly left open in the order, with liberty to apply. In February, 1949, the defendant applied by summons in the redemption proceedings for, *inter alia*, a declaration as to his lien on the documents of title. ROMER, J., following the decision of VAISEY, J., held that the defendant was not entitled to the lien claimed. On the present appeal against this decision, it was contended for the defendant that, having received the deeds in his professional capacity, the defendant became entitled to a lien over them so long as they remained in his physical possession, and that a lien so acquired continued to be available against any claim to possession of the documents regardless of any intermediate change in the ownership of the documents or in the identity of the person for whom the defendant held them.

Cross, K.C., and *D. H. Cohen* for the defendant.

Gray, K.C., and *J. A. Brightman* for the plaintiff.

Cur. adv. vult.

Oct. 24. The following judgments were read.

SIR RAYMOND EVERSHED, M.R. : On June 13, 1919, the sale of certain freehold property at Oswestry to the plaintiff was completed, and the documents of title relating to such property were received by the defendant, the present appellant, as the solicitor for the plaintiff. Six months later, on Dec. 11, 1919, a first mortgage of the same property to a Mr. Reece was completed by the plaintiff. The defendant was also Mr. Reece's solicitor and on completion of the mortgage he continued to retain the original documents of title together with the mortgage and he has, in fact, continued to retain them ever since. No special agreement was made at any time between the plaintiff and the defendant in regard to the defendant's rights to retain the documents against the plaintiff. In 1941 Mr. Reece died. The defendant and three others became his personal representatives. On June 12, 1943, the plaintiff served on the defendant and the other co-executors, as successors in title to Mr. Reece, notice to redeem the mortgage on Dec. 14 following. At that time the defendant had ceased to act as the plaintiff's solicitor. On Dec. 2, 1943, the plaintiff's then and present solicitors asked for a statement of account showing the sum which would be due for principal and interest on the redemption date. In reply, on Dec. 4 the defendant claimed to be entitled to a lien on the deeds of the property in respect of solicitor's costs incurred by the plaintiff both before and after the original deposit of the deeds in 1919 and asserted a right to withhold the deeds from the plaintiff on the redemption date unless not only the mortgage debt and interest were paid to him and his co-executors, but there was also paid by the plaintiff the amount due to the defendant for costs. It is the validity of this claim for a lien which now, nearly seven years later, comes to this court for determination and which for five years held up the redemption of the mortgage.

The first step in the litigation was the issue by the plaintiff in March, 1944, of an originating summons for redemption of the mortgage in which proceedings he joined the defendant and, later, his co-executors. It was thought possible and convenient to try the question of the validity of the lien as an issue in the action, and the originating summons was, accordingly, adjourned into court and came on for hearing on July 10, 1945, before VAISEY, J. The learned judge held that on the redemption of the mortgage, *i.e.*, on payment by the plaintiff of the sum due for principal and interest, the plaintiff was entitled to the delivery up of the documents of title relating to the property and that the defendant was not entitled to any lien in respect of such documents against the plaintiff. On an appeal by the defendant to this court the order of VAISEY, J., was discharged. This court expressed no view on the correctness, as a matter of principle, of VAISEY, J.'s, judgment, but was of opinion that the matter could not properly then be tried as part of the redemption proceedings, but before actual redemption. It was pointed out in the course of his judgment by LORD GREENE, M.R., not only that the interests of the defendant as solicitor were liable to be in conflict with the interests of his co-executors and himself as mortgagees, but also that at any time prior to actual redemption the defendant might have become bound to hand over the deeds to his co-executors or as they might direct so that at the critical point of time the deeds would not be in the defendant's possession and no question of a lien could then arise.

On Jan. 28, 1946, the defendant took a transfer to himself alone of the mortgage so that he then became sole mortgagee and all possible conflict of interest between himself and his co-executors was resolved. On Feb. 3, 1948, a redemption order was made and at the same time all further proceedings in the action against the second, third and fourth executors were stayed. It is unnecessary to refer at length to the terms of this order. Its effect was (or was treated by the parties as being) that the amount of interest in respect of the mortgage since Dec. 14, 1943 (being the date of expiry of the plaintiff's original notice to redeem) and the amount of certain costs of the defendant were to be separately certified,

but on the plaintiff paying to the defendant the sum certified to be due for principal and interest on the mortgage up to Dec. 14, 1943, and paying into court the remaining interest and costs to be certified, the property was to be conveyed to the plaintiff, but that the defendant was to be entitled to retain physical possession of the title deeds pending the determination of the question of the defendant's lien, for which purpose the parties were to be at liberty to apply by separate summons in the action. The certificate contemplated by the order is dated Nov. 8, 1948. The plaintiff complied with the terms of the redemption order and redeemed the mortgage, and on Feb. 7, 1949, the defendant issued a summons in the action for the determination of his claim to a lien. The summons came before ROMER, J., on Mar. 21, 1950. ROMER, J., expressing no view of his own, followed the view expressed by VAISEY, J., in 1945 and declared that the defendant was not entitled to any lien. Against that order the defendant has again appealed and now the matter comes for a second time before this court.

The proceedings before VAISEY, J., and the Court of Appeal are reported at [1945] 2 All E.R. 414 and 650. I have, therefore, recited somewhat briefly the earlier narrative. It is, however, to be noted that it has been recently appreciated that the original conveyance to the plaintiff was dated in June, 1919, and not (as had previously in the proceedings been supposed) immediately prior to the mortgage to Reece. The circumstance does not affect the question to be tried, but it has, perhaps, emphasised an important distinction between the title deeds other than the mortgage deed, on the one hand, and the mortgage deed itself, on the other. There is no doubt that when the plaintiff deposited the deeds (other than the mortgage) with the defendant as his solicitor, the deeds were the property of the plaintiff who was immediately prior to such deposit entitled to their possession. There is, therefore, also no doubt that from the time of the deposit until the date of the mortgage the defendant was entitled to a lien on the deeds for his costs incurred for, and unpaid to him by, the plaintiff. The mortgage deed, however, from the moment of its execution and coming into existence as a deed was the property of the mortgagee, Mr. Reece, and, having regard to the decision of this court in *Sheffield v. Eden* (1), to which I shall later refer, counsel for the defendant felt unable to press any argument on the defendant's behalf for the existence of a lien as regards this document. Since the mortgage deed is now nearly thirty-one years old it must be confessed that the result is to rob the case of a considerable measure of its reality. I observe, finally, that, though the amount alleged by the defendant to be due for costs (much of which is, unless preserved by lien, said to be statute barred) is in dispute, it is conceded by the plaintiff that, if the defendant is entitled to his lien, there is some sum of costs in respect of which it may operate.

The essential features of the above recital are then: (i) At the time of the original deposit of the deeds (other than the mortgage) the defendant was acting as the plaintiff's solicitor and he continued to act as such until some date after the date of the mortgage and prior to the notice of redemption. (ii) At the date of the mortgage and until the transfer to himself of its benefit on Jan. 28, 1946, the defendant acted as solicitor to the mortgagee and (after the death of the mortgagee) to his estate, and (iii) the defendant has until the present time retained continuously in his physical possession the title deeds of the property, as to all such deeds (other than the mortgage itself) from the date of their deposit with him by the plaintiff in June, 1919, and as to the mortgage deed from the date of its execution in December, 1919. In these circumstances counsel for the defendant has contended (subject to the qualification already stated as regards the mortgage deed itself) that the lien, admittedly created by the plaintiff's original deposit, has never been lost and is available still to the defendant, and that it is immaterial that from and after Dec. 11, 1919, the defendant's possession of the deeds was attributable, or, as counsel for the defendant would have it, attributable primarily, to his capacity as solicitor for

the mortgagee or his estate or to his capacity as mortgagee or one of the mortgagees.

The nature of a solicitor's general retaining lien has more than once been authoritatively stated. It is a right at common law depending, it has been said, on implied agreement. It has not the character of an incumbrance or equitable charge. It is merely passive and possessory, that is to say, the solicitor has no right of actively enforcing his demand. It confers on him merely the right to withhold possession of the documents or other personal property of his client or former client—in the words of SIR E. SUGDEN in *Blunden v. Desart* (2) (2 Dr. & War. 418):

“... to lock them up in his box, and to put the key into his pocket, until his client satisfies the amount of the demand.”

It is wholly derived from, and, therefore, co-extensive with, the right of the client to the documents or other property: see the statement of LORD CRANWORTH, L.J., in *Pelly v. Wathen* (3), cited by CHITTY, J., in *Re Llewellyn* (4) ([1891] 3 Ch. 148).

When the characteristics of the lien have been stated serious difficulties at once appear in the way of the contention of counsel for the defendant. In my judgment, the capacity by reference to which the documents are held is essential. The absence at any time of any right to or property in the documents on the part of the client seems, as a matter of principle, fatal to the continued existence of the lien. The fact that the mortgagee's solicitor is able to assert a lien against his client, the mortgagee, postulates a deposit of the deeds with the solicitor by the mortgagee, which appears necessarily inconsistent with the conception of a continuing deposit of the same deeds by the mortgagor, and since counsel admits that loss of possession in fact by the solicitor will (save in special circumstances) operate to determine the lien, its existence must to some extent be capricious and hazardous.

The matter is not, however, free from authority. Numerous cases were cited to us, but, as regards the law in England, three only of the authorities, or, perhaps, four, are directly in point. The first case—and it is the foundation on which the defendant's argument is found to rest and the foundation of the Irish decisions to which I refer later—is *Colmer v. Ede* (5) before STUART, V.-C. That was a foreclosure suit by a mortgagee, the defendants being the mortgagor's assignee in bankruptcy and Stretton, the solicitor. The essential facts were the same as those in the present case tabulated above. It was held that Stretton's lien had not been lost, but there are two observations to be made on the case. First, the general question of principle does not appear at all to have been considered. The argument for the assignee in bankruptcy seems to have been that there had been a special agreement which negated the lien. In default of such special agreement the lien appears to have been conceded. Secondly—and, perhaps, as a consequence—Stretton was, as I read the judgment, treated as an incumbrancer or as having rights analogous to those conferred by an incumbrance. Indeed, according to the report at 40 L.J.Ch. 187 the form of order made gave to Stretton liberty to redeem the property.

The second case *Re Messenger*, *Ex p. Calvert* (6), came six years later before SIR JAMES BACON, V.-C., sitting as Chief Judge in Bankruptcy. The facts were, in essentials, again the same. The learned judge, founding himself on *Colmer v. Ede* (5), treated the law as settled. He said (3 Ch.D. 318):

“The law is clear that a person who from his position has a right of lien, does not lose that right unless there is some special agreement that he shall do so ... Is not then the result this, that the property was subject to the mortgage and also to the solicitor's lien. *Colmer v. Ede* (5) is a distinct authority ...”

The learned judge was prepared to accept the result that the mortgagee, on

redemption and on the mortgagor's demand for delivery of the deeds, could be heard to refuse the demand on the ground of the solicitor's lien "which you have created and which I cannot destroy."

Seven years later, in 1883, the point again came before the same judge, SIR JAMES BACON, in *Re Nicholson, Ex p. Quinn* (7). The essential facts were indistinguishable from those in *Colmer v. Ede* (5) and *Re Messenger* (6) and both those cases were cited in argument, but the learned judge felt no hesitation or embarrassment in delivering a judgment wholly contrary in effect to his previous judgment in *Re Messenger* (6), and containing no reference either to that case or to its predecessor. He said (53 L.J.Ch. 303):

"A solicitor's right to a lien on deeds and papers depends on his possession and on the question for whom the deeds are held. There was a time when these deeds belonged to Nicholson; but the time came when he wanted money, and the appellants were requested to procure him an advance on these deeds, which they did, obtaining the money from another client. In so doing they undertook duties of a twofold character. It was their duty to deduce a good title for the mortgagee, and, when the money was paid, to hand the mortgagor's deeds to him. If they had declined to hand them over, the mortgagee could have compelled them to do so; and his right to compel the handing over of these deeds is totally inconsistent with any right being left in the mortgagor to continue to hold them. The title-deeds, on payment of the mortgage money, became the mortgagee's, and the mere fact that they remained in the hands of his solicitors, who happened also to be the solicitors for the mortgagor, cannot alter the rights of the parties."

The fourth case to which I have referred is *Re Walker, Meredith v. Walker* (8) before KEKEWICH, J. The facts were somewhat special. The personal representative of a solicitor was claiming against the personal representative of a testator a lien on certain policy moneys. The moneys arose from policies which had been transferred by the testator to the solicitor to enable the latter to raise moneys in Ireland on his principal's behalf and subject thereto to hold the policies on trust for the testator. It is, however, true to say that the learned judge referred to *Messenger's* case (6) as authority for the proposition that the solicitor's lien in circumstances such as those now under consideration was not lost. He said (68 L.T. 520): "There is no case against that view." *Re Nicholson* (7) was not cited. In my judgment, *Re Walker* (8) cannot in the circumstances be regarded as providing any substantial or added support for the defendant's argument.

The four cases to which I have referred appear to be the only English cases in the books directly in point in this appeal, for the report of the earlier case of *Re Mosely* (9) is admittedly too unsatisfactory to be of value. The matter stands, therefore, thus on the authorities. On the one hand, there is *Colmer v. Ede* (5), in which the question of principle was not, apparently, considered, but which was followed and treated as authoritative by SIR JAMES BACON, V.-C., in *Re Messenger* (6) and by KEKEWICH, J., in *Re Walker* (8), and on the other hand is SIR JAMES BACON's later and quite contrary decision in *Re Nicholson* (7). Other cases were cited to us on other aspects of the solicitor's lien. They cannot, therefore, be regarded as authorities directly on the point now in question. Yet they tend, in my view, in favour of SIR JAMES BACON's later opinion. In *Re Snell* (10) the question was on the same essential facts whether the solicitor could assert against his mortgagee client the lien which he claimed to have against his mortgagor client. No doubt, if the true view be that a solicitor in such circumstances must be taken in any case, in the absence of some contrary agreement, to have lost his lien against the mortgagor, that would have been a short and complete answer to the solicitor's claim. It is also true that neither *Colmer v. Ede* (5) nor *Re Messenger* (6) were cited in the argument, but SIR GEORGE JESSEL, M.R., said in the course of his judgment (6 Ch.D. 107):

A “ If the solicitor chooses to act not only for the mortgagee but for the mortgagor also, he is still equally bound, as solicitor to the mortgagee, to see that his client obtains a good security, including possession of the deeds; and if he has a bill of costs against his mortgagor client, he, by acting for both parties, loses his lien upon the deeds, and holds them for his mortgagee client, unless his lien is expressly reserved. He cannot say to his mortgagee client, ‘ I have been guilty of negligence; I do not hold the deeds on your account.’ He must be taken to have performed his duty, and to hold the deeds for his mortgagee client. That is his duty; and the fact that such client knew that he acted as solicitor for the mortgagor, and had a claim for costs against him, is therefore wholly immaterial. Moreover, the mortgagor, having authorised his solicitor to prepare the mortgage, has by so doing authorised him to act in a proper manner, that is, to do all necessary acts for the completion of the security, which of course includes handing over the title deeds. The solicitor requires no further instructions for that; he holds them as agent for the mortgagee client, and must therefore give them up to him when required to do so.”

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BACON uses this language (16 Ch.D. 619):

Ex p. Fuller, Re Long (11) came before SIR JAMES BACON in 1881—between his two decisions of *Re Messenger* (6) and *Re Nicholson* (7). In that case the learned judge rejected the solicitor’s claim to a lien against the mortgagor in the case where the latter became his client after and not before the execution of the mortgage in favour of the solicitor’s mortgagee client. Counsel for the defendant accepts this conclusion, conceding that there must have been an original deposit of the deeds with the solicitor by the mortgagor and the existence of a lien before the transaction of mortgage. If the matter is to be judged by the standards of fairness and reason and if, as counsel contends, the conception is permissible of the solicitor’s possession of the deeds being primarily attributable to his capacity as agent for the mortgagee, but attributable also, and subject to the mortgagee’s rights, to his agency for the mortgagor, the distinction seems to my mind a little capricious. However that may be, in *Re Long* (11), SIR JAMES

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“ The plain law is this, that a lien can only exist where there is a lawful possession of the thing upon which it is claimed by the person who claims it. What rightful possession of the deeds had the solicitors in the present case? The deeds were the deeds of the mortgagees, and they were placed in the solicitors’ hands only for safe custody. The solicitors had the deeds in their possession, not in any right of their own; their possession was that of the mortgagees, and nothing more.”

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Finally, in *Sheffield v. Eden* (1) the question arose whether the solicitors who were themselves the mortgagees could assert a lien against their mortgagor client in respect of the mortgage deed itself. *Sheffield v. Eden* (1) is the only one of the cited cases which came before this court and JAMES, BAGGALLAY and THESIGER, L.JJ., rejected the solicitors’ claim. For that reason counsel for the defendant has felt unable to press his argument as regards the mortgage deed in the present case. It is true that all three judges in their very short judgments were careful to confine themselves to the particular question they had to decide, namely, the alleged lien on the mortgage deed. *Colmer v. Ede* (5) had been cited to them. Nevertheless, their reasoning clearly indicated, in my judgment, as had the reasoning of SIR GEORGE JESSEL, M.R., in *Re Snell* (10) and SIR JAMES BACON in *Re Long* (11), that the capacity in which the solicitor held the deeds is of the essence of the matter and that agency for the mortgagee is incompatible with agency at the same time for the mortgagor. JAMES, L.J., said (10 Ch.D. 293):

“ They might have had a claim against their client as mortgagor for [the] preparation [of the deeds], but when the deeds were executed they became the deeds of the solicitors. A lien only attaches to documents which are

the client's property; it cannot extend to what is the solicitors' own property."

Similarly BAGGALLAY, L.J., said (*ibid.*):

"Directly these deeds were executed they remained in the possession of the solicitors, not in their capacity of solicitors to the mortgagor, but as their own property as mortgagees. The property was in them, not in their client."

In this state of the authorities it is clearly open to this court to decide the present question as a matter of principle. That being so, I think the judgment of SIR JAMES BACON in *Re Nicholson* (7) was correct and ought to be preferred to his own earlier decision in *Re Messenger* (6), and to the decision in *Colmer v. Ede* (5) which in *Re Messenger* (6) he had followed and that the two latter cases must be treated as wrongly decided. In my judgment, from the moment of the execution of the mortgage the solicitor's retention of the documents of title must be exclusively referable to his agency of the mortgagee, and the mortgagor has ceased to have any right or title to the documents from which any lien could be derived. The lien has ceased because the conditions necessary to support it have ceased to exist. On redemption of the mortgage it is the mortgagee's duty to hand back the deeds to the mortgagor: see *Graham v. Seal* (12) (88 L.J.Ch. 36, 38). That duty the solicitor, as the mortgagee's solicitor, is bound to perform. He cannot discharge the duty by handing the deeds to himself on the mortgagor's behalf unless he has the mortgagor's authority, as being still his client or otherwise by agreement, so to do. I think, accordingly, that the view suggested in CORDERY'S LAW RELATING TO SOLICITORS, 4th ed., p. 458, is erroneous and that the doubts expressed in the note (m) to the text are well-founded. Counsel for the defendant says that it is hard on the solicitor thus to lose his lien, but, if it be relevant to consider hardship, I cannot agree. It is open to the solicitor who acts also for the mortgagee to make it plain to his mortgagor client that before the mortgage is effected his bill for costs must be met or a special agreement made so as to preserve his lien. The opportunities of protecting himself are, I should have thought, less rather than more difficult for the solicitor where the proposed mortgagee is another of his clients.

I have earlier referred to the Irish decisions which followed *Colmer v. Ede* (5). Two Irish cases were cited to us, both at first instance, namely, *Re Harvey's Estate* (13) and *Re Stannard's Estate* (14). I think it would be possible to distinguish both cases on their facts from the present case, but, undoubtedly, in both the learned Irish judges treated *Colmer v. Ede* (5) as authoritatively stating the law applicable to such a case as the present: see *per* MONROE, J. (17 L.R.Ir. 67) in the first case, in which *Re Nicholson* (7) was not cited, and *per* ROSS, J. ([1897] 1 I.R. 419) in the second case where he expressly preferred *Re Messenger* (6) to *Re Nicholson* (7). With all respect to those two judges, I am, for the reasons I have given, unable to agree with them and I do not think their conclusions should now be followed in England.

We were also, finally, referred to the Scottish case in the Court of Session of *Drummond v. Muirhead and Guthrie Smith* (15). The essential facts are indistinguishable from those in this appeal and the Court of Session, affirming the opinion of the Lord Ordinary (LORD KINCAIRNEY), decided in the law agent's favour. Both SIR JAMES BACON's decisions were cited to the Lord Ordinary, but he, like ROSS, J., in Ireland, expressed his preference for *Re Messenger* (6). The decisions of the Court of Session are not, of course, binding on us. They are entitled to great respect and I am certainly not at all inclined to create divergencies between the law of England and the law of Scotland on such a matter as the general lien of a solicitor or law agent. Having given the matter my best consideration, I am unable, however, to reconcile the judgments of the Scottish judges with the principles which I think are applicable to such a

lien in England. I think counsel for the plaintiff may be justified in suggesting that the Scottish judgments proceed on the basis that the right of the solicitor is in character analogous to that of an incumbrancer, and so it may be by the law of Scotland—at any rate the lien in Scotland cannot rest on the English common law.

A I have not so far distinguished the position of the defendant as solicitor to the mortgagee from his position as mortgagee himself either alone or jointly with his co-executors. In truth, there is for present purposes no distinction—certainly his position is not strengthened by his interest as mortgagee. If I am right in thinking that the capacity in which he holds the deeds is of the essence of the matter and that a present right or title to the deeds on the client's part is necessary to support the lien, the solicitor's claim is gone whichever of the two capacities, agent or principal, he assumes. If, as solicitor to the mortgagee, he seeks on redemption to retain the deeds against the mortgagor, he involves his client, the mortgagee, in a breach of his legal obligations, which the solicitor cannot, consistently with his duty as solicitor, do or be heard to suggest. On the other hand, if, as mortgagee, he seeks to retain the deeds on redemption, he is himself asserting a right inconsistent with his legal obligations. B C I, therefore, agree with the decision of VAISEY, J., when this matter was before him in 1945. At that time the defendant had not taken a transfer of the mortgage to himself alone, as he has since done. In my judgment, VAISEY, J., correctly anticipated the result of the transfer. He said ([1945] 2 All E.R. 416):

D “Suppose that the claimant in the lifetime of Reece had taken a transfer of the mortgage, thereby becoming sole mortgagee, and then suppose that the plaintiff had sought to redeem. In such a case the claimant would, in my judgment, have been bound not only to re-convey or otherwise release the mortgaged property to the plaintiff but also to restore to him the title deeds. Redemption involves the return by the mortgagee not only of the estate but of the *indicia* of the title to the estate. It seems to me that the claimant could not, in the case supposed, have been heard to say that in his capacity of solicitor he was entitled to preclude himself from discharging in full his duties as mortgagee—chiefly, as I think, for the reason that he would not be holding the deeds as solicitor at all but solely as mortgagee.” E

F In the passage which follows that which I have cited I think the learned judge went somewhat further than was justified or was necessary for his decision, but I think that his decision was right and that the present appeal ought to be dismissed accordingly.

ASQUITH, L.J. : I agree with the judgment just delivered by the Master of the Rolls. I also agree with the judgment about to be delivered by JENKINS, L.J., which I have had the advantage and pleasure of reading.

G JENKINS, L.J.: In this case the defendant, William Gough-Thomas, who formerly acted as solicitor to the plaintiff, Frank Digby Barratt, claims a lien on the documents of title relating to certain freehold property of the plaintiff at Oswestry, in the county of Salop, in respect of the costs, charges and expenses which became due from the plaintiff to the defendant while so acting, and the question for decision is whether, in the circumstances I am about to mention, this claim is well founded.

H The property in question was bought by the plaintiff in June, 1919. The defendant acted for the plaintiff in the matter of this purchase, and the documents of title were left by the plaintiff in the custody of the defendant as his solicitor. It is not in dispute that at this stage the defendant was entitled to the ordinary solicitor's lien on these documents for any costs owing to him by the plaintiff, whether in respect of that particular transaction or in respect of other professional services rendered to the plaintiff by him. In December, 1919, the plaintiff mortgaged the property to a Mr. Reece to secure a sum of £5,000 and interest,

the mortgage taking the ordinary form under the law as it then stood of a conveyance of the property to the mortgagee in fee simple subject to a proviso for redemption on payment of the moneys secured. The defendant acted for both parties in the matter of this mortgage, and the documents of title were never removed from his custody in which they have continuously remained to this day. It is, however, not open to doubt that from and after the completion of the mortgage the defendant ceased to hold the documents as solicitor to the plaintiff and held them thenceforth as solicitor to Mr. Reece, the mortgagee, who became as such exclusively entitled to their possession and control so long as the mortgage subsisted. Mr. Reece died in February, 1941, and in the following year his will was proved by four executors therein named, of whom the defendant was one, and the documents were thenceforth held by the defendant on behalf of himself and his three co-executors as joint mortgagees. In June, 1943, the plaintiff gave the usual six months' notice to pay off the mortgage, and in December of the same year the defendant asserted his claim to a lien on the documents for costs owing to him by the plaintiff, in addition to the amount due to the mortgagee's executors for principal, interest and costs under the mortgage itself.

In March, 1944, proceedings were instituted by the plaintiff against the mortgagee's executors for redemption of the mortgage, and in the following year the proceedings were adjourned into court for argument on the defendant's claim to a lien. The case came before VAISEY, J., who, in a considered judgment delivered on July 10, 1945 (see *Barratt v. Gough-Thomas* (16)), held that the defendant was not entitled to any lien on the documents in question and made a declaratory order accordingly. From that order the defendant appealed to this court, which, on Oct. 19, 1945, without expressing any view as to the correctness or otherwise of the decision of VAISEY, J., on the merits of the case, discharged his order on the ground that (for reasons already mentioned by the Master of the Rolls) it was premature: see [1945] 2 All E.R. 650. I should perhaps mention that in the proceedings so far described the conveyance and mortgage were treated as having both been executed on the same date, whereas they now appear to have been executed in June and December, 1919, respectively. It is, however, agreed that this variation in the facts has no material bearing on the legal result.

In January, 1946, the defendant took a transfer of the mortgage from the mortgagee's executors to himself alone and thenceforth held the documents in question as sole mortgagee, the redemption proceedings being accordingly stayed as against the other three executors who had thus ceased to have any further interest in the matter. On Feb. 3, 1948, an order for redemption was made, the master's certificate thereunder was signed on Nov. 8, 1948, and it appears that the directions therein contained as to payment and re-conveyance have been duly complied with. The redemption proceedings were thus at long last disposed of, apart from a question as to the defendant's right to interest after the expiration of the plaintiff's notice to redeem (with which we are not concerned) and the defendant's claim to a lien, which questions were expressly left open in the order for redemption, with liberty to apply. In February, 1949, the defendant applied by summons in the redemption proceedings, under the liberty to apply reserved by the order, for declarations as to his right to the disputed interest and to a lien on the documents of title, with consequential relief. By order dated Mar. 21, 1950, ROMER, J., declared that the defendant was not entitled to the lien claimed. As appears from his judgment delivered on the same date he founded his decision on the judgment of VAISEY, J., referred to above without expressing any opinion of his own, considering (in my view, quite rightly) that as the Court of Appeal had not formed any view as to the correctness or otherwise of this judgment on the merits of the case his duty as a judge of first instance was to follow it. Thus, while the present appeal is in form an appeal from the order

of ROMER, J., in substance it involves a review of the reasoning which led VAISEY, J., to decide the matter adversely to the defendant on the previous occasion.

A The documents over which the lien is claimed comprise not only the title deeds originally left by the plaintiff in the hands of the defendant as his solicitor on the occasion of the plaintiff's purchase of the property, but also the mortgage deed subsequently executed by the plaintiff, and, when executed, left in the hands of the defendant as solicitor to Mr. Reece, the mortgagee. VAISEY, J., seems to have drawn no distinction between the former and the latter. There is, however, a distinction of some importance. The documents originally deposited with the defendant on the occasion of the purchase were, of course, the property of the plaintiff when so deposited, and admittedly then as against the plaintiff B became subject to the ordinary solicitor's lien in the defendant's favour, the question, so far as these documents are concerned, being whether that lien has remained in existence notwithstanding the subsequent events above referred to, involving as they did changes in the ownership and right to possession of these documents and the capacity in which they were held by the defendant. As will be seen hereafter, that question is not free from difficulty, and has been C the subject of a remarkable conflict of authority. The mortgage deed is in a different position. It never was the property of the plaintiff at all. From the moment of its execution and delivery it was the property of the mortgagee, and it came into the defendant's possession simply in his capacity as solicitor to the mortgagee. Whatever the position may be as regards the other documents, I think it is clear both in principle and on authority that in these circumstances D the defendant is at all events not entitled to any lien against the plaintiff so far as the mortgage deed is concerned. The defendant's possession of this deed and the right to demand it from him which the plaintiff now has as a redeeming mortgagor are referable solely to the relationship of mortgagee and mortgagor, and not to that of solicitor and client, which as between the defendant and the plaintiff never had any relevance to the receipt and retention of this deed by E the defendant: see *Sheffield v. Eden* (1), a decision of the Court of Appeal which apparently was not cited to VAISEY, J. I am, accordingly, of opinion that the defendant's claim must fail as regards the mortgage deed.

As regards the other documents, the argument for the defendant requires more detailed examination. It proceeds substantially on these lines: (i) A F solicitor who in his professional capacity receives deeds from a client becomes entitled to a lien over them so long as they remain in his physical possession. (ii) The lien so acquired continues to be available against any claim to possession of the documents by that client or any person claiming through him so long as physical possession of the documents is retained by the solicitor, and is not destroyed by any intermediate change in the ownership of the documents or in the identity of the person for whom the solicitor holds them. (iii) Thus, if G a client deposits title deeds with his solicitor and subsequently mortgages the property comprised in them to a third party for whom the solicitor also acts, and the solicitor without ever parting with physical possession of the documents retains them on behalf of his mortgagee client, his lien against the mortgagor client survives, though postponed to the paramount claim of the mortgagee to possession of the documents unless and until the mortgage is redeemed. H (iv) Further, in such a case the mortgagor client of the solicitor retains an interest in the documents corresponding to his equity of redemption in the mortgaged property, and it may thus be said that the solicitor, while holding the documents primarily for the mortgagee, yet continues to hold them *quoad* this subordinate interest for the mortgagor from whom they were originally received. (v) It follows that when the mortgagor redeems the mortgage and becomes entitled to possession of the documents, the solicitor is entitled to assert the lien to which they became subject at the time of the original deposit, and this notwithstanding

the cesser in the meantime of the relationship of solicitor and client between himself and the mortgagor.

The defendant's argument finds support in a number of authorities. In *Colmer v. Ede* (5) the solicitor's lien against the mortgagor was upheld, but the lien seems there to have been disputed only on the ground that the deeds had been deposited with the solicitor for the specific purpose of preparing the mortgage, and not on the more general grounds advanced by the present respondent. Next in order of date is *Re Messenger, Ex p. Calvert* (6), a decision of BACON, V.-C., as Chief Judge in Bankruptcy, which is closely in point and which, if accepted as a correct statement of the law, would conclude the present appeal in favour of the defendant. It should, however, be observed at once that in the later case of *Re Nicholson, Ex p. Quinn* (7), the same learned judge on substantially similar facts and after argument in the course of which *Re Messenger* (6) was cited, came to precisely the opposite conclusion. In *Re Walker* (8), KEKEWICH, J., followed *Re Messenger* (6), though it is fair to say that the facts differed in a possibly material respect from those in *Re Messenger* (6) and *Re Nicholson* (7), and that according to the report the latter case was not cited. There are also two Irish cases, *Re Harvey's Estate* (13) and *Re Stannard's Estate* (14), of which the latter, in particular, affords strong support for the defendant's contention, to which should be added the Scottish case of *Drummond v. Muirhead & Guthrie Smith* (15) to the like effect.

The argument for the plaintiff proceeds substantially as follows: (i) Retention of physical possession of documents of title by a solicitor acting for the two parties to a disposition of the property comprised in them does not necessarily preserve his claim to a lien against the party for whom he held the documents before the disposition. Regard must be had to the person for whom and the capacity in which the solicitor holds the deeds at the time when possession is claimed, and the lien can only be asserted if the solicitor then holds the documents in his capacity as solicitor to the party seeking to recover them. (ii) A solicitor's lien is a mere passive right to retain the documents, conferring no proprietary interest or charge, and available only against an owner of the documents entitled but for the lien to claim them as documents belonging to him and held on his behalf by the solicitor in the capacity of solicitor to the claimant. Thus, when the ownership of documents in a solicitor's possession passes from one client to another, with the result that he holds the deeds for the latter in place of the former, his lien against the former owner is necessarily destroyed, and can only be revived if and when the deeds once more become the property of the former owner and are once more held by the solicitor in the capacity of solicitor to that owner. (iii) In circumstances such as those of the present case the mortgagor's right to recover possession of the deeds on redemption is a right against the mortgagee, whose duty it is to return them to the mortgagor, and whose right to possession of them is admittedly paramount to any lien the solicitor may have had against the mortgagor prior to the mortgage. (iv) Where, as here, the solicitor himself takes over the mortgage, his possession of the deeds becomes possession in his own right as mortgagee, not possession in right of and as solicitor to the mortgagor and accordingly he can claim no lien against the mortgagor on redemption by the latter.

As regards the authorities more or less directly in point, the plaintiff's sheet anchor is *Re Nicholson* (7), and we are invited on his behalf to accept that decision as correctly stating the law in preference to the three English, two Irish, and one Scottish, decisions the other way. For my part, I think that of the English cases *Re Nicholson* (7) should be regarded as of the greatest weight. As a later decision of the same learned judge it must, I think, clearly be regarded as supplanting *Re Messenger* (6), especially as that case was cited to him in *Re Nicholson* (7). *Re Walker* (8), apart from the difference in the facts, loses much of its force from the circumstance that *Re Nicholson* (7) was not referred

to. *Colmer v. Ede* (5) was, as I have said, argued on a different ground. The Irish and Scottish cases are, no doubt, worthy of the greatest respect, but I see no ground for preferring them to *Re Nicholson* (7), and the Scottish case may have turned to some extent on conceptions different from those of English law as regards the nature of liens and mortgages. The authorities standing thus, I conceive myself free to decide this case as seems to me right in principle, and, regarding it in this way, I have little hesitation in rejecting the defendant's claim.

I see no justification in principle for holding that the mere accident of continued physical possession of deeds by a solicitor, in circumstances such as the present, necessarily involves the continuance of his lien against the original depositor. No doubt, he loses his lien if he parts with possession, but this is far from establishing the converse proposition that if he retains possession his lien is necessarily preserved. When a client for whom a solicitor holds deeds mortgages the property comprised in them to another client of the same solicitor, who acts for both parties in the matter, then, even though the deeds before and after the mortgage remain continuously in the solicitor's possession, it is plain that after the completion of the mortgage the solicitor holds them exclusively in the right and on behalf of the mortgagee, and that the character and legal basis of his possession is precisely the same as if the deeds had been handed over to the mortgagee on completion of the mortgage and thereafter returned by him to the solicitor to hold on his behalf. I find myself in complete agreement with the view expressed by BACON, V.-C., in *Re Nicholson* (7) to the effect that in these circumstances the mere fact that the deeds remain in the hands of the solicitor because he happens to be solicitor to both parties cannot affect the result, and with his conclusion to the effect that in such a case the solicitor loses any lien he previously had against the mortgagor.

It is not in dispute that a solicitor can acquire a lien on deeds in his possession against a new owner of them without any change in their physical possession. Thus, in circumstances such as those now under consideration the solicitor would have a lien against his mortgagee client for costs owing to him from that client from the moment that he began to hold the deeds in the right and on behalf of the mortgagee. Again, it is plain that the solicitor can lose a lien on the deeds without parting with physical possession of them. Thus, from the moment he holds the deeds in the right and on behalf of the mortgagee he loses as against the mortgagor his lien for costs owing by the mortgagor: see *Re Snell* (10), *Re Mason & Taylor* (17). Similarly, when the mortgage has been paid off, the solicitor cannot assert against the mortgagor client a lien claimed in right of the mortgagee for costs owing to him from the latter, although he originally received the deeds as solicitor to the mortgagor and they have thereafter remained continuously in his possession: see *Re Llewellyn* (4). Again, mere possession of a client's deeds will not necessarily give the solicitor a lien upon them: see *Ex p. Fuller*, *Re Long* (11), where solicitors holding the deeds of mortgaged property received from a mortgagee client were held to have no lien on the deeds against the mortgagor for costs due to them from him because they had never held the deeds as his solicitor.

The right conclusion seems to me to be that a solicitor can claim a lien on deeds against a person demanding their delivery if, but not unless, at the date of such demand his possession of them is referable to the relationship of solicitor and client between himself and the claimant. If this condition is not satisfied the solicitor cannot make good his lien by showing that he originally received the deeds from the claimant as his client and has since retained physical possession of them down to some past date in the right and on behalf of the claimant, but thereafter and at the date of the demand retains them in right and on behalf of some other person through whom the claimant now makes title. This may be illustrated by the imaginary case of a sale of property by "A" to "B," the same solicitor acting for both parties and holding the deeds continuously

for "A" down to the date of the sale and thereafter for "B." After the sale "A" changes his solicitor, and later re-purchases the property from "B." On completion of his re-purchase "A" demands the deeds. In such circumstances it is obvious that "A's" former solicitor (holding the deeds for "B") cannot assert any lien against "A" for costs due from him, the fact that the solicitor originally received the deeds from "A" as his solicitor and held them in that capacity down to the date of the sale to "B" and had never since parted with physical possession of them being wholly irrelevant.

Precisely the same reasoning seems to me to apply in the case of a mortgage. The fact that the mortgagor retains an interest in the form of his equity of redemption is, I think, immaterial. That gives him no right to possession of the deeds unless and until he redeems the property, and such right when it arises is a right against the mortgagee, not against the solicitor, who is simply bound to deal with the deeds as the mortgagee may direct and cannot set up against him or any person claiming through him any lien he formerly had against the mortgagor. I think this is borne out by the reasoning on which the judgment of CHITTY, J., in *Re Llewellyn* (4) proceeds although the lien there unsuccessfully asserted against the mortgagor was a lien claimed in right of the mortgagee for costs due from him to the common solicitor. There was on the facts of the case no question of any lien in respect of costs owing to the solicitor from the mortgagor personally, as admittedly none were so owed, but the learned judge said ([1891] 3 Ch. 147):

"I will assume in favour of the respondent [*i.e.*, the solicitor] that though he received them originally from the applicant [*i.e.*, the mortgagor] the custody was changed; that he afterwards held them as solicitor for the mortgagee. The lien claimed on the documents of title is thus a lien in virtue of the right of the mortgagee to hold such documents."

Then he says of the lien (*ibid.*, 148):

"It does not confer on the solicitor any higher right to retain deeds than the client himself has."

After citing a number of authorities in support of this proposition he continues (*ibid.*):

"From these it follows, that when the mortgagor has paid to the mortgagee all that is due to him . . . and the mortgagee has given the mortgagor a release, the mortgagee's solicitor has no right to retain the deeds as against the mortgagor, even for costs due to the solicitor from the mortgagee for work done relating to the mortgaged property pending the mortgagee."

By parity of reasoning, and, indeed, *a fortiori*, it seems to me that the solicitor holding the deeds in virtue of the right of the mortgagee to hold them cannot set up against the mortgagor a lien for costs due from the latter which not only could not be set up by the mortgagee himself against the mortgagor, but could not even be asserted by the solicitor against the mortgagee. *Re Llewellyn* (4) thus, in my view, bears out the direct authority of *Re Nicholson* (7). The same may, I think, be said of the *ratio decidendi* in *Sheffield v. Eden* (1), although (as appears above) the actual decision in that case is confined to the mortgage deed itself.

The theory that the solicitor's lien against the mortgagor client survives after his custody of the deeds is changed to custody as solicitor for the mortgagee client, though subject to the paramount right of the mortgagee to their possession, seems to me clearly inconsistent with the nature of the lien as defined in *Re Llewellyn* (4) and the cases there cited, particularly *Blunden v. Desart* (2) and *Pelly v. Wathen* (3). The lien being neither the result of contract, nor an equitable charge, nor an incumbrance on the estate, but merely a right of the solicitor

“ to keep back from his client the deeds and papers, which he holds as solicitor, until his bill of costs is satisfied ” (*per* LORD CRANWORTH, L.J., in *Pelly v. Wathen* (3) (1 De G.M. & G. 23), it is difficult to see how, once the solicitor has ceased to hold the deeds for the mortgagor and holds then for the mortgagee, whose right to possession completely ousts that of the mortgagor and is free from any lien the solicitor could previously have asserted against the latter, the lien against the mortgagor can fail to be completely extinguished not merely as against the mortgagee but against the mortgagor also. A new lien against the mortgagor might no doubt arise if in the circumstances of the particular case the solicitor could be shown after the discharge of the mortgage to have resumed custody of the deeds in the capacity of solicitor to the mortgagor, but no such circumstances exist in the present case.

In the course of his argument for the defendant counsel pointed out that a solicitor's lien against his client may continue though the relationship of solicitor and client has ceased, as, for example, where the client changes his solicitor, or on the death of the solicitor or the client, but this carries the defendant's argument no further. In such cases the possession of the deeds on the strength of which the lien is asserted is still referable entirely to the relationship of solicitor and client formerly subsisting between the original parties even though that relationship has been brought to an end, and the rights appropriate to possession so referable survive accordingly. In the type of case now under consideration there is not merely a cessation of the relationship of solicitor and client between the solicitor and the person for whom the deeds were held, but a change in the character of the solicitor's possession of the deeds from possession as solicitor to and on behalf of the original client (the mortgagor) to possession as solicitor to and on behalf of a different client (the mortgagee), and it is by this change that the solicitor's lien against the mortgagor is destroyed.

It follows from what I have said above that I am in substantial agreement with the views of VAISEY, J., on the aspect of the case which he made a subsidiary basis of his decision (*i.e.*, the effect on the lien of the mortgage transaction in which the defendant acted for both parties). Logically, however, I think this aspect of the case comes first, as, if the defendant lost his lien from the moment he held the deeds as solicitor to and on behalf of the mortgagee, it is unnecessary to consider whether apart from this the lien would in any event have been lost when the defendant subsequently assumed office as one of the four executors of the mortgagee and later (since the date of VAISEY, J.'s judgment) took a transfer to himself of the mortgage. At all events it is abundantly plain that neither of these subsequent events can have improved the defendant's position in regard to the lien he claims. Accordingly, while by no means dissenting from what has been said by the Master of the Rolls on this aspect of the case, for my part I find it unnecessary to express any opinion on the effect of these later transactions as it might have been if the case had depended on them alone. In the result I agree that the appeal fails and should be dismissed.

Appeal dismissed with costs.

Solicitors: *Rooke & Sons*, agents for *W. Gough-Thomas*, Ellesmere (for the defendant); *Field, Roscoe & Co.*, agents for *Batten & Whitsed*, Peterborough (for the plaintiff).

[*Reported by F. GUTTMAN, Esq., Barrister-at-Law.*]

EDWARDS AND ANOTHER v. HALLIWELL AND OTHERS.

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Asquith and Jenkins, L.JJ.), October 31, November 1, 2, 1950.]

Trade Union—Action by member against union—Matter of substance, tintured with oppression—Invasion of members' individual rights.

Rule 19 of the rules of the defendant trade union provided: "The regular contributions of employed members shall be as per tables . . . and no alteration to same shall be made until a ballot vote of the members has been taken and a two-thirds majority obtained." In December, 1943, a delegate meeting of the union, without taking any ballot, passed a resolution increasing the amount of the contributions of employed members. The plaintiffs, two members of the union, claimed against two members of the executive committee of the union and the union itself a declaration that the alteration adopted at the delegate meeting was invalid.

HELD: (i) as the matter in question was not a mere irregularity in the internal management of the union, but was a matter of substance and tintured with oppression, the court would grant the plaintiffs relief if it was proper to do so.

Amalgamated Society of Engineers v. Jones (1913) (29 T.L.R. 484), distinguished.

(ii) it was implicit in the rule in *Foss v. Harbottle* (1843) (2 Hare 461) that the matter relied on as constituting the cause of action should be a cause of action properly belonging to the general body of members of the association in question as opposed to a cause of action which some individual member could assert in his own right. In the present case, the personal and individual rights of membership of the plaintiffs had been invaded and particular damage inflicted by the invalid alteration of the tables of contributions, and in such circumstances the rule in *Foss v. Harbottle* had no application to individual members who were suing, not in the right of the union, but in their own right to protect from invasion their individual rights as members, and, therefore, the plaintiffs were entitled to their declaration.

Pender v. Lushington (1877) (6 Ch.D. 70), applied.

Per JENKINS, L.J.: The rule in *Foss v. Harbottle* does not prevent an individual member suing if the matter in respect of which he is suing can validly be done, not by a simple majority of the members of the association, but, as in the present case, only by some special majority: *Cotter v. National Union of Seamen* ([1929] 2 Ch. 58), applied . . . I cannot regard the paying by the majority of the members of the increased rates without demur as equivalent to a ballot vote at which a two-thirds majority was obtained in favour of the alteration.

[AS TO THE AMENDMENT OF THE RULES OF A TRADE UNION, see HALSBURY, Hailsham Edn., Vol. 32, p. 494, para. 787; and FOR CASES, see DIGEST, Vol. 43, p. 101, Nos. 1048-1052, and Digest Supp.]

Cases referred to:

- (1) *Foss v. Harbottle*, (1843), 2 Hare 461; 67 E.R. 189; 13 Digest 417, 1377.
- (2) *Amalgamated Society of Engineers v. Jones*, (1913), 29 T.L.R. 484; 43 Digest 101, 1050.
- (3) *Cotter v. National Union of Seamen*, [1929] 2 Ch. 58; 98 L.J.Ch. 323; 141 L.T. 178; Digest Supp.
- (4) *Pender v. Lushington*, (1877), 6 Ch.D. 70; 46 L.J.Ch. 317; 9 Digest 572, 3500.

APPEAL by the defendants from a judgment of VAISEY, J., dated July 28, 1950.

The plaintiffs, two members of the Cricklewood branch of the defendant union, claimed a declaration on behalf of themselves and all other members of the branch that the alteration of the general rules of the union adopted at

a delegate meeting in December, 1943, was invalid in so far as it purported to alter the amount of the regular contributions of employed members. The defendants were two members of the executive committee of the union sued as representatives of the committee and the union. VAISEY, J., granted the declaration. The facts appear in the judgment of ASQUITH, L.J.

Pascoe Hayward, K.C., and Lindner for the defendants.

A *Milner Holland, K.C., and Hesketh* for the plaintiffs.

SIR RAYMOND EVERSHED, M.R.: I will ask ASQUITH, L.J., to deliver the first judgment.

ASQUITH, L.J.: This is an appeal by the defendants from a judgment of VAISEY, J., whereby he made a declaration asked for by the plaintiffs in terms to which I will refer. The plaintiffs sue on behalf of themselves and all other members of the Cricklewood branch of the National Union of Vehicle Builders, a registered trade union. The defendants are sued on behalf of themselves and all other members of the executive committee of the union, and the union itself is joined as a defendant.

B The main point in the appeal is whether VAISEY, J., has rightly construed r. 19 of the rules of the union. The defendants contend that, even if he has rightly construed that provision, the plaintiffs are precluded, for other reasons, from obtaining the relief which they have been awarded. The only relevant part of r. 19 is the first five lines, which are:

C "The regular contributions of employed members shall be as per (pp. 115 and 116) and no alteration to same shall be made until a vote of the members has been taken and a two-thirds majority obtained."

D In December, 1943, a delegate meeting was held at which the delegates, without any ballot, let alone a ballot resulting in a two-thirds majority, purported to increase the regular contributions of employed members and also certain benefits payable to the members. The plaintiffs contend that that alteration in the contributions is a nullity because the condition precedent to its validity laid
E down in r. 19 had not been satisfied. They refused to pay the amount of the increase, and were threatened or actually visited with loss of their rights as union members, including that of eligibility for election to certain offices. In the action they claimed:

F "A declaration that the alteration of the general rules of the National Union of Vehicle Builders adopted at a delegate meeting in December, 1943, is invalid in so far as it purports to alter the regular contributions of employed members."

[HIS LORDSHIP considered the rules of the union; held that, on construction of them, the alteration in December, 1943, of the rates of contribution was invalid, and continued:] The other point relied on by the defendants was that, even if they
G were wrong on the point of construction, the court either could not, or should not, grant the plaintiffs the relief which they claim. Under this head counsel for the defendants relied on the alleged principle that, when an action is brought by an individual in respect of a mere irregularity in a matter that is *intra vires* a trade union and concerns its internal management, the court will not as a rule intervene. For this purpose he conceded that a "mere irregularity" meant
H something not involving fraud, oppression or unfairness. I confess I should have thought the action complained of here was strongly tinged, not, indeed, with fraud, but with "oppression" and "unfairness." Here were men who had a right not to have their contributions increased except after a ballot resulting in a two-thirds majority. This right was clearly violated. An unauthorised increase was sought to be extorted, and when they refused to pay, as they were entitled to do, severe penalties were imposed or threatened. To call this a mere informality or irregularity without any element of oppres-

sion or unfairness would be an abuse of language. When in circumstances such as I have described a remedy is sought by an individual, complaining of a particular act in breach of his rights and inflicting particular damage on him, it seems to me the principle of *Foss v. Harbottle* (1), which has been so strongly relied upon by the defendants, does not apply either by way of barring the remedy or supporting the objection that the action is wrongly constituted because the union is not a plaintiff. Nor, lastly, can I accept the submission that, if the action is maintainable at law, it should nevertheless be dismissed because the vast majority of members approved the action taken by the defendants. The answer to the defendants' argument under this head will, I hope, be presented more fully by my Lords who are much more familiar with this branch of the law than myself. I think the appeal should be dismissed.

JENKINS, L.J., stated the facts and continued: I will pass to the argument based on the reluctance of the court to interfere with the domestic affairs of a company or association on the ground of mere irregularity in form in the conduct of those affairs, and the argument based on the more general proposition commonly called the rule in *Foss v. Harbottle* (1). As to the contention that, even though the purported alteration of the tables of contributions was invalid, the court should not interfere because the omission to hold a ballot and obtain a two-thirds majority as required by r. 19 was a mere irregularity in point of form, in my judgment, that argument can be shortly dismissed by saying that this was not a matter of form. It was a matter of substance. The relevant part of r. 19, I conceive, was designed to protect members against increases in the rates of contributions unless those increases were agreed to by a particular majority of members on a vote obtained in a particular way—that is to say, a two-thirds majority on a ballot vote. It seems to me that the executive committee's disregard of that express provision in the rules was a wrong done to each individual member on a point of substance. I say "on a point of substance," because it is *nihil ad rem* to point out that the increases in question were merely a matter of pence per week. In my judgment, this question should be viewed in precisely the same way as if the increase had been a matter of pounds, which might have made a substantial difference to the financial position of the members. In my judgment, the case cited on this part of the argument—*Amalgamated Society of Engineers v. Jones* (2)—has no bearing on the facts of the present case. In that case a meeting had been held and certain resolutions passed, and it was suggested that the mode of convening the meeting was irregular. The learned judge was able to hold that there had been no wrong done as a matter of substance, but that there had been a mere irregularity in procedure and he took the view that, in those circumstances, the court should not interfere. For the reasons I have endeavoured to state, I regard the present case as an entirely different one.

The rule in *Foss v. Harbottle* (1), as I understand it, comes to no more than this. First, the proper plaintiff in an action in respect of a wrong alleged to be done to a company or association of persons is *prima facie* the company or the association of persons itself. Secondly, where the alleged wrong is a transaction which might be made binding on the company or association and on all its members by a simple majority of the members, no individual member of the company is allowed to maintain an action in respect of that matter for the simple reason that, if a mere majority of the members of the company or association is in favour of what has been done, then *cadit questio*. No wrong had been done to the company or association and there is nothing in respect of which anyone can sue. If, on the other hand, a simple majority of members of the company or association is against what has been done, then there is no valid reason why the company or association itself should not sue. In my judgment, it is implicit in the rule that the matter relied on as constituting the cause of action should be a cause of action properly belonging to the general

body of corporators or members of the company or association as opposed to a cause of action which some individual member can assert in his own right.

The cases falling within the general ambit of the rule are subject to certain exceptions. It has been noted in the course of argument that in cases where the act complained of is wholly *ultra vires* the company or association the rule has no application because there is no question of the transaction being confirmed by any majority. It has been further pointed out that where what
A has been done amounts to what is generally called in these cases a fraud on the minority and the wrongdoers are themselves in control of the company, the rule is relaxed in favour of the aggrieved minority who are allowed to bring what is known as a minority shareholders' action on behalf of themselves and all others. The reason for this is that, if they were denied that right, their grievance could never reach the court because the wrongdoers themselves,
B being in control, would not allow the company to sue. Those exceptions are not directly in point in this case, but they show, especially the last one, that the rule is not an inflexible rule and it will be relaxed where necessary in the interests of justice.

There is a further exception which seems to me to touch this case directly. That is the exception noted by ROMER, J., in *Cotter v. National Union of Sea-*
C *men* (3). He pointed out that the rule did not prevent an individual member from suing if the matter in respect of which he was suing was one which could validly be done or sanctioned, not by a simple majority of the members of the company or association, but only by some special majority, as, for instance, in the case of a limited company under the Companies Act, a special resolution duly passed as such. As ROMER, J., pointed out, the reason for that exception
D is clear, because otherwise, if the rule were applied in its full rigour, a company which, by its directors, had broken its own regulations by doing something without a special resolution which could only be done validly by a special resolution could assert that it alone was the proper plaintiff in any consequent action and the effect would be to allow a company acting in breach of its articles to do *de facto* by ordinary resolution that which according to its own regulations
E could only be done by special resolution. That exception exactly fits the present case inasmuch as here the act complained of is something which could only have been validly done, not by a simple majority, but by a two-thirds majority obtained on a ballot vote. In my judgment, therefore, the reliance on the rule in *Foss v. Harbottle* (1) in the present case may be regarded as misconceived on that ground alone.

F I would go further. In my judgment, this is a case of a kind which is not even within the general ambit of the rule. It is not a case where what is complained of is a wrong done to the union, a matter in respect of which the cause of action would primarily and properly belong to the union. It is a case in which certain members of a trade union complain that the union, acting through the delegate meeting and the executive council in breach of the rules by which
G the union and every member of the union are bound, has invaded the individual rights of the complainant members, who are entitled to maintain themselves in full membership with all the rights and privileges appertaining to that status so long as they pay contributions in accordance with the tables of contributions as they stood before the purported alterations of 1943, unless and until the scale of contributions is validly altered by the prescribed majority obtained
H on a ballot vote. Those rights, these members claim, have been invaded. The gist of the case is that the personal and individual rights of membership of each of them have been invaded by a purported, but invalid, alteration of the tables of contributions. In those circumstances, it seems to me the rule in *Foss v. Harbottle* (1) has no application at all, for the individual members who are suing sue, not in the right of the union, but in their own right to protect from invasion their own individual rights as members.

I would be content so to hold as a matter of self-evident principle, but the

matter is not free from authority. It will, I think, be enough for the present purposes if I refer, briefly, to a passage in the judgment of SIR GEORGE JESSEL, M.R., in *Pender v. Lushington* (4). There was a discussion in the course of the case whether the action was one which an individual shareholder could maintain and SIR GEORGE JESSEL, M.R., said (6 Ch.D. 80):

"But there is another ground on which the action may be maintained. This is an action by Mr. Pender for himself. He is a member of the company, and whether he votes with the majority or the minority he is entitled to have his vote recorded—an individual right in respect of which he has a right to sue. That has nothing to do with the question like that raised in *Foss v. Harbottle* (1) and that line of cases. He has a right to say, 'Whether I vote in the majority or minority, you shall record my vote, as that is a right of property belonging to my interest in this company, and if you refuse to record my vote I will institute legal proceedings against you to compel you.' What is the answer to such an action? It seems to me it can be maintained as a matter of substance, and that there is no technical difficulty in maintaining it."

In my judgment, precisely the same conclusions as are there expressed apply in the present case, and the rule in *Foss v. Harbottle* (1) affords no answer to the action. It was sought to show that this was not a matter affecting the individual rights of any particular member of the union because all were subject to the same alteration of the tables and, therefore, it was a matter which affected the general body of members as a whole. I do not agree. For one thing, the contributions to be paid by any individual member would depend on the particular category of membership to which he belonged, but, for another thing and more important, it seems to me that, although all the members are liable to pay the subscriptions appropriate to their respective categories, the right of each member to maintain himself in membership by paying his subscription—that is to say, by paying whatever subscription appropriate to his case is validly fixed and for the time being in force under the rules—is an individual right of his own which he himself is entitled to protect by an action on his own behalf.

It was pointed out in the course of the argument (though the matter was not fully developed) that the vast majority of members of the union had, in fact, paid without demur subscriptions at the new and invalid rate. It was further pointed out that those who had become entitled to benefits had taken benefits at the enhanced rate. It was further pointed out that in practice r. 19 (1) had never been resorted to for many years. Before VAISEY, J., these matters seem to have been put forward as amounting to such acquiescence as to make r. 19 (1) a dead letter which could no longer be enforced. That argument was not pressed before us, but these considerations were put as showing that the case was without substance. It was said that the fact that the vast majority of members had paid the new rate of subscriptions without demur demonstrated that the will of the union as a whole was in favour of the new subscriptions and consequently the action was without substance. I cannot agree. I cannot regard the mere paying by individual members of the increased rates without demur as equivalent to a ballot vote at which a two-thirds majority was obtained in favour of the alteration. In my judgment, the scale of contributions as fixed in the rules before the disputed alteration must stand unless and until altered in accordance with r. 19. It not having been so altered, the rates so fixed remain the only rates properly exigible, and no member is bound to pay any other rate except as a matter of individual consent. It may well be that in most cases it would be found, when the particular member's account was gone into, that he had by his conduct in paying the new rate of subscription expressed his individual consent to the alteration and thereby become bound, but I see no ground in principle or in authority

for holding that these individual assents arising from the conduct of individual members can have any binding effect at all on those members who say: "We are prepared to pay the contributions validly exigible under the rules and no more." Accordingly, I agree that the appeal fails and should be dismissed.

SIR RAYMOND EVERSHED, M.R.: I am entirely of the same opinion.

A On the question of the construction of the rules, the point was debated whether a delegate conference could validly by ordinary resolution of the conference revise r. 19 (1) by the abrogation or suspension of the words of prohibition on which the plaintiffs' action has been founded and then proceed by a further ordinary resolution to alter the rates of contribution payable, thereby avoiding any need to have a ballot or to obtain a two-thirds majority upon a ballot. I am not satisfied that, if a delegate conference made such an alteration or

B revision of r. 19 as a mere prelude to the alteration of the rates of contribution, such a procedure would successfully withstand challenge. If it is the desire of those responsible for the administration of the affairs of this union either to abrogate altogether the relevant prohibition in r. 19 or to make it inapplicable to an alteration of contribution rates by a delegate conference, I think prudence would demand that such a revision should receive the confirmation of the

C necessary two-thirds majority. Upon the *Foss v. Harbottle* (1) point, I should be guilty of repetition if I added anything to the reasons given by JENKINS, L.J., with which I find myself in entire agreement. The appeal fails and will be dismissed.

Appeal dismissed with costs.

D Solicitors: *Rowley, Ashworth & Co.* (for the defendants); *Ernest Bevir & Son* (for the plaintiffs).

[*Reported by F. GUTTMAN, Esq., Barrister-at-Law.*]

E

Re SCHAR (*deceased*). MIDLAND BANK EXECUTOR AND TRUSTEE CO., LTD. *v.* DAMER AND OTHERS.

[CHANCERY DIVISION (Vaisey, J.), November 7, 1950.]

F

Will—Joint tenancy—Disclaimer—Release—Purported disclaimer by one joint tenant.

G

H

By his will, dated Mar. 30, 1931, a testator, who died on Jan. 19, 1943, appointed a bank and two persons to be his executors and directed the payment of legacies and shares of his residuary estate to certain persons resident in Germany. By a codicil, dated May 31, 1940, he appointed F. and J. to be his executors with the bank in place of the persons appointed by the will, and declared that if, at the time of his death or at any time before his trustees had wound up his estate, legislation was in force in the United Kingdom by which some beneficiaries were deprived of the right to receive their benefits, then: "I give such benefits to my trustees absolutely with the request but without creating any trust that they will carry out the wishes contained in my said will or any codicil thereto when legislation permits them to do so." On Mar. 20, 1945, COHEN, J., held that, on the true construction of the will and codicil, the legacy and shares of residue thereby given to persons who survived the testator and were at his death enemies within the meaning of the Trading with the Enemy Act, 1939, were payable to the bank, F., and J. beneficially. On Nov. 19, 1945, the bank executed a deed in which the parties were described as the bank, of the one part, and F. and J. ("the beneficiaries"), of the other part. The deed, which was not executed by F. or J., recited the will and

codicil (to both of which it was made supplemental), the order of Mar. 20, 1945, and that the bank was desirous of executing a release of the interests to which it was entitled under the will and codicil, and it witnessed that "in pursuance of the said desire the bank doth hereby disclaim all that the share and interest of the bank of and in the legacies and share of residue referred to in the said order."

HELD: the bank, F., and J. were beneficial joint tenants under the will and codicil, and, there having been no severance of the joint tenancy, the deed could not operate as a disclaimer, but it operated as a release to F. and J. of the bank's beneficial interests.

[AS TO DISCLAIMER, see HALSBURY, Hailsham Edn., Vol. 34, pp. 124-126, paras. 158-160; and FOR CASES, see DIGEST, Vol. 44, pp. 399-402, Nos. 2312-2346.]

Case referred to:

- (1) *Re Wilks*, [1891] 3 Ch. 59; 60 L.J.Ch. 696; 65 L.T. 184; 38 Digest 692, 358.

ADJOURNED SUMMONS for the determination of the question whether, on the true construction of the will and codicil of Ernst Friedrich Schar, deceased, and in the events which had happened, certain interests under the said will and codicil, declared by an order of COHEN, J., dated Mar. 20, 1945, to be vested in the deceased's executors beneficially, were, having regard to the purported disclaimer of one of the executors, vested in the remaining executors or in the Custodian of Enemy Property. The relevant facts appear in the judgment.

D. H. Cohen for the plaintiffs, the Midland Bank Executor and Trustee Co., Ltd.

W. F. Waite for the first and second defendants, the two other executors.

Denys B. Buckley for the third defendant, the Custodian of Enemy Property.

VAISEY, J.: This is a curious point, and one on which there is very little authority to guide me. The testator, Mr. Ernst Friedrich Schar, made his will on Mar. 30, 1931. He appointed the plaintiff company, the Midland Bank Executor and Trustee Co., Ltd., and certain other persons to be his executors. He directed them to sell his residuary estate and invest the net proceeds, and to pay the income of those investments to his wife during her life. After her death, which occurred on Jan. 19, 1942, *i.e.*, in the lifetime of the testator, he gave legacies to a certain beneficiary who lived in Germany. He gave the ultimate residue to be divided in certain shares among certain people, all (or some) of whom were resident in Germany. On May 31, 1940, he made a codicil to his will revoking the appointment of the persons who were to be the executors with the bank and in their stead appointing the first two defendants, Mr. Frederick Charles Damer and Mr. Joseph Guggenheim, to be executors with the bank. By cl. 6 of the codicil he directed that if at the time of his death or at any time before his trustees had wound up his estate and paid or transferred to the beneficiaries their benefits legislation was in force in the United Kingdom by which the said benefits became charged in favour of some other person or persons or corporation or the said beneficiaries were or might be deprived of the right to receive the benefits given to them, then:

"I give such benefits to my trustees absolutely with the request but without creating any trust that they will carry out the wishes contained in my said will or any codicil thereto when legislation permits them to do so."

On Jan. 19, 1943, the testator died. His will was proved later in the same year by the plaintiffs and the first two defendants, the net estate being of the value of some £30,000.

For reasons which are quite intelligible the bank felt some embarrassment in having thrust on it, apparently as beneficial owner, property of the testator of whose will it was one of the executors, and the matter came before the court. On Mar. 20, 1945, COHEN, J., declared that

A " . . . upon the true construction of the will and codicil . . . and in particular of cl. 6 of the said codicil and in the events which have happened legacies and shares of residue thereby given to persons who survived the testator and were at his death enemies within the meaning of the Trading with the Enemy Act, 1939, and any orders made thereunder are payable to the plaintiffs [the bank] and the defendants Damer and Guggenheim beneficially."

B The embarrassment of the bank was thereby intensified, and to relieve itself of it, on Nov. 19, 1945, the bank executed a deed in which it as a party of the one part carried out an operation the effect of which I have to determine. The parties of the other part were Mr. Damer and Mr. Guggenheim, therein defined as "the beneficiaries." It is, of course, not conclusive, but it is significant that those two personal executors should be made parties to this document. The recitals to the deed are, first, that "these presents are intended to be supplemental to the will and codicil" of the testator, and, secondly, a recital
C setting out the effect of the order of COHEN, J. The third recital is:

"The bank does not intend and has never intended to accept or take advantage of any interests to which it is entitled beneficially under the will and codicil of the testator and is desirous of executing such release as is hereinafter contained."

D There follows the one short clause comprising the operative part of the deed:

"This deed witnesseth that in pursuance of the said desire the bank doth hereby disclaim all that the share and interest of the bank of and in the legacies and share of residue referred to in the said order."

E Two views can be taken of this document. First, it is said that it is a disclaimer, and, secondly, that it is a release. It will be observed from what I have said that in the last recital the bank expresses the intention of executing a release, and in the operative part it purports to exercise a right, or claim a privilege, of disclaimer. I am bound to add that, if it was a disclaimer into the air, so to speak—a shaking off of the embarrassing benefit which the combined effect of the will and the order of COHEN, J., had imposed on the bank, I find it rather
F curious that the other two parties should have been made parties of the other part, and it looks to me as though the intention, so far as one can make it out, was that the parties of the other part were in some way to benefit by this document. If it was a pure disclaimer, I should have thought that the proper form was that of a deed poll. However that may be, here is a document *inter partes*, the bank, of the one part, and the other two executors and trustees, of the other
G part. It is expressed as a disclaimer and prefatorily called a release in the recital. There is no indication whatever how "the beneficiaries," the first two defendants, come in—what they are supposed to be doing and what they would get out of it.

This summons came before me as long ago as May, 1947, and the question which was asked me then and is repeated now, was:

H "Whether upon the true construction of the will and codicil of the testator and in the events which have happened [in particular, the order of COHEN, J., and, secondly, the deed of Nov. 19, 1945] (a) the interest declared by the said order to be vested in the plaintiffs and the first and second defendants is now vested in the first two named defendants as joint tenants or otherwise; or (b) whether a one-third share of the said legacies and share of residue or some other and what share devolves on the last named defendant as the Custodian of Enemy Property."

In May, 1947, the matter stood over because it was suggested that the bank under its objects had no power to give away property to which it was entitled. Now, after three and a half years, the bank come back to me with further evidence which shows clearly that the bank did not know nor care what happened to this property so long as the bank did not have to handle it. The general manager of the bank explains to me that he did not think it good business for the bank to, so to speak, soil its hands by accepting, even notionally, any property of a testator which was not deliberately left to it. Why it should not have accepted it in those circumstances, I do not really understand. A

The question, however, which I have to decide is whether this document operates either as a severance of the joint tenancy and putting back into the estate, as property undisposed of, a third share in these various interests, or whether it is a release of the bank's share in those particular items of property which go in the ordinary way to the other joint tenants. Learned counsel have told me that there is very little authority, and I am not surprised, because this is not a document which ought to be adopted as a precedent. B
The question whether there can be a disclaimer in the proper sense by one of several joint tenants is one to which some attention has been paid, and in HALSBURY'S LAWS OF ENGLAND, Hailsham ed., vol. 34, p. 124, para. 158, I C find this statement:

"A disclaimer puts a donee, as regards his liabilities, burdens, and rights, in the same position as if no gift had been made to him, but does not necessarily render the gift void in regard to all persons and for all purposes, as, for example, where the donee is a trustee."

I do not believe that disclaimer can be made by one of several joint tenants because I think the unity of the estate and of the interest in the estate enures for the benefit of each and all and that each and all have one undivided and indivisible property in the subject-matter of the gift, just as, although for other reasons, one trustee cannot disclaim. I think that the only disclaimer which can be made by joint tenants is a disclaimer which is made by them all. D
The case to which counsel for the Custodian of Enemy Property has referred me, *Re Wilks* (1), seems to me to contain some statement as to how to sever a joint tenancy in the ordinary way, and it may be that, if there had been a definite severance of the joint tenancy before the deed or so-called disclaimer was executed, the position would have been very different, but there is no evidence of such a severance, and I think that all three parties, described in the deed as the bank and the beneficiaries, were together joint tenants. E
It is a little significant that the joint beneficiaries, named as of the other part, did not execute the deed. F
The only execution of the deed was by the bank.

I think that this document, which obviously, having regard to the prefatory recital, the bank thought was going to be a release, operated as a release to the other two joint tenants, and I should have thought that the bank would have been well pleased that that should be so because those two joint tenants are morally bound to carry out certain express desires and wishes of the testator. G
Why the bank felt that it was in some way precluded from helping them to carry out that moral duty, I do not understand, but it may be that, if there had been the slightest breath of suspicion that the bank had been helping itself to property that it did not consider itself entitled to, that would do harm to its reputation. I think that the effect of the deed was to confer on the first two defendants the whole of the interest declared in the order of COHEN, J., H
to be vested in them and the bank as joint tenants, and I shall so declare.

Order accordingly. Costs of all parties as between solicitor and client to be paid out of the estate.

Solicitors: *Buckeridge & Braune* (for the plaintiffs and the first and second defendants); *Solicitor, Board of Trade* (for the Custodian of Enemy Property).

[Reported by H. McL. MORRISON, ESQ., Barrister-at-Law.]

*Re FENTEM (deceased). COCKERTON v. FENTEM
AND OTHERS.*

[CHANCERY DIVISION (Harman, J.), October 26, 27, November 3, 1950.]

Will—Condition—Forfeiture—Restraint of marriage—Motive—Construction of words of futurity.

A By her will, made on Feb. 28, 1935, the testatrix gave the income of her residuary estate on trust, subject to her sister's life interest therein, for her brother for life, and "at the death of the survivor of them, in case he shall not have married," the capital and income were to be paid to the brother's personal representative. She then directed that "in case he shall have married," the income of the residue was to be paid to her manservant during his life and after his death the capital and income were to be paid to the vicar and churchwardens for the time being of the parish church to be expended by them on the fabric of the church. On Apr. 3, 1935, the brother, who was living in the same house as the testatrix at the date of the will, married U.M., who was also living in that house at the time. The testatrix died on Mar. 8, 1938, and the sister died on Oct. 26, 1948. After the sister's death the brother claimed that he was entitled to the capital of the residue by combining his life interest with the gift to his personal representative, as the condition attached to the gift to his personal representative was void.

D HELD: (i) there was no sufficient context in the will of the testatrix to render inapplicable the rule that, *prima facie*, words of futurity in a will speak from the date of the will, and, therefore, the words "in case he shall have married" referred, not merely to the marriage of the brother after the death of the testatrix, but also to marriage after the date of the will and before the death of the testatrix.

Re Chapman ([1904] 1 Ch. 431), *applied*.

E (ii) on the true construction of the will, the testatrix, in attaching the condition to the gift to the brother's personal representative, had not intended to restrain the brother from marrying, but merely wished to ensure that after his death her residue would be dealt with in a particular manner, and, therefore, the condition was valid, and the gifts over would take effect after the brother's death.

Re Hewett ([1918] 1 Ch. 458), *applied*.

F [AS TO CONDITIONS IN WILLS, see HALSBURY, Hailsham Edn., Vol. 34, pp. 103-115, paras. 138-147; and FOR CASES, see DIGEST, Vol. 44, pp. 454-456, Nos. 2763-2777.]

Cases referred to:

(1) *Scott v. Tyler*, (1788), 2 Bro. C.C. 431; 2 Dick. 712; 21 E.R. 448; 44 Digest 483, 3030.

G (2) *Re Chapman*, [1904] 1 Ch. 431; 73 L.J.Ch. 291; 90 L.T. 339; *affd. sub nom.*, *Chapman v. Perkins*, [1905] A.C. 106; 74 L.J.Ch. 331; 92 L.T. 372; 44 Digest 490, 3095.

(3) *Re Hewett*, [1918] 1 Ch. 458; 118 L.T. 524; *sub nom.*, *Re Hewitt*, 87 L.J.Ch. 209; 44 Digest 455, 2773.

H (4) *Bellairs v. Bellairs*, (1874), L.R. 18 Eq. 510; 43 L.J.Ch. 669; 44 Digest 455, 2774.

(5) *Re Lanyon*, [1927] 2 Ch. 264; 96 L.J.Ch. 487; 137 L.T. 806; 44 Digest 456, 2782.

(6) *Davis v. Angel*, (1862), 31 Beav. 223; 31 L.J.Ch. 613; 54 E.R. 1123; *affd.* 4 De G. F. & J. 524; 6 L.T. 880; 45 E.R. 1287; 44 Digest 479, 2965.

(7) *Smith v. Cowdery*, (1825), 2 Sim. & St. 358; 3 L.J.O.S. Ch. 205; 57 E.R. 382; 44 Digest 479, 2964.

(8) *Jones v. Jones*, (1876), 1 Q.B.D. 279; 45 L.J.Q.B. 166; 34 L.T. 243; 44 Digest 455, 2776.

ADJOURNED SUMMONS to determine whether, on the true construction of the will of the testatrix and in the events which had happened, a condition attached to a gift was valid, or whether it was void as being in general restraint of marriage.

By her will the testatrix gave her residuary estate, subject to the life interests therein of her sister and brother, to the brother's personal representative if the brother "shall not have married," with gifts over "in case he shall have married." The brother married soon after the date of the will and before the death of the testatrix. After the death of the sister the brother claimed that he was entitled to the capital of the residue by combining his life interest with the gift to his personal representative. It was contended on his behalf that the condition attached to the gift to his personal representative was a condition subsequent and, its object being to restrain him from marrying, it was void as being contrary to public policy, and, therefore, the gift took effect free from the condition. On behalf of the next of kin it was contended that the condition was a condition precedent and, therefore, as performance of the condition had become impossible before the will took effect, the gift failed and there was an intestacy after the brother's death. The persons entitled under the gifts over contended that the object of the condition was not to restrain the brother from marrying, but merely to dispose of the property in a particular manner, and, therefore, the condition was good. The facts appear in the judgment.

Gravenor Hewins for the plaintiff, an executor of the will.

Raffety for the brother.

Wigglesworth for the persons interested under the gifts over.

J. Monckton for the next of kin.

Cur. adv. vult.

Nov. 3. **HARMAN, J.:** The testatrix, Ann Hattersley Fentem, was a spinster living at Dagnall, in the parish of Bakewell in Derbyshire. When she made her will on Feb. 28, 1935, she was living in a house with her sister, Mary Margaret Brown Fentem, also a spinster, and a brother, Thomas Fentem, who is the first defendant to this summons. He also was unmarried. There was also living in the house another spinster, Ursula Mather. The testatrix had a modest fortune to dispose of and, after appointing the plaintiff and her sister to be her executors and trustees, she gave all her property to her trustees on trust for sale and conversion in the usual way. She gave a small legacy to her professional executor, the plaintiff, and directed the investment of the balance of her residue and the payment of its income to her sister during her life, and, after the sister's death, to her brother, Thomas, during his life. She then continued in these words:

"... and at the death of the survivor of them, in case he [Thomas] shall not have married, I direct the capital and income of the said investments shall be paid to his legal personal representative, but in case he shall have married, I direct the said income shall be paid to John Bramwell, our man servant, during his life, and after his death the capital and income of the said investments shall be paid to the vicar and churchwardens for the time being, of the Bakewell parish church, to be expended by them upon the fabric of the church."

This clause has given rise to considerable difficulty. On Apr. 3, 1935, the brother married Miss Ursula Mather. One would suppose that the testatrix knew that that event was in contemplation when she made her will, but that is not a matter which I know with certainty. I shall assume that she knew of the marriage when it happened, because it was between her brother and a lady who were both living in the same house with her.

A The testatrix died on Mar. 8, 1938. Thereupon, in due course the estate was administered and the income of the investments representing the residue was paid to the sister until her death on Oct. 26, 1948, when it became payable to the brother during his life. The question arises what is to happen after the brother's death. *Prima facie*, that would be a future question, but the brother contends (and, in my judgment, rightly) that, if the gift over to his personal representative is a good gift, he is entitled to the capital now by combining his life interest with the gift to his personal representative. Counsel for the brother contended that the condition attached to the gift to his personal representative was a condition subsequent, and being (as he said) a condition in restraint of marriage, its object being to restrain or discourage him from marrying, was bad as being contrary to public policy, and, therefore, the gift to the brother's personal representative was not divested and remained a good gift. The brother could, therefore, give a good receipt for the capital of the fund. Counsel for the next of kin contended, on the other hand, that this was a condition precedent and, as performance of the condition had become impossible by the time the will came into force, because the marriage had already occurred before that date, the gift to the brother's personal representative fails, and there is an intestacy after the brother's life interest. Counsel for the persons entitled under the gifts over contends that this is not a condition in restraint of marriage, as it is the motive of the testatrix which counts, and, on a true construction of the will, the intention of the testatrix was not to restrain or deter the brother from marrying. Therefore, he contends the condition is good and must be given effect to, according to its tenor. He also advanced the argument that, as to the remainder to what he calls pious uses, *viz.*, the gift to the vicar and churchwardens on a charitable trust, the court will never regard a condition as bad which leads to such pious uses in the end. For that proposition he cited a passage from the judgment of LORD THURLOW, L.C. (2 Dick. 722) in *Scott v. Tyler* (1):

E "It seems also agreed on all hands, that when, on any condition, however restrictive of marriage, the legacy is given over to pious uses, the intention of the party shall be deemed to regard those uses, and not to have aimed at the objectionable purpose of restraining marriage."

F In dealing with the problem which is now before me, I start with the principle that, when words of futurity are used in a will, *prima facie* they speak from the date of the will and not from the death of the testator, so that the words, "in case he shall not have married," *prima facie* refer to marriage after the date of the will and before the death of the testatrix, and not merely to marriage after the death of the testatrix: see *Re Chapman* (2), the headnote to which contains this sentence:

G "Though *prima facie* words of futurity in a will point to events happening after the execution of the will, and not merely to events happening after the testator's death, that *prima facie* meaning may be controlled by the context."

H The Court of Appeal, by a majority, held that there was enough in the context of the will in that case to show that a forfeiture clause operated only in the case of a marriage after the testator's death. COZENS-HARDY, L.J., dissented from that view, but agreed with the majority of the court in regard to the principle to be applied. He said ([1904] 1 Ch. 440):

"Although I have the misfortune to differ from my learned brethren as to the result of this appeal, I entirely agree as to the principles which ought to be applied. *Prima facie* a will speaks from the date of its execution, except as regards the property comprised in it, but there may be a context sufficient to show that this rule is not applicable. It is a matter of construction whether a particular clause is intended to speak and operate

only from the death of the testator and not from the date of the execution of the will."

I find no sufficient context to enable me to say that the clause which we are now considering was meant to operate only from the death of the testatrix. She uses the words, "he shall have married," and that, I think, points to the period from the date of the will as well as later. Therefore, I cannot say that, as the marriage occurred during the lifetime of the testatrix, the condition does not, on its true construction, operate.

Secondly, it was, I think, agreed by all parties, that conditions in restraint of marriage, if general, are at least *prima facie* void as being contrary to public policy. There is a learned discussion of the subject by YOUNGER, J., in *Re Hewett* (3), where a gift to an unmarried woman was cut down, in the event of her marriage, in favour of the testator's child by her. It was contended on her behalf that the condition was void, being a general restraint against marriage, but the learned judge came to the conclusion that the testator's motive was not to restrain the woman from marrying, but to provide for his natural son by her, and that that was a good and laudable motive. The headnote contains these words: "A condition subsequent in restraint of marriage is only *prima facie*, and not *per se*, void." I do not think I need read a great deal of the judgment, because there is no doubt about the principle. The learned judge cited ([1918] 1 Ch. 463) a passage from the judgment of SIR GEORGE JESSEL, M.R., in *Bellairs v. Bellairs* (4), where the Master of the Rolls, who evidently disliked the principle, but felt bound to follow it, used these words (L.R. 18 Eq. 513):

"In the present case the law is settled thus far, that a general condition prohibiting marriage, by which a legacy is cut down, is void. I consider that to be the law of the courts of equity."

In *Re Lanyon* (5) RUSSELL, J., came to the conclusion that a condition, which was not, on the face of it, in general restraint of marriage, but which was a deterrent to marriage because the person subject to it could never know whether he could safely marry anyone, was also bad. *Re Lanyon* (5) is also germane to the present purpose in that there, too, the condition operated, not on the life interest of the person who was not to marry, but only on the interests which his children might take. The testator in that case gave his residuary estate to his trustees on trust to pay the income to his son, J.L., for his life, and on his decease on trust to pay the capital to his child or children and equally between them if more than one,

"... provided he does not marry a relation by blood, as I wish to mark my great objection to marriage between blood relations ..."

There were then certain other trusts in the event of the son marrying a blood relation. Therefore, the son lost nothing himself, but his children, if he had any, would be deprived of their interest if the person whom he married turned out to be a blood relation. The learned judge felt that the testator's son could never tell whom he could marry. He said ([1927] 2 Ch. 274):

"Looking to the case before me the restraint is in terms partial; although no one could say how large or small a portion of the female world is left open to choice, it is still in terms a partial restraint. But its nature is undoubtedly such that it would be difficult, almost impossible, to ascertain definitely that any particular lady was not a blood relation—that a Pevensy Bay or even more remote common ancestor could not be found. No marriage with a supposed stranger in blood could be contracted except subject to the risk that should a common ancestor be traced the provision for defeasance would operate. The son could only be certain that he was marrying a blood relation, he could never be certain that he was not. A provision which by its nature produces those results is in my opinion a

provision leading to the probable prohibition of marriage and is void accordingly. There is one novel feature in this case—namely, that the penalty is inflicted not on the son who violates the provision but upon his children. No property is taken away from the son. In my opinion this makes no difference. It might well be that a provision taking away property from A. in the event of a breach of condition by B., would not operate *in terrorem* as regards B., if A. were a stranger. But I am clearly of opinion that where the victims are B.'s children, and the prohibited event is B.'s marriage, there is complete scope for operation *in terrorem* as regards B."

It seems to me that those last words are pertinent here. Although the brother's children are not the victims, the brother's personal representative is deprived of the right to dispose of the property, and, therefore, it seems to me that there is room for the words to operate *in terrorem*.

Counsel for the brother and counsel for the next of kin, who attack the condition, do so, of course, from different standpoints. Counsel for the brother contends that the condition is bad and, therefore, goes, and the gift is left. Counsel for the next of kin, on the other hand, contends that the condition is precedent, and, therefore, when it goes, the gift dependent on it goes too, and an intestacy supervenes. The difference between the two kinds of condition was discussed in *Davis v. Angel* (6), where SIR JOHN ROMILLY, M.R., said (31 Beav. 226):

"This is, in fact, the plain and ordinary distinction between conditions precedent and conditions subsequent. If the condition be precedent and the performance of it become impossible, the estate or interest never vests, and the devisee or legatee takes nothing. But if the condition be subsequent and the performance of it becomes impossible, then the estate does not divest or go over to any other person, by reason of the non-performance of that condition. So also the consent of the person who imposed the condition will remove the consequence of the non-performance of the condition subsequent, and this, I think, was the view which the Vice-Chancellor took in the case of *Smith v. Cowdery* (7), and the other cases of that description which were cited and commented upon in the argument of this case. But no such consent will alter the effect of the devise or bequest, which makes the performance of the condition necessary before any interest is taken by the intended devisee or legatee. The consent of the testator, in the case of a condition subsequent, has the effect of revoking that part of his will, which gives the estate over to another person on the non-performance of the condition . . ."

Points of great nicety have been argued in a number of cases on the question whether a condition is or is not precedent, but I think that I must first consider the condition itself without regard to that consideration. *Re Hewett* (3) shows that, in the view of YOUNGER, J., motive was a material matter to consider. As an authority for his view, YOUNGER, J., cited ([1918] 1 Ch. 467) a passage from the judgment of BLACKBURN, J., in *Jones v. Jones* (8), which was a decision of a Divisional Court of the Queen's Bench Division on an appeal from a county court in a replevin suit. It was necessary for the court to decide whether the motive in taking away a gift of property from a girl, called Mary Davies, was to prevent her marriage, so that the defeasance was bad. BLACKBURN, J., said (1 Q.B.D. 282):

"A number of cases have been referred to, from which it appears that the courts of equity have adopted from the ecclesiastical or civil law, it is unnecessary to say to what extent, the rule that conditions in general restraint of marriage are invalid. The attempt to escape from the consequences of this rule led to decisions in which a great many nice distinctions

were established, as to whether the bequest amounted to a condition or only to a limitation."

He then said that he was dealing with a devise of land to which that last consideration did not apply, and he continued (*ibid.*):

"There is, I admit, strong authority, that when the object of the will is to restrain marriage and to promote celibacy, the courts will hold such a condition to be contrary to public policy and void. But here there appears to be no intention to promote celibacy. The testator leaves all his real estate, together with all his goods and chattels, to three women, his relations, during their lifetime; and he then proceeds: 'And when any or some of the before-mentioned parties named, Mary my sister, Elizabeth her daughter, or Sarah, the daughter of the said David Jones, shall depart this life, I give, devise, and bequeath her or their shares to be possessed and enjoyed by my sister Jemima, the wife of John Davies, together with her daughter Mary, during their lifetime: Provided the said Mary, daughter of the said Jemima, my sister, shall remain in her present state of single woman, otherwise, if she shall alter her present state of single woman, and bind herself in wedlock, she is liable to lose her share of the said property immediately, and her share to be possessed and enjoyed by the other mentioned parties share and share alike.' Now here, I think, when one sees the scope of the testator's dispositions, it comes to this: 'I have left to three women enough to live upon, and if one of them dies I bring in Jemima and Mary. But if Mary' (I suppose as the youngest she was most likely to change her state) 'happens to marry, her husband must maintain her, and her share shall pass to the rest.' Now, if he had said this in express words, could it have been contended that his provision was contrary to public policy? I think not. It is admitted that a limitation to Mary until she marries is perfectly good, but it is said that here, because the disposition is in the form of a condition, it is bad."

The learned judge then said that that consideration did not apply to real estate, and he continued (*ibid.*, 283):

"... I think that, looking at the object of this will, and the fact that the testator probably thought that his property was not more than enough for these women to live upon together, his direction that the one who married should lose her share, cannot be said to be opposed to public policy."

LUSH, J., concurred in that opinion.

What, then, was the motive or the object of the testatrix when she made this rather strange bequest? She, her sister and the brother were all living in the same house with Ursula Mather, whom the brother married soon after the date of the will. She seems to have felt that it would be right that her sister should enjoy the income of her residue and that the brother should enjoy it after the sister's death, and she was, apparently, quite content that, if he were not married, he should have the disposition of it. One cannot suppose that she knew that, if she left it to his personal representative, the brother might take the capital. Her intention clearly was that he should, if he remained a bachelor, have a life interest with a remainder as he should choose to dispose of it. She may have had some arrangement with him, or she may have thought that she could trust him to do the best with it, but it then occurred to her—or, perhaps, she strongly suspected—that he was minded to marry. She must have known that there are other calls on the generosity or bounty of a married man than a local charity—it may be his widow, or his children. She came to the conclusion that, if the brother married, he would not be free to dispose of the property in the way which she wished and which, perhaps, he had agreed to. She, therefore, says: "If he shall have married, then

he shall not have the disposition of it, but it shall go to our servant and then to the vicar and churchwardens of the parish church." In my judgment, the condition was not inserted with the motive of preventing the brother marrying. It did not punish him in any way. The testatrix merely provided that, if he did marry, then she, and not he, would dispose of the remainder. I may add that the condition clearly could not have operated to prevent him marrying, because he married before the will became an effective document. It could have no deterrent effect, but that I disregard, because, if the object was one of which the law disapproves, the condition might, nevertheless, be bad.

Having come to the conclusion that the condition was not intended to restrain the brother from marrying, I do not think I need decide whether, if it had been a bad condition, it was subsequent or precedent, nor need I decide the point in regard to the remainder being for pious uses. In my judgment, counsel for the brother and counsel for the next of kin do not make out their case, because they fail to persuade me that the motive or object of this condition was to restrain marriage. Therefore, I regard the condition as good and the remainder as well given. The brother, therefore, will continue to receive the income and it will go over after his death as the will directs.

Declaration accordingly. Costs of all parties, as between solicitor and client, to be paid out of the corpus of the fund.

Solicitors: Woodcock, Ryland & Co., agents for Goodwin & Cockerton, Bakewell (for the plaintiff and the persons contingently interested); Sharpe, Pritchard & Co., agents for Sedgwick, Turner, Swarder & Wilson, Watford (for the brother and the next of kin).

[Reported by R. D. H. OSBORNE, Esq., Barrister-at-Law.]

LANGFORD PROPERTY CO., LTD. v. BATTEN.

[HOUSE OF LORDS (Lord Porter, Lord Goddard, Lord Normand, Lord Oaksey and Lord Radcliffe), July 7, 11, 12, November 16, 1950.]

Rent Restriction—Standard rent—Premises let with dwelling-house—House let on Sept. 1, 1939—Subsequent letting of house and separate garage—Treatment of garage as part of dwelling-house—Rent and Mortgage Interest Restrictions Act, 1939 (c. 71), s. 3 (3).

On Sept. 1, 1939, a flat, which came within the Rent and Mortgage Interest Restrictions Act, 1939, was let at a rent of £135 a year, and a garage in the vicinity of the flat, but not contiguous thereto, was let to a different tenant at a rent of £13 a year. The flat occupied an area of six hundred to seven hundred square feet and the garage an area of 140 to 150 square feet. On Jan. 16, 1946, the flat and the garage were let by a single lease to a tenant for a period of three years at a rent of £175 rising to £185 a year, the lease providing that the premises let were entire and indivisible. At the end of the term the tenant held over as a statutory tenant. In proceedings to determine the standard rent of the premises,

HELD (LORD GODDARD *dissenting*): although, under s. 3 (3) of the Rent and Mortgage Interest Restrictions Act, 1939, the garage was to be treated as part of the flat with which it was let for the purposes of the Rent Restrictions Acts, as the flat and garage together differed substantially from the the flat alone, the premises which were let in 1946 (*viz.*, the flat and garage together) were a different entity from the premises let in 1939 (*viz.*, the flat alone), and, therefore, the flat and garage constituted a dwelling-house which was first let on Jan. 16, 1946, and the standard rent was £185 a year.

Haldane v. Sinclair (1927 S.C. 562), *approved*.

Decision of the Court of Appeal ([1949] 2 All E.R. 422), *reversed*.

[AS TO STANDARD RENT, see HALSBURY, *Hailsham Edn.*, Vol. 20, pp. 312-314, 316, paras. 369, 372, and 1950 Supp.; and FOR CASES, see DIGEST, Vol. 31, pp. 564-566, Nos. 7117-7132, and Supplements.]

Cases referred to:

- (1) *R. & P. Properties, Ltd. v. Baldwin*, [1938] 4 All E.R. 845; [1939] 1 K.B. 461; 108 L.J.K.B. 463; 160 L.T. 445; Digest Supp.
- (2) *Vaughan v. Shaw*, [1945] 2 All E.R. 52; [1945] K.B. 400; 114 L.J.K.B. 350; 173 L.T. 6; 2nd Digest Supp.
- (3) *Hemns v. Wheeler*, [1948] 2 K.B. 61; [1948] L.J.R. 1024; 2nd Digest Supp.
- (4) *Haldane v. Sinclair*, 1927 S.C. 562; Digest Supp.
- (5) *Veale v. Cabezas*, [1921] W.N. 311; 31 Digest 565, 7124.
- (6) *Langford Property Co., Ltd. v. Sommerfeld*, [1948] W.N. 287; 206 L.T. Jo. 38; 2nd Digest Supp.

APPEAL by the landlords from an order of the Court of Appeal (BUCKNILL, COHEN and ASQUITH, L.JJ.), dated July 21, 1949, and reported [1949] 2 All E.R. 422, affirming an order of His Honour JUDGE SIR GERALD HURST, K.C., made at Croydon County Court on Mar. 4, 1949.

On a summons taken out by the landlords for the determination of the standard rent of premises comprising a flat and a garage which were let to the tenant by a lease dated Jan. 16, 1946, the county court judge held that under the Rent and Mortgage Interest Restrictions Act, 1939, s. 3 (3), the garage (which had not been previously let with the flat) was to be treated as part of the flat and the standard rent of the premises was the rent at which the flat alone was let in September, 1939. The landlords' appeal from this decision was dismissed by the Court of Appeal. The facts appear in the opinion of LORD PORTER.

Sir Arthur S. Comyns Carr, K.C., Heathcote-Williams, K.C., and Plume for the landlords.

Vester and R. E. Megarry for the tenant.

The House took time for consideration.

Nov. 16. The following opinions were read.

LORD PORTER: My Lords, this case raises once again a question on the construction of the difficult and elusive wording of the Rent Restrictions Acts. Whether it will ever be possible to consolidate and re-draft their provisions I do not know, but the difficulty to which their language gives rise undoubtedly calls for their re-consideration.

In the present instance the appellants, who own a large block of flats known as The Woodlands, Beulah Hill, S.E.19, took out a summons in the Croydon County Court on Jan. 29, 1949, asking that the standard rent of Flat No. 2 and garage No. 7, which were then occupied by the respondent, might be determined by that court, claiming as landlords that the rent was £185 per annum, whereas the tenant contended that it was £135 only. On the trial of the summons the learned county court judge found for the respondent and the Court of Appeal upheld his judgment.

The facts as found by the county court judge have been tabulated in the Cases of the parties and are not in dispute. He found [according to the facts as set out in the landlords' Case]:

- "(a) That Flat No. 2 was not controlled by the Rent Acts before Sept. 1, 1939, but became controlled by the [Rent and Mortgage Interest Restrictions Act, 1939]. (b) That on Sept. 1, 1939, Flat No. 2 was let alone as a flat, and garage No. 7 existed as a garage with a rateable value of £6 per annum and was not let with Flat No. 2. (c) That garage, No. 7, had been added to Flat No. 2, and by the lease of Jan. 16, 1946, the [landlords] had let to the [tenant] the premises comprising garage No. 7 with Flat No. 2 as entire and indivisible. (d) That such addition of the garage No. 7 was totally

unconnected with any structural alterations to or improvements of the original dwelling-house constituted by the letting of Flat No. 2 alone without the garage. (e) That the inclusion of the garage No. 7 in the letting of Flat No. 2 does not represent a trifling accession to the flat, that the flat occupies from six to seven hundred square feet and the garage an area of 140 to 150 square feet, and that the garage was let in 1939 at a rent of £13 per annum and had a rateable value of £6 per annum. (f) That, were it a pure question of fact, it would seem difficult to say that a flat plus a garage is the same thing as a flat without a garage, and that, on this assumption, *i.e.*, that there has been a change of identity, the standard rent of the premises comprising Flat No. 2 and garage No. 7 would be fixed at £185 per annum as the rent under the first letting after Sept. 1, 1939, of the new dwelling-house, *i.e.*, the flat plus garage, and not at £135, the rent under the letting of the flat alone on Sept. 1, 1939."

The county court judge also found [as set out in the tenant's Case]:

"That at the end of the war the [landlords] adopted a policy of compelling prospective tenants of flats to accept the inclusion of a garage in the demised premises whether the tenants needed or desired the garage or not, for the purpose of establishing, if possible, an increased standard rent in respect of their flats."

As stated in the landlords' Case, the learned county court judge went on to express the opinion that:

"(g) The view that the content of the new tenancy of the flat plus garage is not identical with the content of the tenancy of the flat alone without garage is supported by the decisions in the Court of Appeal in *R. & P. Properties, Ltd. v. Baldwin* (1) and *Vaughan v. Shaw* (2). (h) That, as a matter of law, by applying the provisions of s. 3 (3) of the Act of 1939 to the fact that garage No. 7 is let with Flat No. 2, the garage is therefore to be treated as part of the flat and that it is notionally part of the flat, and its accession to the flat cannot alter the standard rent of the flat as fixed by the letting of the flat alone in September, 1939, and that this literal interpretation of the statute was acted upon in *Hemms v. Wheeler* (3), where the analogous provisions of s. 12 (2) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, were considered. (i) That for the reasons given in para. (h) the standard rent of £135 of Flat No. 2, fixed by the letting in September, 1939, of Flat No. 2 alone, was also the standard rent of the premises comprised in the letting of Flat No. 2 plus garage No. 7."

The flat alone was let at a rent of £135 per annum on Sept. 1, 1939, and was then rated at £56, and, accordingly, it came under the control of the provisions contained in the Rent and Mortgage Interest Restrictions Act, 1939. It became vacant shortly before Jan. 16, 1946, and was then leased to the tenant with a garage at a rent of £175 rising to £185, for a term of three years beginning on Feb. 1 of that year. If, then, the standard rent is to be calculated on the rent payable for the flat alone on Sept. 1, 1939, it is limited to £135. If, on the other hand, Jan. 16, 1946, is the appropriate date and the composite entity of flat and garage is considered to have then been let for the first time, it is £185. Clause 13 of the lease of Jan. 16, 1946, contained the provision:

"It is hereby mutually agreed by and between the parties hereto that the said premises are entire and indivisible and in the event of the tenancy hereby created being continued after the expiration of the term or of the tenant remaining in possession by virtue of the Rent and Mortgage Interest Restrictions Acts or other statutory power any such extension shall be on the terms and condition that the said premises are entire and indivisible."

Whether the standard rent is to be fixed at £135 or at £185, the premises are admittedly within the scope of the Rent Restrictions Acts, and at the expiry

of his lease the tenant was entitled to and did hold over as a statutory tenant.

The sole question for your Lordships is whether the standard rent is £135 or £185, but the matter is of some importance to the landlords, as they have let at least six flats with garages to which similar considerations apply, and it may also affect a large number of prospective tenants of this and similar blocks of flats who may be compelled to pay an increased standard rent to obtain the accommodation which they require. A flat with a garage is, as the landlords maintain, a different entity from a flat without a garage, and, therefore, if the Acts contained no special provision dealing with the matter, the tenant's contention is wrong. But, says the tenant, the Acts have specifically provided for such an incident, first in s. 12 (2) of the Act of 1920 and now in s. 3 (3) of the Act of 1939. The matter, however, had already been dealt with in s. 2 (2) of the Increase of Rent and Mortgage Interest (War Restrictions) Act, 1915, which has now been repealed by the Act of 1920, but, as I think, has some bearing on the history and development of the principles and meaning of the Acts, and I set out each of the three sub-sections in the belief that they may be of assistance to your Lordships in reaching a conclusion as to their true construction.

Section 2 (2) of the Act of 1915 provides:

"This Act shall apply to a house or a part of a house let as a separate dwelling where such letting does not include any land other than the site of the dwelling-house and a garden or other premises within the curtilage of the dwelling-house . . ."

Section 12 (2) (iii) of the Act of 1920 provides:

"For the purposes of this Act, any land or premises let together with a house shall, if the rateable value of the land or premises let separately would be less than one quarter of the rateable value of the house, be treated as part of the house, but, subject to this provision, this Act shall not apply to a house let together with land other than the site of the house."

Section 3 (3) of the Act of 1939 provides:

"Subject to the provisions of para. (a) of the last preceding sub-section, the application of the principal Acts, by virtue of this section, to any dwelling-house shall not be excluded by reason only that part of the premises is used as a shop or office or for business, trade or professional purposes; and for the purposes of the Rent and Mortgage Interest Restrictions Acts, 1920-1938, as amended by virtue of this section, any land or premises let together with a dwelling-house shall, unless the land or premises so let consists or consist of agricultural land exceeding two acres in extent, be treated as part of the dwelling-house; but, save as aforesaid, the principal Acts shall not, by virtue of this section, apply to any dwelling-house let together with land other than the site of the dwelling-house."

My Lords, as I see it, s. 2 (2) of the Act of 1915 was concerned only with defining what was included in the term "dwelling-house" for the purpose of that Act. If the letting embraced more than the garden or curtilage of the dwelling-house, it was not subject to the mischief of the Act. If more was let, the premises were not the subject of control. That Act was not dealing with a case where some addition was made to the premises which were let—indeed, if the house came into the landlord's hands and was re-let as one entity with a portion of land which comprised more than a garden or curtilage, it was no longer subject to the provisions of the Act. When, in 1920, the question of what restrictions were to be imposed on landlords against increasing the rent of houses let at or below a prescribed figure again arose, it appears to have been found that the definition of "dwelling-house" was too narrowly drawn, and that expression was, therefore, extended to include, not only the curtilage, but any land let with the house provided its rateable value was not more than one-quarter

A of the rateable value of the house with which it was let. Again, however, the sub-section, in my view, was not framed to deal with a case where the extent of the land let with the house was subsequently increased to a substantial extent. It was only enacted for the purpose of determining whether the premises as originally let consisted of a house together with land of less value than a quarter of the house's value or whether the land so let was of greater value. In the former case the premises were a dwelling-house within the meaning attributed to that expression by the Act: in the latter case they were not.

B The Act of 1939 was, in general, an enlargement in scope of the premises to which the Rent Restrictions Acts applied, and it extended the time during which they were to remain in force. The definition of a dwelling-house contained in the former Acts was felt to exclude premises which should be included and s. 3 (3) of the Act of 1939 was enacted to widen the protection given. Under that sub-section any land (except a certain quantity of agricultural land, which is immaterial to the question at issue) let with the dwelling-house forms part of the dwelling-house and the only question is whether the rateable value of the combined entity is less than or exceeds the figures prescribed in s. 3 (1) of the Act. Section 3 (2), it is true, excludes certain premises from the control of the Act even if their value is less than the stipulated figure, but, to my mind, has C no further bearing on the topic under discussion. If, then, a house is let together with any quantity of land and the total rateable value is under the figure prescribed for the locality in which it is situated, the house and land are within the mischief of the Acts. If, however, a house of a less value than the prescribed limit is let alone, and afterwards possession is recovered and the house is subsequently let with the addition of a piece of land of substantial rateable value, D it does not follow that it remains the same dwelling-house, even though the total rateable value of house and land is less than £75. For example, suppose a house rated at £30 is let to one tenant but is afterwards handed back to the landlords and is thereafter let to another tenant together with land rated at £45, the provisions of s. 3 (3) do not, in my opinion, necessarily constitute the house and land the same dwelling-house as the premises originally let. Land let with the dwelling-house, it is true, must be treated as part of the dwelling-house with E which it is let, but this does not mean that a house and land are the same thing as the house without the land. To my mind, the provision is a protection for the landlord as well as the tenant, since it prevents the latter from demanding that the rateable value of house and land should be separated one from the other and claiming that, if the proportion attributed to the house is less than the F prescribed figure, the house is a protected dwelling though the rateable value of the total premises let far exceeds that figure. Whether the subject-matter of the new letting is to be regarded as the same entity as that of the old is a question for the county court judge.

G I would only add that there must be a substantial change between the premises formerly let and those subsequently the subject of a letting. A mere small or incidental change is not enough. In the present instance, however, the learned county court judge has said:

H "Although I felt impelled to decide in the tenant's favour for reasons which I shall state later, it is only right to say that I am satisfied that the inclusion in each tenancy of a garage does not represent a trifling accession to the flat. Each flat occupies from six to seven hundred square feet. The garages were let independently in 1939 at rents varying between £19 10s. and £10. They were and are still separately rated at £6 a year, and they occupy areas of 140 to 150 square feet in each case. Certainly, at first impression it would seem difficult to say—were it a pure question of fact, that a flat plus garage is the same thing as a flat without a garage."

This, in my view, is a finding that the new premises let differ substantially from the old and, so differing, are not the same entity. The conclusion follows, on

my interpretation of the Acts, that the flat and garage constitute a dwelling-house which differs from the flat alone and was first let on Jan. 16, 1946, and the standard rent is £185 per annum.

Like BUCKNILL, L.J. ([1949] 2 All E.R. 427), I find some difficulty in reconciling the reasoning of the court in *Vaughan v. Shaw* (2) with that in *Hemms v. Wheeler* (3), though, unlike him, I prefer the reasoning in the former case. Actually, however, I doubt whether the decision reached in either case is at variance with the view I have expressed. *Vaughan's* case (2), obviously, is not, and it might well be held in *Hemms' case* (3) that there had been no substantial change of entity. As TUCKER, L.J., said ([1948] 2 K.B. 66) in *Hemms' case* (3):

"I think that the policy of the Acts is, in effect, to ignore the existence of these small plots of land and added premises in ascertaining what is the dwelling-house."

The result of that case, therefore, might be unchanged even if the opinion which I have expressed had been followed, though, no doubt, the reasoning by which that result was reached was arrived at on the ground, which I do not accept, that no addition to the premises originally let took the dwelling-house outside the protection of the Acts unless the total rateable value exceeded the prescribed limit.

As I view it, *Haldane v. Sinclair* (4), was rightly decided and took the correct view of the object and effect of s. 12 (2) of the Act of 1920, an object and purpose which have not been altered by the change of wording adopted in s. 3 (3) of the Act of 1939. It is true that that decision dealt with the question whether a letting with land of a value greater than one-quarter of the value of the dwelling-house, following a letting of the same dwelling-house with land of less value than one-quarter of the dwelling-house, altered the position so that the later letting was free from the control of the Acts, but the reason given for the decision was that this letting had altered the identity of the house. If the argument of the tenant in the case now before us is right, I find difficulty in seeing that the fact that the rateable value of the totality let on the second occasion [in *Haldane v. Sinclair* (4)] exceeded the limits prescribed by the Acts can make any difference. The dwelling, as he contends, is still the same dwelling and the added premises are to be treated as part of it and will still be subject to the Act. If this is the true view, it must, I think, logically follow that, however large the addition, the premises with the additional land remain the same dwelling-house and have the same standard rent as the house alone. This difficulty is avoided if the question in each case is: "Is it the same entity as that originally let or have the additional premises substantially altered it?"

In the course of the argument before your Lordships' House many cases decided on the terms of this difficult and controversial section and its predecessors were quoted, but those to which I have referred are, I think, sufficient to illustrate the differences of view which have been held and the reasons for the construction which, in my opinion, the section bears. I was at one time somewhat influenced by the fear that such a construction might take from tenants the protection which the Act was passed to afford, but I have come to the conclusion that, provided a sufficiently substantial change of identity is required, no such consequence will follow. In any event, I think that the true construction of the Acts is that which I have indicated and I would allow the appeal.

LORD GODDARD [read by LORD PORTER]: My Lords, in my opinion, the construction placed by the Court of Appeal on s. 3 (3) of the Act of 1939 was right. Indeed, I think that this is the very class of transaction which the subsection was intended to deal with and prevent, that is to say, one in which a landlord obliges a prospective tenant of a dwelling-house, hitherto subject to a controlled rent, to take with it something for which he has neither use nor desire, the object being to extricate the house from the operation of the Rent Restriction

tions Acts. As, however, the rest of your Lordships are of a different opinion, it would serve no useful purpose to burden the law reports, already congested with decisions on these difficult and obscurely worded Acts, by expressing my dissent at length, and I, accordingly, say no more than that I would dismiss the appeal.

A **LORD NORMAND:** My Lords, I agree with the opinion of my noble and learned friend on the Woolsack, and also with the opinion about to be delivered by my noble and learned friend, LORD RADCLIFFE, which I have had the advantage of reading in print. To these opinions I cannot usefully add anything.

B **LORD OAKSEY:** My Lords, I agree with the motion proposed. The question appears to me to depend on the construction of the expressions "standard rent" and "dwelling-house" in the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 12, as amended by the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, and the Rent and Mortgage Interest Restrictions Act, 1939. The expression dwelling-house means a house
C "let as a separate dwelling" and includes not only the house itself and its site but "any land or premises let together with" it "unless the land or premises so let consists or consist of agricultural land exceeding two acres in extent." I would refer on this matter to the judgment of the Lord President (LORD CLYDE) in *Haldane v. Sinclair* (4), with which I respectfully agree. The dwelling-house, the standard rent of which has to be determined in the present case, therefore, included not only the flat but the garage, and the question is: When was that dwelling-house first let? To that there can, in my opinion, only be one answer, that it was first let on Jan. 16, 1946. It is argued, and has been held by the Court of Appeal, that the effect of s. 3 (3) of the Act of 1939, which
D provides that land or premises let together with a dwelling-house, unless they consist of agricultural land exceeding two acres, shall be treated as part of the dwelling-house, has the effect of making the dwelling-house let in 1946 the same dwelling-house as was let in 1939. In my opinion, this sub-section and the corresponding sub-section in the Act of 1920, *viz.*, s. 12 (2) (iii), define the extent of dwelling-houses to which the Act applies, but do not, and cannot in the
E absence of explicit language, make one dwelling-house of one extent let at one time the same as another dwelling-house of a different extent let at a different time. It has been suggested that this construction will enable landlords to evade the Rent Restrictions Acts by adding small pieces of land or premises to houses to which a standard rent has already attached, but I do not think that
F this possibility is a sufficient reason for adopting a construction which, in my opinion, is not the true meaning of the words used. Moreover, I think that it may very well be that it is a question of fact whether the dwelling-houses let are, in fact, different. In the present case the learned county court judge appears to have found as a fact that they were different, and, in my opinion, he could not have found anything else on the evidence. I see no sound distinction between
G cases such as *Veale v. Cabezas* (5), *R. & P. Properties, Ltd. v. Baldwin* (1), and *Vaughan v. Shaw* (2), and the present case. The dwelling-house let is the dwelling-house contracted to be let and all the parcels that that contract contains. To say that the garage in the present case is no part of the dwelling-house let seems to me to contradict the words in the Acts which say what is deemed to be the dwelling-house let and to be treated as part of that dwelling-house.

H **LORD RADCLIFFE:** My Lords, I, too, agree with the motion proposed. This is a case about standard rent under the Rent Restrictions Acts. The Court of Appeal have held that the standard rent of a flat which has a garage let with it is bound to be the same as the rent paid for that flat on Sept. 1, 1939, when it was let without the garage. If that is right, the addition to the letting of a substantial item of property counts for nothing in the ascertainment of the standard rent of the whole subject so let. If the Acts require that, there is nothing more to be said, but, as a general proposition, this conclusion seems to me to

be contrary to common sense and to be unfair to the landlords, and, although we were warned by counsel against the folly of supposing that any construction of these Acts could escape the recognition of anomalies, I do not wish to start by going to the other extreme and by inferring that, because a particular construction leads to an anomaly, we have by that very fact an indication that the Acts have been correctly interpreted. The crucial words are those contained in s. 3 (3) of the Act of 1939. But, although those are the crucial words, the crucial question seems to me to be not so much what they mean as how they are to be applied to the ascertainment of standard rent in accordance with s. 12 (1) (a) of the Act of 1920, as modified in respect of the relevant date by the provisions of sched. I to the Act of 1939. I have great difficulty in seeing how there can be any room for substantial controversy as to what the words mean. On the other hand, I am very conscious how little easy it is to be certain what is the right way of applying them when it comes to the question of ascertaining a standard rent.

First, then, as to what they mean. I think that the significance of this part of s. 3 (3) of the Act of 1939 can best be understood if one goes back to s. 12 of the Act of 1920 in which the words previously appeared. There are, of course, changes in the wording and arrangement in the later Act, but the changes are not due to any circumstance that bears on the present purpose and I have no doubt that the general meaning and effect of the material words in the Act of 1939 are the same as in the earlier Act. Now s. 12 of the Act of 1920 is a section entitled "Application and interpretation," and it is plain that, while sub-s. (1) is devoted to supplying interpretations or definitions of phrases employed in the Act, sub-s. (2) has as its function to declare to what subjects and under what conditions the Act is to apply. Sub-section (2) opens by stating that the Act is to apply to every "house or a part of a house let as a separate dwelling," if within the specified limits of rateable value, and it closes by stating, in proviso (iii), that subject to what is provided by that proviso, the Act shall "not apply to a house let together with land other than the site of the house." The basic thing, therefore, which is protected is the structure forming a house or part of a house and the site that it occupies. If something beyond that is also to come within the protection of the Act, it must be brought within it by the operation of some positive enactment to be found between the beginning and the end of sub-s. (2). Similarly, if a structure which would be protected if let by itself is included in a letting which comprises land other than the site of the structure or premises other than the structure itself, sub-s. (2) must make plain whether the structure or the whole complex of property that is the subject of the tenancy is to be within or without the scope of the Act. The words at the beginning of proviso (iii) to s. 12 (2),

"for the purposes of this Act, any land or premises let together with a house shall, if the rateable value of the land or premises let separately would be less than one-quarter of the rateable value of the house, be treated as part of the house . . ."

seem to me designed to do, and in fact do, just what is required for the purpose that I have mentioned. They indicate that land or premises which are not intrinsically protected subjects are to be treated as part of a house which is a protected subject if they are let with it and if their rateable value does not exceed a certain proportion of the rateable value of the house. There results, for the purposes of the Act, a kind of house which is really an artificial conception created by the Act, for it is a house of which some land or premises are to be treated as a part. I think that TUCKER, L.J., accurately described the effect of these words when he said ([1948] 2 K.B. 66) in *Hemms v. Wheeler* (3): "This results in a notional dwelling-house consisting of bricks and mortar plus land." I can, however, find no warrant for taking the further step of interpreting the words as meaning that the notional dwelling-house so created is to be deemed to be the same dwelling-house as would be the house without the land. It is because

the Court of Appeal have given just that meaning to the words of the sub-section that I do not find it possible to agree with their judgment. This provision has no special relevance to a case where land or premises, or more land or other premises, have been added to a dwelling-house which was previously a controlled house. It will apply to the tenancy so created, at any rate so long as, under s. 3 (3) of the Act of 1939, the land is not more than two acres of agricultural land, but it is a mistake to regard it as designed to solve the difficulties created by a variation in the subject-matter of a tenancy. For the words are not apt to do so. Nor can I see on what foundation is based the observation of TUCKER, L.J. ([1948] 2 K.B. 66) in *Hemms v. Wheeler* (3) that

“... the policy of the Acts is, in effect, to ignore the existence of these small plots of land and added premises in ascertaining what is the dwelling-house.”

Since a belief in the existence of such a policy is of some importance to the tenant's argument, because it would at least make purposeful the otherwise purposeless anomaly which it supports, I must devote a moment to explaining why I do not entertain it.

My Lords, it is, perhaps, a little misleading to speak of “small plots of land” in this connection. It is not that one need strain the imagination with visions of the improbable contingency of a valuable factory being “let together with” a controlled house or by speculating what would happen if a large acreage of non-agricultural land were included in the letting of such a house. No doubt, the sort of thing that was contemplated was small in extent and of no great value—a garden, a courtyard, a shed, a garage, etc. But the legislature is dealing with these things in relation to other things that are also on a small scale, small dwellings, small tenants and often, though this is sometimes ignored, small landlords, to whom a difference of even a few shillings a week in rent is not a matter of no importance. I do not think that the mere smallness of the kind of property that was contemplated can itself give any clue to the intention of the Act. But how can it be said that the Act is so framed as to ignore the existence of such property? If on Sept. 1, 1939, land and premises, say a garden and shed, were let together with a dwelling-house and the rateable value of the whole unit on the appropriate day exceeded the statutory limit, it seems to me plain that every part of it would be unaffected by the Act, even though the dwelling-house, if a separate unit, would have a rateable value within the limit. In this case the presence of the land and premises makes an essential difference. Or take the case of standard rent. If the same house, garden and shed were within the rateable limit and were let on Sept. 1, 1939, the standard rent of that “dwelling-house” would be the rent then paid, not the less because part of it was attributable to the amenity provided by the shed and garden. Here, again, full value is given to the accessory in the operation of the Act. To ask whether, if the house were subsequently let without the shed and garden, its standard rent would still be as high as the former figure is only to pose in another form the question involved in the present appeal. The tenant's argument would seem to require that it would be, but, however that may be, there is no basis for any general conception that the Act is so constructed as to treat land or premises let with a dwelling-house as if they were an inconsiderable portion of that house.

I conclude, therefore, that, while s. 3 (3) of the Act of 1939 certainly applies to the garage which is let together with the flat in the case which we are now considering and while its effect is to oblige us to treat the garage as a part of the flat with which it is let for all the purposes of the Act, it is not expressed in terms which call for the assumption that the flat which is deemed to have the garage as a part of it is the same flat as that which previously had no such part. In particular, the sub-section is incapable of providing a statutory solution of the vexed question whether the “dwelling-house” the standard rent of

which is now in issue was let on Sept. 1, 1939, or was first let on Jan. 16, 1946, when the tenant assumed the present tenancy. Indeed, to ask this question in the abstract is to raise a problem that belongs more to philosophy than to law. I do not, however, think that it can usefully be answered by treating it as a general question of continuing identity. The right answer must be found by such guides as the scheme of the Rent Restrictions Acts affords and by the marks that have been left by a settled course of judicial interpretation. So far as I can see, the Acts do not contain any explicit directions how to treat changes in the subject-matter of a tenancy which embraces a house within the Acts. Two main causes must be responsible if such changes come about. One is a physical change brought about by improvement or structural alteration of the premises. The other is an alteration of the subject-matter by including in a subsequent letting more than was previously let or, alternatively, by excluding some part formerly demised. In the first case I think it reasonably clear that the Acts do not regard mere improvement or structural alteration as effecting a change of identity for the purposes of standard rent. On the contrary, the provision of s. 2 (1) (a) of the Act of 1920, which allows the landlord, by way of permitted increase of rent, a certain percentage on the amount of his expenditure on improvements or structural alteration, shows that for the purposes of s. 12 (1) (a) of the same Act the dwelling-house as improved or altered is regarded as the same dwelling-house as it was before. Some change more radical than the mere fact of improvement or structural alteration must take place before it can be said that, in effect, the dwelling-house which will then be under consideration has not been previously let. In the second case, however, I can find no pointer as to what is intended by the Acts. The gap has had to be filled by judicial interpretation. It might have been thought that the overriding purpose of these Acts was to invest each separate dwelling, which was brought within their protection at the commencing date with a special status incapable of surrender and to charge that dwelling with its existing rent as the permitted standard, regardless of whatever combinations of parcels might subsequently be effected by arrangements between landlord and tenant when new lettings took place. If such an interpretation of the general scheme of the Acts could have been extracted from them and could have been consistently applied by the courts, I am not persuaded that the result would have been unsatisfactory. Indeed, both s. 8 of the Act of 1920 and s. 9 (1) of the Rent and Mortgage Interest Restrictions Act, 1923, were aimed at making it impossible for a landlord to do the same sort of thing as the landlord achieved in this case by making the tenant take the garage, which he did not want, with the flat, which he did. I am, however, bound to recognise that the courts have not approached the Acts in this way and have been ready to interpret a subsequent variation in the content of a tenancy as creating a new dwelling-house for the purposes of the Acts. I think that the decisions in *Veale v. Cabezas* (5), *R. & P. Properties, Ltd. v. Baldwin* (1) and *Vaughan v. Shaw* (2) are all based on the theory that the act of parties in arranging a new letting can "destroy" the entity of a dwelling-house a former letting of which had attracted a standard rent, and can create a new standard rent for the new entity which is the subject of the new letting.

If, then, there is no simple general rule that will provide the answer, I think that it is in substance a question of fact whether a dwelling-house, the standard rent of which is to be ascertained, is the same dwelling-house as one previously let. It would be all wrong, as it seems to me, to deduce a change of identity from some unimportant variation in the content of the tenancy. For the question is not so much whether the premises are in all respects the same as whether the dwelling-house now in question is the same dwelling-house as before. Trivial variations—a few feet here or there—ought not to be treated as causing a change. That argument, that any variation in the parcels demised must result in law in a new dwelling-house, was advanced on behalf of the landlord in *Hemns v.*

Wheeler (3) and was rightly rejected. I agree with what TUCKER, L.J., said ([1948] 2 K.B. 67):

“ . . . it is, in my view, erroneous to say that this dwelling-house was not let in August, 1914, merely because a piece of land has been added.”

A But then the word “merely” has significance. In this case, however, the county court judge has said that the addition of the garage to the flat is no trifling accession. I think that what he has said after that in his judgment is intended to convey that, were he to regard this as a pure question of fact, he would hold the flat with garage to be substantially a different dwelling-house from the flat alone. In fact, he had so held in similar circumstances in *Langford Property Co., Ltd. v. Sommerfeld* (6). Either view, a change of identity or the same dwelling-

B house, seems to me a possible one on the facts, but, if s. 3 (3) of the Act of 1939 does not have the effect of compelling the court to assume the continued identity, as I think that it does not, the county court judge’s views on a question of degree, as to which there is no absolute test, ought not to be departed from by an appellate court, if there is evidence to support them. Consequently, I think that the appeal should succeed.

C My Lords, we are warned that, if the landlords’ argument should succeed, much of the protection that standard rent affords to tenants of controlled houses will be lost. That is a serious consideration, although, if it were to influence our decision, we should only be allowing one injustice in order to avoid the possibility of another. On the whole, however, I think that the dangers anticipated may be somewhat exaggerated. Landlords may, indeed, find it possible in some cases

D to re-arrange the subjects of their tenancies so that the standard rent of what was previously let is no longer the standard rent of the new accommodation. There is, however, something rather unreal in visualising the typical landlord as a property-owner with a reserve stock of spare assets which he can add to his tenancies at will on future lettings. I doubt if a great many landlords could take advantage of such a device if they wanted to. Nor, as I see it, will it serve

E their purpose to make some trifling re-arrangement of the parcels. It is not the maxim *de minimis* which stands between continuing identity and a change of identity, but the fact that only a substantial variation in what is let can justify a finding that there is a new dwelling-house for the purposes of the Acts. Lastly, the Landlord and Tenant (Rent Control) Act, 1949, has now brought it about that the standard rent in such a case will no longer be what the landlord may be

F able to extract from the tenant’s necessities, but will be such as the appropriate tribunal may allow. With all this in mind, I cannot think that success in this appeal will afford landlords as a class any but a minor source of gratification.

Appeal allowed. No order as to costs.

Solicitors: *Stikeman & Co.* (for the landlords); *R. Edler & Co.* (for the tenant).

[*Reported by J. D. PENNINGTON, Esq., Barrister-at-Law.*]

DODDS v. DURHAM COUNTY COUNCIL.

[DURHAM ASSIZES (Finnemore, J.), October 18, 1950.]

Local Government—Compensation to transferred officer—“Emoluments for which compensation granted”—Increases of salary in new employment—Power to review compensation—Local Government Act, 1929 (c. 17), s. 123; sched. VIII, para. 14.

The plaintiff was a road surveyor employed by a rural district council, and, on the delegation of powers in respect of roads to that council being determined by the defendant county council under s. 35 (7) of the Local Government Act, 1929, he was transferred to the county council and was employed by them as a divisional surveyor at a lower salary. He was, accordingly, entitled to, and was paid, compensation based on the difference between the two emoluments. When in the service of the county council he received yearly increases in his emoluments.

HELD: (i) the transfer of the plaintiff to the county council having been effected under s. 120 of the Act, on the true construction of para. 14 of sched. VIII to the Act the plaintiff's increases in the emoluments of his office under the county council were “by virtue of” something “done in pursuance of or in consequence of” the Act, and, therefore, his compensation could be diminished or suspended from time to time so that he should not receive any greater amount of compensation than with the emoluments of his office under the county council was equal to the emoluments in respect of which compensation had been granted.

(ii) the last-named emoluments must be taken to be the full amount of the plaintiff's emoluments at the time of his transfer and not the average of his emoluments for the previous five years which had been taken into account in assessing his compensation.

[FOR THE LOCAL GOVERNMENT ACT, 1929, s. 123 and sched. VIII, para. 14, see HALSBURY'S STATUTES, Second Edn., Vol. 14, pp. 298, 318.]

Cases referred to:

- (1) *Re Bidie*, [1948] 2 All E.R. 995; [1949] Ch. 121; [1949] L.J.R. 386; 113 J.P. 22; 2nd Digest Supp.
- (2) *National Pari-Mutual Assn., Ltd. v. R.*, (1930), 47 T.L.R. 110; Digest Supp.

ACTION tried by FINNEMORE, J., at Durham Assizes.

Before Apr. 1, 1947, the plaintiff was employed by the Durham Rural District Council as a road surveyor. On Apr. 1, 1947, certain powers delegated to that council by the defendants, the Durham County Council, as highway authority, were determined by the defendants under s. 35 (7) of the Local Government Act, 1929. In consequence, the plaintiff's employment by the rural district council was determined and he was transferred to the service of the defendants as a divisional surveyor. The plaintiff's yearly salary immediately before his transfer was £728, but his average salary for the five years ending Mar. 31, 1947, was £706 15s. 2d. His salary in the service of the defendants as from Apr. 1, 1947, was £594 19s. 3d. The compensation payable to him under s. 123 (1) of the Act was fixed by the Minister of Health under para. 13 of sched. VIII to the Act at the rate of £67 1s. 9d., this sum being 36/60ths of the difference between the plaintiff's average salary for the previous five years and his new salary. The plaintiff's salary for the year ending Mar. 31, 1949, was £685, and he was paid £43 compensation, and for the year ending Mar. 31, 1950, it was £710 and no compensation was paid. The plaintiff claimed £91 3s. 6d., being £24 1s. 9d. for the year ending Mar. 31, 1949, in respect of compensation at the rate determined by the Minister less the sum of £43 paid, and £67 1s. 9d. for the year ending Mar. 31, 1950. The defendants contended (i) that the

compensation for the year ending Mar. 31, 1949, had been paid at the rate of £43 under a mistake of fact and should have been £21 15s. 2d. (the difference between the five years' average and the actual salary for that year), and they counterclaimed for the sum of £21 4s. 10d., and (ii) that no compensation was payable for the year ending Mar. 31, 1950.

M. L. Lyell for the plaintiff.

A *J. Charlesworth* for the defendants.

FINNEMORE, J., stated the facts and continued: The short point is this. The plaintiff says: "My compensation was fixed when I was transferred and nothing has happened since which has entitled the defendants to diminish or suspend it." The defendants say: "By virtue of sched. VIII, para. 14, of the Local Government Act, 1929, we are entitled to reduce or to suspend altogether the amount of compensation that is payable." The matter turns ultimately on the construction of the words of para. 14, but I ought first to refer to s. 123 (1) of the Act which thus provides for compensation:

C "Every person who having been an officer of an authority or committee from whom functions are transferred under this Act . . . on Nov. 12, 1928, is at the appointed day an officer of such an authority or committee . . . and who by virtue of this Act, or of anything done in pursuance or in consequence thereof, suffers any direct pecuniary loss by determination of his appointment, or by diminution or loss of fees, salary, or emoluments, and for whose compensation for that loss provision is not made by any other enactment for the time being in force, shall be entitled to compensation under this Act for that loss."

D That compensation has been settled between the parties by a decision of the Minister of Health on the appeal which was made to him, and that decision cannot be varied except in certain circumstances which are laid down in para. 14 of sched. VIII. Paragraph 1 of sched. VIII provides:

E "For the purpose of determining whether compensation is payable to an officer and, if so, the amount of such compensation, regard shall be had to . . . (d) any additional emoluments which he acquires by virtue of this Act, or of anything done in pursuance or in consequence of this Act . . ."

F The second appearance of that phrase, "anything done in pursuance of or in consequence of this Act," in para. 14 of the schedule is the cause of the present action. Paragraph 14 provides:

G "If a person receiving compensation under this schedule is appointed to any office under the Crown or any local or other public authority, or by virtue of this Act, or anything done in pursuance of or in consequence of this Act, receives any increase of the emoluments of the office held by him, he shall not, while receiving the emoluments of that office, receive any greater amount of his compensation, if any, than with the emoluments of the said office, is equal to the emoluments for which compensation was granted to him, and if the emoluments of the office he holds are equal to or greater than the emoluments for which compensation was granted, his compensation shall be suspended while he holds that office."

H That seems to be a common sense provision. It would appear to me anomalous if a man should continue in the public service and be in receipt of the full amount, or even more than, he would have received if no transfer had taken place, and still be entitled to receive compensation, the whole purpose of which is to make up part of the pecuniary loss which he has suffered by the loss of his original appointment and his transfer under this Act. If he is appointed to an office under the Crown or an office under a local or other public

authority, the compensation is reviewed in the light of his new salary. That is not in dispute, and no question relating to it arises in the present case. The second part of para. 14 deals with an increase in his emoluments. The words used are:

"If a person . . . by virtue of this Act, or anything done in pursuance of or in consequence of this Act, receives any increase of the emoluments of the office held by him . . ."

The argument of counsel for the plaintiff on the construction of that paragraph was that the increase in the emoluments of the office held by him must be either "by virtue of this Act, or anything done in pursuance of or in consequence of this Act," and, as the increase which the plaintiff received was not, directly at least, "by virtue of this Act or anything done in pursuance of or in consequence of this Act," the paragraph did not apply. In other words, nobody could point to anything in the Act and say: "Here is something which has led to and caused to be brought about this increase of the emoluments of the office held by the plaintiff." The argument of counsel for the defendants was based on a broader interpretation of this paragraph. He said that "by virtue of this Act," or of something "done in pursuance of or in consequence of this Act," the plaintiff was transferred as a surveyor to the Durham County Council. Subsequently, he received in that office an increase of the emoluments paid to him, and, therefore, that increase was the result of something "done in pursuance of or in consequence of" the Act.

Taking it broadly, the distinction between the two arguments addressed to me is this. One is the narrower construction; the other is the broader construction. The question is: Which is the right one? I confess I find it difficult to see how the second limb of para. 14 could apply at all if it was necessary to point to something in the Act which authorises, or directly provides for, an increase in the emoluments of the officer. On the narrower construction it is somewhat difficult to know to what it does apply, or, indeed, to what it could apply. It is plain under the first part of the paragraph that, if an officer is appointed to another office in the public service, his compensation is reviewed. It would seem logical that, similarly, if his salary increases while he is in that office in the public service, then also the compensation ought to be reviewed. But that, of course, is not a reason for deciding against the plaintiff because the decision must depend on the construction of the Act. It is not a question of what ought to be done. It is not even a question of what one might imagine Parliament intended to do. It is a question of interpreting the words and trying to decide what they mean.

My attention has been directed to the words of LORD GREENE, M.R., in *Re Bidie* (1) about the general principle that should be applied—which I accept, *i.e.*, that words must not be taken out of their context and given a certain meaning quite irrespective of the words with which they are connected. As LORD GREENE, M.R., said ([1949] Ch. 130), it is necessary to read the statute as a whole and ask oneself the question:

"In this statute, in this context, relating to this subject-matter, what is the true meaning of that word?"

I have come to the conclusion, remembering that canon of construction, that what I call the broader interpretation is the correct one, so that when the plaintiff received the increase in the emoluments of his office he did receive an increase as the result of "something done in pursuance of or in consequence of this Act," because it was through something done in pursuance of or in consequence of the Act that he had been transferred from the service of the Durham Rural District Council to the office which he now holds, in which office he has received the increase in emoluments.

There are two other points. I gather that counsel for the defendants does not press either of them very much, because a question of principle is raised which may affect a great many people. It is to be noted that the latter part of para. 14 does not only refer to compensation. It provides that, if a person receiving compensation receives any increase in the emoluments of the office held by him,

- A " . . . he shall not . . . receive any greater amount of his compensation, if any, than with the emoluments of the said office, is equal to the emoluments for which compensation was granted to him . . . "

The question is: What is that figure? Does "emoluments," when used the second time, mean the five years' average which was taken as the basis in assessing compensation, or does it mean the actual amount that he was receiving at the date when he was transferred? I think here again I would take what I call the broader view and say that he is entitled to have considered his full emoluments at the time he is transferred and not the average for the five years. In other words, in the present case I think that £728 would be the proper figure to take into account in dealing with the construction of this paragraph, and not the five years' average figure, £706 15s. 2d., which was the basis of compensation in general. With regard to the counterclaim, I think the defendants were prepared to concede (I should be inclined myself, in any event, to accept the view) that the mistake, whatever it was, was a mistake of law rather than of fact, and that, therefore, the money claimed under the counterclaim is not recoverable.

Judgment for the plaintiff for £18. Counterclaim dismissed. No order as to costs.

- D Solicitors: *Timothy Hales* (for the plaintiff); *J. K. Hope*, Durham (for the defendants).

[Reported by G. M. SMAILES, Esq., Barrister-at-Law.]

E

PROTHEROE v. RAILWAY EXECUTIVE.

[KING'S BENCH DIVISION (Parker, J.), November 10, 13, 1950.]

Carriage of Passengers—Injury to passenger—Defective paving near edge of platform—Breach of implied warranty that premises reasonably safe.

F

A railway season ticket holder, when about to board a train, caught his foot in a crack between a paving stone and one of the coping stones along the edge of the station platform belonging to the defendants, with the result that a bone in his foot was fractured.

HELD: although the question of access to the train was ancillary to the actual contract of carriage, there was to be implied in that contract a warranty that that part of the premises which a passenger was bound to use for the purpose of access to, or dismounting from, a train, was reasonably safe; the crack in close proximity to the edge of the platform resulted in the premises not being reasonably safe; and, therefore, the defendants were in breach of the warranty.

G

Gillmore v. London County Council ([1938] 4 All E.R. 331), *applied*.

Maclean v. Segar ([1917] 2 K.B. 325), *not applied*.

H

[AS TO RAILWAY COMPANY'S LIABILITY FOR CONDITION OF PLATFORM, see HALSBURY, Hailsham Edn., Vol. 4, p. 67, para. 102; and FOR CASES, see DIGEST, Vol. 8, pp. 85-87, Nos. 586-594.]

Cases referred to:

- (1) *Maclean v. Segar*, [1917] 2 K.B. 325; 86 L.J.K.B. 1113; 117 L.T. 376; 36 Digest 123, 817.

- (2) *Gillmore v. London County Council*, [1938] 4 All E.R. 331; 159 L.T. 615; Digest Supp.
- (3) *Indermaur v. Dames*, (1886), L.R. 1 C.P. 274; 35 L.J.C.P. 184; 14 L.T. 484; *affd.* (1867), L.R. 2 C.P. 311; 36 L.J.C.P. 181; 16 L.T. 293; 31 J.P. 390; 36 Digest 35, 208.
- (4) *Horton v. London Graving Dock Co.*, [1950] 1 All E.R. 180; [1950] 1 K.B. 421.

ACTION for damages for breach of warranty or, alternatively, for negligence.

The plaintiff, a chief inspector of the City of London police, was the holder of a season ticket on the defendants' railway from Plaistow station to Mansion House station. On July 21, 1949, on his way to work at 8.50 a.m. he was standing on the west bound platform at Plaistow station when a train came in. He had taken a few paces towards it when his right foot caught in a crack between a paving stone and a coping stone along the edge of the platform so that he stumbled, and, later, it was found that he had suffered a fracture of a bone in the foot. As a result he was unable to return to sedentary duties until Oct. 24, and to full duties until Nov. 11. The plaintiff claimed that there had been a breach of an implied warranty in the contract contained in the season ticket that the station platform should be reasonably safe, or, alternatively, a breach of general duty owed to him. It was contended for the defendants that their contract with the plaintiff was one of carriage from Plaistow station to Mansion House station and back, and that any implied warranty extended only to the actual period when the carriage was taking place, and not to the premises to which the plaintiff had access for the purpose of commencing the carriage. They further contended that, if there was any breach of duty on their part, which they denied, it was actionable in tort only and not in contract.

Sir Shirley Worthington-Evans for the plaintiff,
Southall for the defendants.

PARKER, J., stated the facts and continued: The first question that arises is whether the defendants have failed to perform any contractual duty to the plaintiff. He was the holder of a season ticket from Plaistow to Mansion House. What the conditions of that ticket were I do not know and I have little doubt they are immaterial to this action, otherwise I should have been referred to them. It is said on the plaintiff's behalf that by reason of the contract contained in that ticket there was a duty on the defendants as expressed in *Macleanan v. Segar* (1) where it was held that by reason of the contractual relationship between an innkeeper and his guest there was an implied warranty that the premises were as safe as reasonable care and skill on the part of anyone could make them for the purpose of personal use by the guest. In the alternative, it is said that, if the duty is not as high as that, it is as high as the duty which *DU PARCQ, L.J.*, sitting as an additional judge of the King's Bench Division, found in *Gillmore v. London County Council* (2). In that case the plaintiff, who had paid a fee to the London County Council to partake in certain physical training classes, had slipped and injured his left foot in the hall, which had a polished floor, where these classes were taking place. The learned judge there said ([1938] 4 All E.R. 333):

"I am not sure that one can apply to a case of this kind the rule which has been pressed upon me associated with the case of *Macleanan v. Segar* (1). I think that the proper way to put it is this. If any person or body of persons invite a man for reward to take part in physical training, and invite him to come for that purpose to premises which they have hired, or of which for the time being they are in possession, then, in those circumstances, that person or body of persons impliedly warrant that they have taken reasonable care to see that the premises are in all respects reasonably safe for the purpose."

Counsel for the defendants argues with considerable force that the only contract between the parties is the contract of carriage and that any implied warranty only extends to the actual period when the carriage is taking place. He points out that in all, or nearly all, of the reported cases that deal with the duty of railways in such circumstances as these the plaintiff's claim is always made in tort and not in contract. Counsel for the defendants argues that the implied warranty in *Maclean v. Segar* (1) does not extend to the premises to which a passenger has access for the purpose of commencing the carriage.

I think that that is too narrow a view. It seems to me that there must be a contractual duty in relation to the premises which the passenger is bound to use for the purpose of access to the train or for dismounting from the train, and, although access to the premises is what one might call ancillary to the actual contract of carriage, it seems to me that in relation to those premises—certainly in relation to those premises which are so near the edge of the platform—over which a passenger is going to step to mount the train there is an implied warranty as to the premises being reasonably safe. I think that the proper test here is that laid down, not in *Maclean v. Segar* (1), but by DU PARCQ, L.J., in *Gillmore v. London County Council* (2). I think that the proper direction which I should give myself is to ask whether the defendants have taken reasonable care to see that the platform in this particular position was in all respects reasonably safe for the purpose, and I should also go on to direct myself that, in considering what is reasonable, perfection must not be required and that it must not be expected that the platform should be absolutely perfect throughout. Finally, as the learned judge said in *Gillmore's* case (2), I should not consider it to be conclusive, to show that the platform was reasonably safe, that it has been used by hundreds and thousands of passengers without injury to anybody.

Was this platform in this particular position reasonably safe? In considering that, it is important to bear in mind that the position in question was near the platform's edge. It is, as I have described it, between the York stone and the coping stone forming the edge of the platform. It is, therefore, a position where people frequently have to move quickly, jostled by other people, without any opportunity of looking to see where they are going, and I think that a different standard is required for a platform in that position than, say, the paving adjoining a highway where people can see where they are going and where their attention is not all the time focussed on something else. It may be that the chances of anyone suffering damage by this crack were fairly remote, but it does seem to me that anybody using the platform at that point is entitled to have a reasonably flat or even surface on which to find his way on and off the train. No doubt, this duty may put a heavy burden on the Railway Executive, and I have throughout deliberately sought to limit the duty to the close proximity of the platform's edge without dealing with any question of paving in passages leading to a platform or the like or even of the back part of a platform. In the position in which this crack was, it was, I think, a danger, and the premises clearly were not reasonably safe in all the circumstances.

That being so, it becomes unnecessary for me to deal with the alternative way in which the case was put, namely, on *Indermaur v. Dames* (3). I think it is sufficient for me to say that on that aspect of the case the plaintiff is in very considerable difficulty. Without deciding the matter in any way, I find it hard to believe that there was any breach of duty on the part of the defendants within the principle of *Indermaur v. Dames* (3) as qualified in *Horton v. London Graving Dock Co.* (4).

[HIS LORDSHIP assessed the general damages at £350 and gave judgment for this sum and £23 19s. agreed special damage to the plaintiff, with costs.]

Judgment for the plaintiff with costs.

Solicitors: *Comptroller and City Solicitor* (for the plaintiff); *M. H. B. Gilmour*, solicitor of the Railway Executive (for the defendants).

[*Reported by F. A. AMIES, Esq., Barrister-at-Law.*]

LANCASHIRE WELDERS, LTD. v. HARLAND AND WOLFF, LTD.

[COURT OF APPEAL (Cohen, Singleton and Birkett, L.JJ.), November 7, 1950.]

Judgment—Judgment on admission of facts—Discretion of court—Specially indorsed writ—Unconditional leave to defend granted although claim partially admitted—Defence partially admitting claim—Payment into court—R.S.C., Ord. 32, r. 6.

The plaintiffs issued a writ specially indorsed under R.S.C., Ord. 3, r. 6, claiming £31,657 14s. 2d., being the balance of moneys due for work done and services rendered by the plaintiffs for and to the defendants. The plaintiffs applied by summons under R.S.C., Ord. 14, for summary judgment, and in answer the defendants filed an affidavit in which they admitted that an amount of £1,694 19s. 9d. was owing to the plaintiffs, but disputed the claim as to the residue. The district registrar gave unconditional leave to defend as to the whole. That decision was not made the subject of appeal. Later, the defendants filed a defence in which they admitted indebtedness in the sum of £1,756 18s. 8d. (which they paid into court in full satisfaction of the plaintiffs' claim), but disputed the claim as to the residue. On that defence, the plaintiffs issued a summons under R.S.C., Ord. 32, r. 6, asking for judgment for the sum admitted in the defence. The district registrar refused the order asked for and his order was affirmed by the judge, who gave weight to the fact that, on the similar question being before the court on the summons under Ord. 14, no such order was made. On further appeal by the plaintiffs,

HELD: the facts that judgment had not been given for the sum admitted to be due in the proceedings under R.S.C., Ord. 14, that the amount claimed was very much larger than the amount admitted, and that the amount of the claim, so far as admitted in the defence, had been paid into court afforded no reason why judgment should not be given for the plaintiffs under R.S.C., Ord. 32, r. 6; to refuse the relief claimed would result in injustice to the plaintiffs; and, therefore, the judge's order, although it depended on the exercise of his discretion under R.S.C., Ord. 32, r. 6, would be reversed.

Evans v. Bartlam ([1937] 2 All E.R. 646), *applied*.

[AS TO JUDGMENT ON ADMISSIONS OF FACTS, see HALSBURY, Hailsham Edn., Vol. 19, pp. 232, 233, paras. 536, 537; and FOR CASES, see DIGEST, Pleading, pp. 214-217, Nos. 1790-1828.]

Cases referred to:

- (1) *Evans v. Bartlam*, [1937] 2 All E.R. 646; [1937] A.C. 473; 106 L.J.K.B. 568; *sub nom.*, *Bartlam v. Evans*, 157 L.T. 311; Digest Supp.
- (2) *Contract Discount Corpn., Ltd. v. Overlyne Trading Co., Ltd.*, (1947), unreported.

INTERLOCUTORY APPEAL by the plaintiffs from an order of McNAIR, J., made in chambers on Oct. 24, 1950, affirming an order of the district registrar of Liverpool refusing an application by the plaintiffs for judgment under R.S.C., Ord. 32, r. 6. The learned judge held (having regard, *inter alia*, to the fact that an application by the plaintiffs for summary judgment under R.S.C., Ord. 14, had been refused) that the application under R.S.C., Ord. 32, r. 6, should also be refused. The facts appear in the judgment of COHEN, L.J.

M. L. Lyell and *de Ferrars* for the plaintiffs,
Olson for the defendants.

COHEN, L.J.: The writ in this matter was issued on Jan. 7, 1949. It was a specially indorsed writ by which the plaintiffs claimed £31,657 14s. 2d., being

the balance of moneys due for work done and services rendered by them for and to the defendants from June, 1943, to 1946. The plaintiffs applied under R.S.C., Ord. 14, for summary judgment, and in answer to that summons an affidavit was filed on behalf of the defendants which contained this paragraph:

"The defendants admit that on current account for work executed by the plaintiffs as at Mar. 31, 1947, there is a balance due and owing to the plaintiffs of £1,694 19s. 9d. Payment of this sum was offered to the plaintiffs before the writ was issued in this action, but was declined on their behalf."

It was agreed that that offer was conditional on the plaintiffs accepting the sum in full satisfaction of the balance of account between the parties. On that affidavit the district registrar gave the defendants unconditional leave to defend the action. It seems to me, *prima facie*, though we have not heard the full facts, that that order is not in accordance with what is the generally accepted practice where part of the claim is admitted. In THE ANNUAL PRACTICE, 1949, p. 206, under the heading "Part of claim admitted" is this statement:

"The proper order is judgment for plaintiff for amount admitted, and unconditional leave to defend as to residue."

The defendants, however, were given unconditional leave to defend, and it would, I think, have been open to them to put in a defence denying any liability, although, if they had gone to trial on such a defence, their witnesses would have been liable to cross-examination on the paragraph which I have read from their affidavit. On June 28, 1950, the defendants put in a defence in which they admitted that they were indebted to the plaintiffs in the sum of £1,756 18s. 8d., *i.e.*, about £60 more than the amount for which they had previously admitted liability. They alleged that they had a good defence as regards the balance, on the ground that the work concerned was done under a contract which, they said, bound the parties to conform to certain Admiralty schedules with which the accounts rendered were not in conformity. On Oct. 7, 1950, the summons now before us was issued asking for judgment under R.S.C., Ord. 32, r. 6, for £1,756 18s. 8d.

R.S.C., Ord. 32, r. 6, provides:

"Any party may at any stage of a cause or matter, where admissions of fact have been made, either on the pleadings, or otherwise, apply to the court or a judge for such judgment or order as upon such admissions he may be entitled to, without waiting for the determination of any other question between the parties; and the court or a judge may upon such application make such order, or give such judgment, as the court or judge may think just."

Counsel for the defendants says, and it is undoubtedly true, that the power of the court under this rule is discretionary, and so he argues that, applying the ordinary rules, we ought not to interfere with the exercise of the judge's discretion unless he can be shown to have gone wrong in principle, or, on the authority of *Evans v. Bartlam* (1), it can be otherwise established that injustice would be done if the order were allowed to stand. Counsel for the plaintiffs relied on a previous decision of this court in *Contract Discount Corp., Ltd. v. Overlyne Trading Co., Ltd.* (2), which bears a very considerable similarity to the case now before us. In that case the plaintiffs were suing for the balance of the price of goods sold and delivered. When the summons under R.S.C., Ord. 14, came before the court there was this important difference between the two cases. At that time the defendants denied all liability, and, accordingly, there can be no question but that, if leave to defend was given, it had to be unconditional. Then they proceeded to put in a defence. In para. 1 of their amended defence they admitted liability to the plaintiffs for the sum of £485 9s. 2d., part of the sum claimed, but alleged that they had a good defence as to the balance. A

summons similar to that with which we are dealing was taken out, and the master made an order that the plaintiffs should be allowed to enter judgment for the sum admitted, but, on appeal to the judge, the judge reversed that order and the matter was brought before the Court of Appeal, composed of SOMERVELL, L.J., and myself. We have not a copy of the judgment, because it is not a reported case, but counsel for the plaintiffs was able to produce a note of the judgment and from that we can gather the ground on which the court decided the matter. In that case, as in this, there had been a lodgment of money in court in a form which made it plain that the plaintiffs could only take the money out if they were prepared to accept the amount paid in in full satisfaction of their claim. SOMERVELL, L.J., stated that this court does not interfere with a discretionary order unless the judge errs in principle, but he expressed the view that, where the defendant admitted that the plaintiff was entitled to £485, the issue being only as to the balance, it is *prima facie* not just that the plaintiff should stand out of the money or take it out of court on condition of abandoning the balance.

In matters of this kind one case cannot be regarded as an absolute precedent for another. I must, therefore, turn to consider what are the grounds on which, in this case, McNAIR, J., thought that it was right to deprive the plaintiffs of the benefit which, I think, R.S.C., Ord. 32, r. 6, was intended to confer on them in respect of the admission that was made. Counsel for the defendants said that the learned judge had regard to the whole history of the case and that he attached importance, among other things, to what had happened under the procedure under R.S.C., Ord. 14. He made it clear that he was not treating the matter as *res judicata*, but he thought that the fact that the issue had already been before the court on the summons under R.S.C., Ord. 14, and that no order had then been made allowing the plaintiffs to sign judgment for the sum admitted, was of importance. Speaking for myself, I do not think that that was a factor which had any real importance. The defendants have had the benefit of what, *prima facie*, appears to have been a mistake on the part of the district registrar. They could, as I said, have put in a defence denying any liability. When they repeat the admission in their defence, and, indeed, admit a slightly larger sum than they admitted in the affidavit in answer to the summons, it seems to me that the summons under R.S.C., Ord. 14, affords no reason why it should cease to be just to allow the plaintiffs to recover the sum which, it is unconditionally admitted, they are entitled to in any event.

Counsel for the defendants then contends that it would be unfair to deprive the defendants of the advantage of having paid the money into court. That, says counsel, would have enabled them to recover judgment if nothing further was found due beyond the amount which they had paid into court. That, again, I do not think is a factor of any real weight because, as SINGLETON, L.J., pointed out during the argument, if judgment is entered now for the admitted sum and at the trial of the action nothing is found to be due, the defendants will still recover the whole of the costs subsequent to to-day or to the date of the judgment which we should allow to be entered.

The next matter which was raised by counsel for the defendants was that the issues which are raised as a defence to the balance are really common to the whole matter, and that, in deciding those issues, the court would be dealing also with the matter of the £1,756. I do not think that that is a relevant consideration. There is no suggestion that, whatever the answer to the issues outstanding may be, the plaintiffs will not be entitled to their £1,756, and I cannot think that the fact that the issues are, perhaps, not so clearly settled as they were in the *Contract Discount Corpn.* case (2) is a reason why the plaintiffs should be deprived of their rights. It was then contended by counsel for the defendants that the contrast between the amount claimed and the amount admitted is another reason why the order should not be made. No doubt, £31,000 is a very much larger sum than £1,700, but £1,700 is a very substantial sum without which, I do not say these plaintiffs, but some plaintiffs, might be seriously embarrassed in conducting

the proceedings and enforcing the rights to which they claim to be entitled. I cannot think that the fact that the sum claimed is very much larger is a ground on which the plaintiffs should be deprived of that which is admittedly their due. Lastly, it was said that, because of the offer of payment in full satisfaction before the action was brought, the court might well, if the action were allowed to go to trial, have deprived the plaintiffs of any costs, and, indeed, have ordered them to pay the costs of the whole action. It is possible that such an order would be made, but I should have thought that it was improbable. In any event, I do not think that that is a consideration to which the judge ought to have given weight. Finally, I come to this conclusion. It seems to me that, if we allow the order to stand depriving the plaintiffs of the use of the £1,756 18s. 8d., which is admitted to be their money, we may be inflicting on them an injustice within the meaning of *Evans v. Bartlam* (1), and that we shall not be interfering with any of the principles applicable to discretion cases if we reverse the order of the learned judge and make the order which the plaintiffs seek, viz., to allow them to enter judgment for the admitted sum. For these reasons I think that the appeal should be allowed.

SINGLETON, L.J.: I agree.

BIRKETT, L.J.: I agree.

Appeal allowed.

Solicitors: *Sidney Pearlman*, agent for *Alsop, Stevens & Co.*, Liverpool (for the plaintiffs); *Hill, Dickinson & Co.* (for the defendants).

[*Reported by C. N. BEATTIE, ESQ., Barrister-at-Law.*]

JAMES v. THOMAS H. KENT & CO., LTD.

[COURT OF APPEAL (Somervell and Denning, L.JJ., and Romer, J.), November 10, 1950.]

Contract—Memorandum or note—Contract of service—No mention of nature of duties—Implication of term as to reasonable notice of termination of contract where memorandum insufficient—Statute of Frauds, 1677 (c. 3), s. 4.

A company was incorporated on June 4, 1946, and in the minutes of a meeting of the company held on June 17, 1946, it was stated: "First directors. The appointments of Messrs. Kent and James as first directors of the company was approved subject to a three-year contract with the company at salaries of £1,020 and £420 per annum respectively." At a directors' meeting on the same day it was resolved to request the company's solicitor to prepare service agreements for a minimum period of three years for Kent and James. The agreements were never, in fact, prepared. On Dec. 22, 1948, James was summarily dismissed, and he claimed the amount of his salary for the remainder of his three years' term of office. The company pleaded that the agreement was not to be performed within one year and there was no memorandum or note of it to satisfy the Statute of Frauds, 1677, s. 4.

HELD: (i) if there was an oral contract of employment for three years the minute of June 17, 1946, did not constitute a sufficient memorandum of it for the purposes of s. 4 because there was no indication in the minute of the general nature of the duties which James had to perform, and, therefore, the contract was unenforceable.

(ii) it was impossible to imply that James was entitled to reasonable

notice, because so to do would be to imply a fresh contract from acts done in pursuance of an unenforceable express contract while that contract was still in existence.

Britain v. Rossiter (1879) (11 Q.B.D. 123), *followed*.

(iii) on the construction of the minutes, the parties had agreed subject to the drawing up of a formal contract, and, as the formal contract had never been drawn up, there had been no contract for three years; there was a contract of employment for an unspecified period; and James was entitled to reasonable notice of the termination of that contract or payment of salary in lieu of such notice.

Per DENNING, L.J.: If the servant had fully performed his part of the contract by serving his full time, or, what is the same thing, by serving his full time save when excused by sickness, he could sue for his stipulated wages. So, also, if he had served up to the time when any instalment fell due, he could sue for that instalment. In those cases, his action would be in debt on an executed consideration to which the Statute of Frauds has no application.

Dictum of TINDAL, C.J., in *Souch v. Strawbridge* (1846) (2 C.B. 814), *applied*.

Scott v. Pattison ([1923] 2 K.B. 723), *criticised* by DENNING, L.J.

[EDITORIAL NOTE.] The court decided this case in favour of the appellant on the basis of an argument which was not raised by him at first instance. The court is naturally reluctant to refuse to hear an argument which is reasonably open to the appellant on the basis of the facts and evidence adduced, but LORD BIRKENHEAD, L.C., in *Wilson v. United Counties Bank, Ltd.* ([1920] A.C. 106) took the view that "unless the circumstances are wholly exceptional, appellants must be strictly held to the grounds of appeal which they think proper to set forth in the formal documents which are demanded from them . . . In the present case, both in the Court of Appeal and before your Lordships, entirely new contentions have been submitted on behalf of the defendants. The practice is extremely inconvenient and ought in my judgment to be discouraged in every possible way." The general rule appears to be that a party at first instance omits a contention at his peril, but in a proper case the appellate court will, in its discretion, admit a new argument of the appellant.

AS TO TERMS OF MEMORANDUM, see HALSBURY, Hailsham Edn., Vol. 7, pp. 120-124, paras. 170-176; and FOR CASES, see DIGEST, Vol. 12, pp. 148-152, Nos. 1015-1052.]

Cases referred to:

- (1) *Re Alexander's Timber Co.*, (1901), 70 L.J.Ch. 767; 9 Digest 592, 3493.
- (2) *Elliott v. Roberts*, (1912), 107 L.T. 18; 12 Digest 151, 1037.
- (3) *Britain v. Rossiter*, (1879), 11 Q.B.D. 123; 48 L.J.Q.B. 362; 40 L.T. 240; 43 J.P. 332; 12 Digest 123, 810.
- (4) *Snelling v. Huntingfield (Lord)*, (1834), 1 G.M. & R. 20; 3 L.J.Ex. 232; 149 E. R. 976; 12 Digest 123, 807.
- (5) *Scott v. Pattison*, [1923] 2 K.B. 723; 12 Digest 166, 1214a.
- (6) *Souch v. Strawbridge*, (1846), 2 C.B. 808; 15 L.J.C.P. 170; 135 E.R. 1161; *sub nom.*, *Touch v. Strawbridge*, 7 L.T.O.S. 64; 12 Digest 121, 793.

APPEAL by the plaintiff from an order of PARKER, J., dated June 26, 1950.

The plaintiff claimed £175 as his salary due to him for the period unexpired of an oral contract of personal service for three years, or, alternatively, as damages for breach of contract and/or wrongful dismissal. PARKER, J., held that there was no sufficient memorandum of the alleged contract for the purpose of the Statute of Frauds, 1677, s. 4, and that no agreement to give reasonable notice could be implied. On appeal, the plaintiff argued, in the alternative, that there

had been no contract for a definite term, and that in the circumstances he was entitled to reasonable notice or payment of salary in lieu of such notice.

Rees-Davies for the plaintiff.

Aarvold for the defendants.

SOMERVELL, L.J.: The plaintiff, Mr. Frank James, claims from the defendants, Messrs. Thomas H. Kent & Co., Ltd., the sum of £175, as five months' salary due to him under a service agreement with the defendants. Alternatively, the plaintiff claims damages for breach of agreement and/or wrongful dismissal. The case made in the court below was that the plaintiff had, as the learned judge found, an oral agreement with the defendants for employment in a garage business for three years. He was dismissed, which is not disputed, and the five months in respect of which salary is claimed is the balance of the three years which was covered by the agreement between him and the defendants. In their defence the defendants said with regard to that agreement, which they first denied:

"If any such agreement as alleged was entered into between the plaintiff and the defendants, such agreement was a contract not to be performed within the space of one year from the making thereof and there is no memorandum in writing of the alleged contract sufficient to satisfy the Statute of Frauds."

It was not disputed that the doctrine of part performance applies to a service agreement within the Statute of Frauds. The learned judge held that there was such an agreement, but he held there was no sufficient memorandum of it, and then he held that in those circumstances the plaintiff could not recover anything for wrongful dismissal. Counsel for the plaintiff argued before the learned judge, and it was the first of his arguments before us, that in cases where the court finds an oral agreement but no sufficient memorandum of it, nevertheless, if the person serving under that agreement is dismissed, he can claim damages for wrongful dismissal on the basis that he was entitled to a reasonable notice.

The defendant company was incorporated on June 4, 1946, and took over a business which had been previously carried on by the plaintiff's mother, the plaintiff working in the garage. A Mr. Kent, whose name is borne by the defendant company, was concerned in the negotiations. It appears that he bought the freehold of the garage for £15,000. There was to be a share capital of £5,000, he was to have 9,000 shares and the plaintiff 1,000, and the other shares were to be split up. The company was not incorporated until June, 1946. In the minutes of a meeting of the members of Thos. H. Kent & Co., Ltd., held at Westbridge Road on June 17, 1946, it is stated that:

"First directors. The appointments of Messrs. Kent and James as first directors of the company was approved subject to a three-year contract with the company at salaries of £1,020 and £420 per annum respectively."

There was a meeting of the directors on the same day and it was resolved to appoint Mr. Gibson as solicitor and to request him to prepare service agreements for a minimum period of three years for Mr. Kent and the plaintiff. No service agreements, however, were ever prepared. The plaintiff was dismissed on Dec. 22, 1948. PARKER, J., found that there was an oral agreement for three years on those terms, and, therefore, the first question we have to consider is: Assuming that there was such an oral agreement, was there a sufficient memorandum of it in writing to satisfy the statute? One point taken was that it was not clear from the minute at what date the agreement started. We were referred to authorities [*Re Alexander's Timber Co.* (1) and *Elliott v. Roberts* (2)] which decided that that was a vital matter, so that if the date on which service is to start cannot be found in the alleged memorandum, it is not a sufficient memorandum. I do not propose to deal with that point. I think it may well be that this minute, in its context, pointed to the agreement beginning on June 4,

1946, but, however that may be, I think it clearly appears that the minute was not a sufficient memorandum because it gave no indication, special or general, as to the nature of the duties which the plaintiff was to perform. Under a service agreement a man may often have to do many things on orders which he receives from his employers, but, it seems to me, to satisfy the statute, there must be some indication of the general nature of the duties he has to perform and his position as an employee in the company's service. I, therefore, think that the learned judge was right in saying there was no sufficient memorandum. On that basis, the learned judge held that he could not recover damages for wrongful dismissal.

This is the paragraph in the learned judge's judgment which counsel for the plaintiff challenges:

"That being so, it seems to me that the claim on the agreement alleged, as to which [the plaintiff] gave evidence before me, must fail on the ground that it is unenforceable in law. It is said by counsel for the plaintiff in the alternative that, even if he fails to establish an enforceable agreement in those terms, his client is nevertheless entitled to damages for wrongful dismissal, broadly speaking, on this basis, that he did, in fact, serve the company from day to day and from month to month and from year to year, in a managerial capacity, and that he cannot, as it were, be thrown out for no reason assigned and without notice, and he says in the alternative that his client is entitled to six months' or thereabouts, wages as reasonable notice. The difficulty I feel about that claim, attractive as it is, is that there is really only one contract alleged—the contract as to which [the plaintiff] gave evidence in the witness box, and his claim is under that contract. And if, as I have held, that contract, although a contract in being, is unenforceable under the Statute of Frauds, I cannot see how any alternative claim can lie. Indeed, if an alternative claim in such circumstances did lie, it would in effect render the Statute of Frauds in this respect a complete nullity."

Counsel for the plaintiff argued that that was wrong and said that, having to disregard the contract, you must then imply a term under which the plaintiff was entitled to reasonable notice. I agree with the learned judge on that point. It has often been laid down that, if a man has actually done work under a contract of service which is unenforceable under s. 4 of the Statute of Frauds, work for which he has not been paid, he can recover as on a *quantum meruit* any reasonable remuneration, but that is not this point. The question here is whether we can imply a term as to notice. On that matter, counsel for the defendants relied on the old and often cited case in this connection, *Britain v. Rossiter* (3), where it was held (11 Q.B.D. 123):

"A contract, which is not enforceable by reason of the provisions of the Statute of Frauds, s. 4, nevertheless is an existing contract and is not void altogether, and a fresh contract cannot be implied from acts done in pursuance of it."

That seems to me to be precisely what counsel for the plaintiff is asking us to do. He is asking us to imply a new contract of service "from acts done in pursuance" of the contract to which his client deposed. BRETT, L.J., said (11 Q.B.D. 127):

"It seems to me impossible that a new contract can be implied from the doing of acts which were clearly done in performance of the first contract only, and to infer from them a fresh contract would be to draw an inference contrary to the fact."

THESIGER, L.J., said (*ibid.*, 132):

"But I need not discuss this question further, for in *Snelling v. Huntingfield* (Lord) (4), which has never been overruled but on the contrary has been

often followed, it was held that a contract not enforceable by reason of the Statute of Frauds, s. 4, nevertheless existed, and no contract can be implied where an express contract exists."

This area of law was considered in *Scott v. Pattison* (5) where it was held ([1923] 2 K.B. 723):

A "That he was entitled to sue in *assumpsit* upon an implied promise by the defendant to pay for the services rendered, and for that purpose to rely upon a local custom, if proved, to pay wages during absence from work through illness."

That is an example of the principle to which I have already referred.

B On those points, therefore, I come to the conclusion that on the case as presented to him the learned judge was right, but, in the course of argument here the question arose whether there ever was a concluded contract for three years? It seems to me reasonably plain that when the matter mentioned in the minute was resolved there was no concluded agreement for three years. There were matters which might well come up for discussion with regard to the draft agreement. The plaintiff's appointment was to be "subject to contract"—subject to the preparation of a draft which the board would consider. On that construction C of this document, I think that there was no binding agreement for three years. The solicitor failed to produce the draft agreement, and an agreement that the plaintiff and the company should be bound for a three years' period was never signed. If it had not been the case of a company, the position might have been different, but here was a matter which had come before the board, and I think D it is impossible to think of circumstances which would render binding for three years the proposed arrangement which was to be "subject to contract."

E For these reasons, the plaintiff falls to be considered as a man employed at the work I have described with a contract which fixed his remuneration—which he was paid until he was dismissed—but without any term which fixed the period of the employment. In those circumstances, the law requires a reasonable period of notice. PARKER, J., decided on three months, counsel for the plaintiff suggested that six months was more appropriate, and counsel for the defendants suggested one month. I see no reason to disagree with the period decided on by the learned judge. Therefore, in my judgment, the plaintiff is entitled to succeed by way of damages for loss of earnings for three months.

F DENNING, L.J.: On the points argued before the learned judge, I agree with him. Assuming there was a concluded oral agreement to employ the plaintiff for three years and there was no memorandum of it sufficient to satisfy the statute, then the plaintiff could not sue for wrongful dismissal. He could not set up the special agreement because of the statute, and he could not rely on an implied agreement because one cannot have an implied contract covering the same ground as an existing express contract. The effect of the statute is, not to make an agree- G ment void, but only to make it unenforceable. There would, therefore, still be in existence a special contract dealing with the duration of the service, and, while it remained in existence, there could not be an implied contract on the self-same point. That appears from *Britain v. Rossiter* (3).

H If the plaintiff had fully performed his part of the contract by serving his full time, or, what is the same thing, by serving his full time save when excused by sickness, he could sue for his stipulated wages. So, also, if he had served up to the time when any instalment fell due, he could sue for that instalment. In those cases his action would be in debt on an executed consideration to which the Statute of Frauds has no application. That was expressly laid down by TINDAL, C.J., in *Souch v. Strawbridge* (6) (2 C.B. 814), and is, I think, still good law to-day. I know that a Divisional Court in *Scott v. Pattison* (5) decided the contrary, but I do not think they were right for reasons which I elaborated some time ago in an article which I wrote in the *LAW QUARTERLY REVIEW* (41 L.Q.R.

79) and to which I still adhere. Even if the servant has not served his full time, or the time necessary to earn the next instalment, but is dismissed beforehand without good cause, he can recover payment for any work he has done as on a *quantum meruit*. It used to be said in the old days that in that case his action was on an implied contract, but that is not a correct way of approach because, in this case, as in the other, you cannot have an implied contract covering the same ground as an existing special contract. The proper ground of the claim is not in contract at all, but in restitution. It is money which, in justice, ought to be paid for services rendered. The present claim for wrongful dismissal cannot be put on any such footing because restitution is confined to cases where the defendant has received money which he ought to restore, or benefits for which he ought to pay. A claim for damages for wrongful dismissal can only rest in contract, and, if that contract is unenforceable by reason of the Statute of Frauds, the claim must fail. This is the ground on which the judge dismissed the claim, and on that I entirely agree with him.

There was, however, another point which was not argued before the learned judge. When the facts of this case are examined it becomes plain that there was no concluded agreement to employ the plaintiff for three years. It was subject to a condition, "subject to a contract being executed binding him for three years," and no contract was ever executed. The result is that the plaintiff was employed for no determinate time. It was a general employment, (not caught by the statute,) in which it is always implied that it is only determinable by reasonable notice. Three months' notice would be reasonable, and the plaintiff is entitled to damages on that basis. This point was not put before the learned judge, but I think we should give effect to it. I cannot see that any evidence could have been called which would have altered the position, or that the defendants are in any way prejudiced by its not being taken before, save in regard to costs, and we can make provision for them. I agree that the appeal should be allowed.

ROMER, J.: I agree.

Appeal allowed; judgment for the plaintiff for £105 with costs below; plaintiff to pay to the defendants the costs of appeal.

Solicitors: *Williams & Poole* (for the plaintiff); *Woodroffes* (for the defendants).

[*Reported by F. GUTTMAN, ESQ., Barrister-at-Law.*]

HOWGATE v. ATTORNEY-GENERAL AND OTHERS.

[KING'S BENCH DIVISION (Barry, J.), October 30, 31, November 1, 3, 1950.]

War Injury—Injury caused by impact of aircraft on property—Injury sustained by passenger in aircraft—Injury sustained abroad—Personal Injuries (Emergency Provisions) Act, 1939 (c. 82), s. 8 (1).

An aircraft, which was Crown property and was operated by and under the Control of Transport Command of the Royal Air Force, caught fire after twice touching down when landing at Karachi, India, during the recent war, and a passenger in the aircraft was killed. In an action brought by his executor against the captain and the second pilot of the aircraft under the Fatal Accidents Act, 1846, and the Law Reform (Miscellaneous Provisions) Act, 1934, it was admitted that the death of the passenger resulted from the accident and was caused by the negligence of these defendants. On the question whether the claim against the defendants was barred by s. 3 (1) of the Personal Injuries (Emergency Provisions) Act,

1939, on the ground that the passenger's death was due to a "war injury" within s. 8 (1) of the Act, *i.e.*, an injury caused by the impact on the aerodrome of the aircraft,

HELD: (i) the words "physical injuries . . . caused by the impact on any . . . property" of a British or allied aircraft, in the definition of "war injuries" in s. 8 (1) (b) of the Act of 1939, included injuries sustained by a passenger travelling in that aircraft.

(ii) on the facts, there was no evidence to show that the impact of the aircraft was a real and effective cause of the injuries, and, therefore, the executor was not precluded by s. 3 (1) of the Act from bringing the action.

Per curiam: the Act of 1939 applies to all British subjects who suffer "war injuries," within the meaning of the definition of that term, in any part of the world.

[FOR THE PERSONAL INJURIES (EMERGENCY PROVISIONS) ACT, 1939, s. 3, s. 8 (1), see HALSBURY'S STATUTES, Second Edn., Vol. 17, pp. 893, 895, and FOR CASES, see 2nd DIGEST Supp.]

Cases referred to:

- (1) *Yates v. R.*, (1885), 14 Q.B.D. 648; 54 L.J.Q.B. 258; 52 L.T. 305; 49 J.P. 436; 32 Digest 202, 2521.
- (2) *Greenfield v. London & North Eastern Ry. Co.*, [1944] 2 All E.R. 438; [1945] K.B. 89; 114 L.J.K.B. 252; 171 L.T. 337; 2nd Digest Supp.
- (3) *Adams v. Naylor*, [1946] 2 All E.R. 241; [1946] A.C. 543; 115 L.J.K.B. 356; 175 L.T. 97; 2nd Digest Supp.
- (4) *Minister of Pensions v. Chennell*, [1946] 2 All E.R. 719; [1947] K.B. 250; [1947] L.J.R. 700; 176 L.T. 164; 2nd Digest Supp.
- (5) *Yorkshire Dale S.S. Co., Ltd. v. Minister of War Transport*, [1942] 2 All E.R. 6; [1942] A.C. 691; 111 L.J.K.B. 512; 167 L.T. 349; 2nd Digest Supp.
- (6) *Tomalin v. Pearson (S.) & Son, Ltd.*, [1909] 2 K.B. 61; 78 L.J.K.B. 863; 100 L.T. 685; 2 B.W.C.C. 1; 34 Digest 258, 2208.
- (7) *Schwartz v. India Rubber, Gutta Percha & Telegraph Works Co., Ltd.*, [1912] 2 K.B. 299; 81 L.J.K.B. 780; 106 L.T. 706; 5 B.W.C.C. 390; 34 Digest 258, 2209.
- (8) *Keegan v. Dawson*, [1934] I.R. 232; 27 B.W.C.C. Supp. 136; Digest Supp.
- (9) *Krzus v. Crow's Nest Pass Coal Co.*, [1912] A.C. 590; 81 L.J.P.C. 227; 107 L.T. 77; 6 B.W.C.C. 270; 2 Digest 131, 72iii.
- (10) *Billings v. Reed*, [1944] 2 All E.R. 415; [1945] K.B. 11; 114 L.J.K.B. 11; 171 L.T. 312; 2nd Digest Supp.

ACTION for damages for negligence under the Fatal Accidents Act, 1846, and the Law Reform (Miscellaneous Provisions) Act, 1934.

The plaintiff was the executor of the deceased, a passenger in an aircraft belonging to the Crown and operated by and under the control of Transport Command of the Royal Air Force, who had been killed in 1944 in an accident at Mauripur Airfield, Karachi, India, through the admitted negligence of the two defendants, the captain and second pilot of the aircraft. The action was brought for the benefit of the widow and six children of the deceased. It was contended for the defendants (i) that the action was barred by s. 3 (1) of the Personal Injuries (Emergency Provisions) Act, 1939, since the injuries of the deceased, which caused his death, were war injuries, being physical injuries caused by the impact of the aircraft on property, *viz.*, the aerodrome, within the meaning of the definition of "war injuries" in s. 8 (1) of the Act, and (ii) that the event causing the injuries was not actionable in this country since the Act of 1939 had no extra-territorial application.

Scott Henderson, K.C., and Skelhorn for the plaintiff.

Sir Walter Monckton, K.C., and J. P. Ashworth for the defendants.

Cur. adv. vult.

Nov. 3. **BARRY, J.**, read the following judgment. This is a claim brought by the plaintiff, suing as an executor, under the Fatal Accidents Act, 1846, and the Law Reform (Miscellaneous Provisions) Act, 1934. The action is brought for the benefit of the widow and six children of the late Mr. Reginald Bousfield Lagden and for the benefit of the deceased's estate. The Attorney-General was at one time joined as a defendant, but for reasons which are no longer material the plaintiff's action against him was discontinued in January, 1948. A

The deceased met his death when travelling under official auspices from England to India in an aeroplane which was the property of the Crown and operated by and under the control of Transport Command of the Royal Air Force. The two remaining defendants, Flight Lieutenant Bagnall and Pilot Officer Hutchings, were respectively the captain and second pilot of this aircraft. On Oct. 20, 1944, the aircraft in which the deceased was a passenger landed at the Mauripur Airfield, Karachi, but overran the prepared runway and ultimately burst into flames a short distance from the boundary of the airfield. The deceased appears to have been unable to escape from the burning machine and met his death from asphyxia followed by charring. It is admitted that his death resulted directly from this very distressing accident and that the accident itself was caused by the negligence of the two defendants. The defendants, however, contend that the injuries which brought about the death of the deceased were "war injuries," within the definition of that term contained in s. 8 (1) of the Personal Injuries (Emergency Provisions) Act, 1939, and that, in consequence, the plaintiff's claim against them founded on their negligence or breach of duty is barred by s. 3 of that Act. The sole issue for the determination of the court is whether or not the provisions of the last-mentioned section relieve the defendants from the liability to pay damages which, on the admitted facts, would otherwise fall on them. B C D

Although this issue can be simply stated, it gives rise to a number of problems of considerable nicety. It must first be ascertained whether the injury suffered by the deceased can properly be described as "war injuries," within the meaning of s. 8 (1) of the Act of 1939, and, if so, whether the provisions of the Act itself, or, alternatively, of s. 3 of the Act, have any application when the injuries complained of were sustained outside the territorial limits of the United Kingdom. The definition of "war injuries," as contained in s. 8 (1) of the Personal Injuries (Emergency Provisions) Act, 1939, reads thus: E F

" ' War injuries ' means physical injuries—(a) caused by (i) the discharge of any missile (including liquids and gas); or (ii) the use of any weapon, explosive or other noxious thing; or (iii) the doing of any other injurious act; either by the enemy or in combating the enemy or in repelling an imagined attack by the enemy; or (b) caused by the impact on any person or property of any enemy aircraft, or any aircraft belonging to, or held by any person on behalf of or for the benefit of, His Majesty or any allied power, or any part of, or anything dropped from, any such aircraft." G

Paragraph (b) is the material one in this case.

Counsel for the plaintiff made two distinct submissions in regard to the construction of these words. First, he contended that in their true meaning the words "physical injuries . . . caused by the impact on any . . . property of any" British or allied aircraft do not include injuries sustained by a passenger in the aircraft concerned. From the logical point of view, it seems to me that there is much that can be said in support of this construction. Looking at the definition of "war injuries" as a whole, it is, I think, extremely doubtful whether the legislature had in mind the peculiar position of a passenger in a H

British or allied aircraft which makes impact with any property. Had the position of passengers been given any specific consideration, it is difficult to believe that no provision would have been made to mitigate some of the strange anomalies to which counsel for the plaintiff has drawn attention. I need only to mention one of them. If an aircraft falls into, and makes impact with, the sea, which can hardly be described as "any property," the passenger or his dependants would not be entitled to a pension under any scheme made by the Minister of Pensions, but could, if negligence or breach of duty were established, recover damages for the injuries sustained. If, on the other hand, the aircraft fell on, or made impact with, the land, the property of which must necessarily be vested either in some subject or in the Crown, the position of the passenger or his dependants would be wholly reversed. It is unlikely that this and other curious results can have been intentional, but it is the duty of the court to construe the words of the definition according to their plain and obvious meaning and it cannot do violence to the wording of a statute merely because that wording may lead to curious results.

Section 1 (1) of the Act provides:

"The Minister may make a scheme . . . providing for the making of payments in respect of . . . (a) war injuries sustained by gainfully occupied persons (with such exceptions, if any, as may be specified in the scheme) and by persons of such other classes as may be so specified . . ."

Section 3 refers to a "war injury" sustained by "any person," and the definition of "war injuries" in s. 8 (1) contains no words which expressly or by implication point to the exclusion of passengers in a British or allied aircraft.

In the face of these broad and general provisions, I have come to the conclusion that the court would not be justified in importing an exception relating to passengers, which, had the legislature so intended, could so easily have been incorporated in the Act by express words. Counsel for the plaintiff drew my attention to certain passages in MAXWELL ON THE INTERPRETATION OF STATUTES, 9th ed., pp. 207-214, and also to *Yates v. R.* (1), but I do not think that the principles there enunciated can properly be applied unless the words of the statute are capable of two reasonable interpretations or there are compelling reasons for construing some wide and general word or words in a more restricted sense than they are capable of bearing. I can find no such compelling reasons in the present case, and I am constrained to hold that a passenger who, in the true sense, suffers injury by the impact on any property of the aircraft in which he is travelling falls within the provisions of the Act. I do so with less hesitation when it is recalled, as pointed out in a number of cases, that, with the exception of s. 3, the object of the Act is to confer benefits on injured persons rather than to deprive them of their normal legal rights. It would, I think, be difficult for the Crown to argue that a person who was included among the classes specified in the scheme and suffered injuries when an aeroplane in which he was travelling crashed into a house should be deprived of compensation merely because he was a passenger.

To establish their defence under s. 3 of the Act, it is, however, necessary for the defendants to provide affirmative proof that the deceased's injuries were, in truth, "war injuries," that is to say, injuries caused by the impact on any property of an aircraft belonging to His Majesty. From the wording of the definition it is, I think, clear that the injuries must be caused by the impact, and not by some other mishap which was causally unconnected with the impact. Were the injuries of the deceased caused by the impact of this aircraft with the ground or with any other property? I have been unable to obtain much assistance from the authorities on this point which have been cited to me. In *Greenfield v. London & North Eastern Ry. Co.* (2) the Court of Appeal took the view that the word "cause" as contained in the definition contained in s. 8 (1) of the Act meant,

and only meant, the immediate and precipitating cause of the injury. This case was, however, decided before the decision of the House of Lords in *Adams v. Naylor* (3), and I respectfully agree with the decision of DENNING, J. (as he then was), in *Minister of Pensions v. Chennell* (4) that the authority of *Greenfield's* case (2) has been seriously undermined by the later decision of the House of Lords. It can, I think, no longer be said that the "impact" must be the sole or immediate or precipitating cause of the injuries. Other causes may also operate to bring about the injuries, but, none the less, the impact must be, of itself, a real and effective cause. It is not, in my judgment, a real and effective cause, if it is nothing more than an event or circumstance on which the true causes either previously or subsequently operate. In considering the causal nature of any event it is, I think, essential to bear in mind the words of LORD WRIGHT in the case of *Yorkshire Dale S.S. Co., Ltd. v. Minister of War Transport* (5) ([1942] 2 All E.R. 15):

"This choice of the real or efficient cause from out of the whole complex of the facts must be made by applying commonsense standards."

The same principle, in my judgment, applies when considering whether any one event is or is not one of the real or efficient causes of another.

Before this question can be answered it is necessary to examine the facts of this unhappy accident. [HIS LORDSHIP stated that the only impacts which were disclosed by the evidence were those which occurred on the two occasions when the aircraft touched down, but that there was nothing to suggest that either of these impacts was an effective cause of the aircraft swinging round or catching fire, and continued :] In these circumstances, I am bound to find that the defendants have failed to prove that the injuries and death of the deceased, were caused by the impact on any property of an aircraft belonging to His Majesty and that in consequence the deceased's injuries were not "war injuries" within the definition contained in s. 8 of the Act of 1939. The provisions of s. 3 of the Act are, therefore, inapplicable and the plaintiff is entitled to enforce his ordinary legal rights on behalf of the dependants and the estate. This finding disposes of the case, save as to the amount of damages which should be awarded, but, out of deference to the arguments presented to me, I think it is right for me to say a few words as to one other major issue which was fully debated at the trial.

Counsel for the plaintiff contended that the Personal Injuries (Emergency Provisions) Act, 1939, had no extra-territorial application and that injuries sustained outside the United Kingdom did not fall within any of its provisions. He based this argument upon the broad proposition set out in MAXWELL ON THE INTERPRETATION OF STATUTES (9th ed.), at p. 149, which is as follows:

"... in the absence of an intention clearly expressed or to be inferred either from its language, or from the object, subject-matter, or history of the enactment, the presumption is that Parliament does not design its statutes to operate on its subjects beyond the territorial limits of the United Kingdom."

This passage, which is well supported by some authority, was cited with approval by COZENS-HARDY, M.R., in *Tomalin v. Pearson (S.) & Son, Ltd.* (6), when the Court of Appeal applied this principle to the Workmen's Compensation Act, 1906. *Tomalin's* case (6) was followed in the case of *Schwartz v. India Rubber, Gutta Percha & Telegraph Works Co., Ltd.* (7). These two decisions have been criticised in the Irish case of *Keegan v. Dawson* (8), but they are, of course, binding on me, and *Tomalin's* case (6) was cited with approval by the Privy Council in the case of *Krzus v. Crow's Nest Pass Coal Co.* (9). These authorities have, however, no direct bearing on the construction of the Act now under consideration, more especially as the Court of Appeal, in arriving at their decision, were strongly influenced by certain provisions contained in s. 7 of the Workmen's Compensation Act, 1906, which have no counterpart in the Personal Injuries (Emergency Provisions) Act, 1939.

Were it material to the decision of the present case, I should have felt bound to accede to the submission of counsel for the defendants that the general scheme of the Act of 1939 and the conditions of universal war which existed, or seemed likely to exist, at the time when the Act was passed, all tend to show that its application is not to be confined to the territorial limits of the United Kingdom. I think that the Act applies, *inter alia*, to all British subjects who suffer "war injuries" within the meaning of the definition of that term in any part of the globe. Counsel for the plaintiff pointed out that this construction of the Act might enable, for example, a British subject resident in the United States of America to recover compensation if he were injured by the impact of an American aircraft. If this were so, it would, perhaps, throw some doubt on the construction which I have indicated, but, in my judgment, Parliament has provided against any such absurdities by enabling the Minister of Pensions to specify in his scheme the classes of persons entitled to benefit under the Act. In fact, the various schemes made under the Act have imposed stringent limitations on the classes of persons who may obtain awards of compensation for injuries sustained outside the United Kingdom. I cannot, of course, have recourse to these schemes as a guide to the correct interpretation of the Act under which they were made, but I am, I think, entitled to consider them for certain limited purposes. In *Billings v. Reed* (10) LORD GREENE, M.R. (as he then was), referring to this subject, said ([1944] 2 All E.R. 419):

"The fact that the object of this Act was in substance what I have suggested can, I think, be seen from a consideration of the way in which the scheme has been framed pursuant to the Act itself, and with the tacit approval of Parliament as provided in the Act. At any rate, we are entitled to look at the scheme for the purpose of seeing the kind of practical treatment of these questions which Parliament has authorised."

It is abundantly clear from the wording of the various schemes made under this Act that the Minister of Pensions, to use the words of the Master of the Rolls, "with the tacit consent of Parliament" has throughout considered that "war injuries" may be sustained outside the United Kingdom and counsel for the plaintiff has, of course, been forced to contend that all these schemes have contained many provisions that were "*ultra vires*." As already indicated, I cannot accept this view.

Finding, as I do, that the Act of 1939 applies to "war injuries" sustained by British subjects outside the United Kingdom, it is unnecessary for me to consider an alternative submission made by counsel for the defendants that, irrespective of the territorial application of the Act, this action was, in any event, barred by s. 3, on the ground that the event which caused the injuries of the deceased was not actionable in this country. I am, however, very far from being convinced that the defendants could have availed themselves of this section if the injuries of the deceased had been "war injuries" to which the Act applied.

[His LORDSHIP assessed the damages at £17,000 under the Fatal Accidents Act, 1846, with £9 11s. in respect of funeral expenses, £250 for loss of expectation of life under the Law Reform (Miscellaneous Provisions) Act, 1934, and £50 in respect of pain and suffering, and gave judgment for the plaintiff for these sums].

Judgment for the plaintiff with costs.

Solicitors: *Maxwell, Batley & Co.* (for the plaintiff); *Treasury Solicitor* (for the defendants).

[Reported by F. A. AMIES, Esq., Barrister-at-Law.]

KERRIDGE v. LAMDIN.

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Asquith and Jenkins, L.J.J.), November 14, 15, 1950.]

Landlord and Tenant—New lease—Time for making claim—“ Within two months after service of notice ”—Landlord and Tenant Act, 1927 (c. 36), s. 5 (2).

A tenant held business premises on a tenancy terminable by notice. On Mar. 23, 1950, the landlord gave the tenant notice to determine the tenancy. On Apr. 6, 1950, the tenant served on the landlord a notice under s. 5 (1) of the Landlord and Tenant Act, 1927, requiring a new lease in lieu of compensation for goodwill. On June 3, 1950, the tenant applied to the county court under s. 5 (2) of the Act for an order granting a new tenancy and settling its terms.

HELD: on a true construction of s. 5 (2) of the Act of 1927, the period of two months within which the application must be made ran from the date of the service on the tenant of the notice to quit and not from the date of the service on the landlord of the tenant's notice requiring a new lease, and, consequently, his application was out of time.

[AS TO TENANT'S RIGHT TO A NEW LEASE, see HALSBURY, Hailsham Edn., Vol. 20, pp. 297-299, para. 340 ; FOR THE LANDLORD AND TENANT ACT, 1927, s. 5 (2), see HALSBURY'S STATUTES, Second Edn., Vol. 13, p. 892; and FOR CASES, see 2nd DIGEST Supp.]

Case referred to:

- (1) *Donegal Tweed Co., Ltd. v. Stephenson*, (1929), 98 L.J.K.B. 657; 141 L.T. 262; Digest Supp.

APPEAL by the landlord from a decision of His Honour DEPUTY JUDGE CLARK, K.C., at Windsor County Court on June 13, 1950, refusing an application by the landlord for an order striking out the tenant's application for a new lease under s. 5 (1) of the Landlord and Tenant Act, 1927, on the ground that, under s. 5 (2), it was out of time.

The county court judge held that on the true construction of s. 5 (2) time for making the application for an order granting a new lease and determining its terms ran from the date of the tenant's notice claiming a new lease and not from the date of the service of the notice to quit. The facts and the relevant sections of the Landlord and Tenant Act, 1927, appear in the judgment of JENKINS, L.J.

L. A. Blundell and *Plume* for the landlord.
Binney for the tenant.

SIR RAYMOND EVERSLED, M.R.: I will ask JENKINS, L.J., to deliver the first judgment.

JENKINS, L.J.: The present case raises a short question of construction on a provision as to time contained in the Landlord and Tenant Act, 1927. The question arises in this way. The tenant held from the landlord certain business premises on a tenancy terminable by notice. On Mar. 23, 1950, due notice was given to determine the tenancy, and, thereupon, under the provisions of the Act, the tenant became entitled under s. 4 of the Act to claim compensation for goodwill on quitting the holding by serving on the landlord the appropriate claim within one month after the service on him of the notice to quit. The tenant further became entitled, if so minded, to claim in lieu of compensation a new lease under s. 5, by service on the landlord of a notice to that effect within the period limited for making his claim for compensation, that is to say, within one month after service on him of the notice to quit. On Apr. 6, 1950, the tenant served on the landlord a notice claiming a new lease well within the period of one month allowed for that purpose.

In that state of affairs, the provisions of s. 5 (2) of the Act came into operation. To state the effect of those provisions in neutral form, they amount to this. In the case of a periodic tenancy (which is the type of tenancy here in question), where a notice claiming a new lease has been served, the county court may make an order granting a new lease and settling its terms on an application for that purpose being made by the landlord or the tenant within the period of two months therein mentioned. The tenant made his application to the county court less than two months from the date of the service on the landlord of his notice claiming a new lease, but more than two months from the date of the service by the landlord on him of the notice to quit, the date of the application to the county court being June 3, 1950.

In those circumstances, the landlord applied to the county court for an order striking out the tenant's application on the ground that it was out of time, inasmuch as the time-limit of two months ran from the date of the service by the landlord of the notice to quit and not from the date of the service by the tenant of his notice requiring a new lease. The county court judge held that on the true construction of s. 5 (2) of the Act time ran, as contended by the tenant, from the date of the service of the tenant's notice requiring a new lease, and not, as contended by the landlord, from the date of the service of the notice to quit. It followed, in the view of the deputy county court judge, that the landlord's application was ill-founded, and he dismissed it. Hence this appeal.

The point is a short one of the construction of this provision as to time. In the course of the arguments before us counsel for the landlord relied primarily on the contention that his view was clearly right on the true construction of s. 5 (2), but he also called in aid provisions in various other parts of the Act in regard to notices which, in his submission, supported his construction of s. 5 (2) as fitting in better with the other provisions of the Act than the construction advanced by counsel for the tenant. Counsel for the landlord further called in aid the general principle that, inasmuch as the Act trenches on the common law rights of landlords, the benefit of any doubt should be given to the landlord. He relied on the view expressed in *MERLIN'S LANDLORD AND TENANT ACT, 1927*, 3rd ed., p. 41, to the effect that the contention advanced on behalf of the landlord in the present case was right. Counsel for the tenant, on the other hand, claimed that, as the Act was designed for the protection of tenants, the benefit of any doubt should be given to the tenant. He contended that his construction fitted in better with the other provisions of the Act, and, in particular, he called attention to s. 6 of the Act, under which a landlord may offer alternative accommodation. He pointed out that, if the construction of counsel for the landlord were adopted, the full time allowed to the tenant for making his application to the tribunal would coincide exactly with the time allowed to the landlord within which to give notice under s. 6 of his willingness to grant a lease of alternative accommodation and that this might result in the making by the tenant of an unnecessary application to the tribunal. Counsel for the tenant further relied on the opinion expressed in *CHESHIRE'S MODERN REAL PROPERTY*, 5th ed., p. 175, to the effect that his construction of s. 5 (2) of the Act was the right one.

After paying the best attention I can to these general arguments on either side, I find I can derive very little assistance from them. If an attempt to construe s. 5 (2) discloses some ambiguity, or something which on the face of it is inconsistent or unreasonable, then, no doubt, so far as it is possible to do so, it is right to resolve the doubt by seeing which interpretation will fit in better with the general scheme or intention of the Act as collected from its terms as a whole. The primary task, however, is to construe the sub-section, and, if its construction is clear, it must be given effect according to its terms, and the result cannot be affected by the fact that some different provision might be thought to be more consonant with the other terms of the Act. A matter of this kind, namely, the

limitation of a period of time within which an act has to be done under a given piece of legislation, is necessarily a matter which must, in a sense, be dealt with in a somewhat arbitrary fashion. A time has to be allowed, and, provided the period prescribed is reasonably sufficient to allow of the act in question being done, there is no particular reason why the period selected should be one month, two months, three months, or of any particular length more than another. All that can be said is that, to make legislation such as this workable, definite periods must be fixed for the taking of the various steps provided for, and the construction of a provision as to time is not one on which much assistance can be expected from general principles.

Turning now to the construction of s. 5 (2), I find it desirable to refer to s. 4 (1), which begins:

"The tenant of a holding to which this Part of this Act applies shall, if a claim for the purpose is made in the prescribed manner—(i) in the case of a tenancy terminated by notice, within one month after the service of the notice on the tenant; and (ii) in any other case, not more than thirty-six nor less than twelve months before the termination of the tenancy; be entitled, at the termination of the tenancy on quitting the holding, to be paid by his landlord compensation for goodwill . . ."

It is to be observed that the method of fixing time is there made to depend on whether the tenancy is a tenancy for a fixed term or a tenancy terminated by notice. In the case of a tenancy for a fixed term the time is limited by reference to a minimum period before the date fixed for the termination of the tenancy, while in the case of a tenancy terminated by notice the time is limited by reference to a maximum period after the service of the notice. That formula is worth noting in view of the language of s. 5 (2). It is, perhaps, also worth mentioning that a very similar formula appears in s. 1 (1), which is one of the sections dealing with the tenant's right to compensation for improvements. The formula there used is substantially in the same terms as the formula appearing in s. 4 (1), except that, in the case of a tenancy terminated by notice, the period allowed is one month after the notice was served on or by the tenant, that variation being due to the fact that a periodic tenant can claim compensation for improvements although he himself determines the tenancy.

Section 5 (1), which gives the tenant the option to claim a new lease instead of compensation for goodwill, provides that:

"Where the tenant alleges that, though he would be entitled to compensation under the last foregoing section, the sum which could be awarded to him under that section would not compensate him for the loss of goodwill he will suffer if he removes to and carries on his trade or business in other premises, he may in lieu of claiming such compensation, at any time within the period allowed for making a claim under the said section, serve on the landlord notice requiring a new lease of the premises at which the trade or business is carried on to be granted to him."

That period is fixed by s. 4 (1), and is "within one month after the service of notice" to quit "on the tenant." In the present case a notice claiming a new lease was duly served by the tenant within that time. Then comes s. 5 (2) on which the present controversy centres, and, so far as material, it provides that:

"Where such a notice is so served, the tribunal, on application being made for the purpose either by the landlord or by the tenant not less than nine months before the termination of the tenancy, or, where the tenancy is terminated by notice, within two months after the service of the notice, may . . . order the grant of a new tenancy . . ."

It will be seen that there are three references to notices. The first reference is to the notice served by the tenant under s. 5 (1) claiming a new lease; the second

is to the notice terminating the tenancy served on the tenant by the landlord; and the third, which gives rise to the difficulty, occurs in the phrase: "within two months after the service of the notice." Is the mention there made of "the notice" intended to refer to the notice claiming a new lease served by the tenant under s. 5 (1) or to the notice terminating the tenancy served by the landlord?

A Construing the words according to their ordinary, grammatical meaning in the order in which they appear, I find it impossible to understand the reference to "the notice" in the phrase, "within two months after the service of the notice," as a reference to anything other than the landlord's notice to determine the tenancy. That is the notice last previously mentioned, and, to my mind, nothing short of a gymnastic feat of construction could carry the reference back, over the intervening mention of the landlord's notice determining the tenancy, to the reference to the notice served by the tenant claiming a new lease which appears at the beginning of the sub-section. Were it not for the contrary view formed by the learned deputy county court judge and the conflict between the views expressed in MERLIN'S LANDLORD AND TENANT ACT, 1927, 3rd ed., p. 41, on the one hand, and CHESHIRE'S MODERN REAL PROPERTY, 5th ed., p. 175, on the other, I would find the point clear beyond argument. I should add that the natural construction of the sub-section, as I have stated it, is strongly supported by the occurrence of the same formula—though in inverted order—as is used in s. 4 (1), and, with variations, in s. 1 (1) of the Act. The conclusion is irresistible that s. 5 (2) is here intended to prescribe the same starting point for the period of time therein allowed as is prescribed for the purposes of the original claim under s. 4 (1).

D The point is not one which is capable of any great elaboration. Giving the matter the best consideration I can, I have come to the conclusion that the construction placed on s. 5 (2) by the deputy county court judge cannot be supported, and that, on the true construction of the sub-section, the period of two months within which the application to the court must be made ran from the date of the service on the tenant of the notice to quit, with the result that the tenant's application to the tribunal was out of time. One reaches a conclusion of this kind with some regret, for it is never very satisfactory that a possibly meritorious claim should be excluded merely because the claimant has inadvertently allowed the time to expire, but, where a statute confers a right and stipulates that it must be exercised within a prescribed period, that period must be observed, and, in the absence of any provision in the Act allowing the time limit to be relaxed, failure to observe the prescribed period must inevitably be fatal to the claim. For these reasons, in my judgment, this appeal should be allowed.

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SIR RAYMOND EVERSLED, M.R.: I am of the same opinion. I think that the geographical position, so to speak, in which the words which we have to construe are found in the sub-section essentially produce the result that the word "notice," where used for the third time, refers to the notice mentioned on the second occasion, that is, the notice determining the tenancy. In my judgment, the arguments which counsel for the tenant has put forward, including the reference to the "serving" of the notice in the relevant passage, and the arguments founded on s. 6, are not of sufficient gravity to displace what I regard as the natural, and, indeed, inevitable, construction of the language used. As regards the second point mentioned by the learned deputy county court judge, that in case of doubt the Act of 1927 should be construed in favour of the tenant, I cannot derive much assistance from it. Assuming there is ambiguity and assuming, as is no doubt a fact, that applications under this sub-section would normally be made by a tenant, nevertheless, on its language, the sub-section intends to provide for application either by the landlord or the tenant. In this particular case it is the tenant who suffers by his failure, as I hold, to give notice in time,

but there might be a case in which a landlord was desirous of making application, and, that being so, there appears to me to be no room for the application of the principle which the learned deputy county court judge invoked, even if the conditions were such as to allow its invocation.

As regards the question of extending time, counsel for the landlord referred us to the decision of the Divisional Court in *Donegal Tweed Co., Ltd. v. Stephenson* (1), and counsel for the tenant has not been able to put forward any argument that the court has power to extend the time where the applicant landlord or tenant, as the case may be, has failed to observe the time limit prescribed by the Act. **ASQUITH, L.J.**, who is unable now to be present, has authorised me to say that he agrees with the judgments which have been delivered.

Appeal allowed with costs.

Solicitors: *Joynton-Hicks & Co.*, agents for *W. Davies & Son*, Woking (for the landlord); *Hancock & Scott*, agents for *Higgs, Thompson & Samwell*, Epsom (for the tenant).

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

NOTE.

R. v. ZIELINSKI.

[COURT OF CRIMINAL APPEAL (Lord Goddard, C.J., Byrne and McNair, JJ.), October 16, 1950.]

Criminal Law—Evidence—Corroboration—Direction to jury—Need for judge to refer to evidence relied on as corroboration.

APPEAL against conviction.

The appellant was convicted at Yorkshire (West Riding) Quarter Sessions of an indecent assault on an elderly woman and was sentenced to twelve months' imprisonment. The prosecution alleged that the offence had been committed when the appellant called at the woman's house to sell bandages. The appellant denied the allegation. In his summing-up the chairman told the jury of the desirability of corroboration, warned them of the danger of convicting in the absence of corroboration, and told them what was meant in law by corroboration, but he did not point out to them any piece of evidence which was capable in law of amounting to corroboration.

The appeal, which was based on the ground, *inter alia*, that no adequate direction with regard to corroboration had been given to the jury, was dismissed. THE COURT held that in a case where corroboration was to be sought as a matter of either law or practice, provided that the judge had given to the jury an adequate warning on corroboration and had explained to them what was meant in law by corroboration, he was not under the further duty of pointing out to them pieces of evidence which could amount to corroboration. If a judge pointed to a piece of evidence as capable as a matter of law of amounting to corroboration and it turned out that it was not so capable, that might, of course, amount to a misdirection which would result in the conviction being quashed.

[AS TO WARNING TO BE GIVEN TO JURY, see HALSBURY, Hailsham Edn., Vol. 9, p. 224, para. 314; and FOR CASES, see DIGEST, Vol. 14, pp. 535-537, Nos. 6064-6078.]

Parris for the appellant.

Stanley-Price for the Crown.

Solicitors: *Field, Roscoe & Co.*, agents for *Emmanuel Austin*, Leeds (for the appellant); *R. C. Linney*, Wakefield (for the Crown.)

H. McL. M.

Reversed. C.A. [1951] 1 All E.R. 767.

COMBE v. COMBE.

[KING'S BENCH DIVISION (Byrne, J.), November 10, 1950.]

Divorce—Maintenance—Undertaking by husband to pay yearly allowance—Forbearance by wife to apply for order for maintenance—Enforcement of undertaking.

Contract—Promise made with intention to create legal relationship—Enforcement—Unequivocal acceptance of liability—Intention that promisee will act on promise—Promise acted on.

A wife, petitioner in divorce proceedings, instructed her solicitors to apply for an order for permanent maintenance in the event of a decree *nisi* being granted to her. The decree *nisi* was granted on Feb. 1, 1943, and on Feb. 9, 1943, the wife's solicitors wrote to the husband's solicitors asking them to confirm that with regard to permanent maintenance the husband was prepared to make the wife an allowance of £100 a year free of income tax. The husband's solicitors replied that he had agreed to allow her that sum. When those letters passed and subsequently the wife, knowing that the husband was not in a good financial position, refrained from applying to the court for an order for permanent maintenance, but in 1950, the husband having fallen into arrears with the payments, she brought an action against him for the amount of the arrears.

HELD: the correspondence between the solicitors disclosed an undertaking by the husband which was intended to be binding and to be acted on, and was, in fact, acted on by the wife; there had, therefore, been an unequivocal acceptance of liability by the husband; and he was liable for the arrears.

Observations of DENNING, J., in Robertson v. Minister of Pensions, ([1948] 2 All E.R. 769), applied.

Gaisberg v. Storr ([1949] 2 All E.R. 411), distinguished.

[AS TO A WIFE NOT APPLYING FOR MAINTENANCE, see HALSBURY, Hailsham Edn., Vol. 10, p. 793, para. 1257; and FOR CASES, see DIGEST, Vol. 27, p. 326, No. 3044, and 2nd DIGEST Supp.]

AS TO VALUABLE CONSIDERATION TO A CONTRACT, see HALSBURY, Hailsham Edn., Vol. 7, pp. 136-138, paras. 195-197.]

Cases referred to:

- (1) *Gaisberg v. Storr*, [1949] 2 All E.R. 411; 2nd Digest Supp.
- (2) *Central London Property Trust, Ltd. v. High Trees House, Ltd.*, [1947] K.B. 130; [1947] L.J.R. 77; 175 L.T. 332; 2nd Digest Supp.
- (3) *Robertson v. Minister of Pensions*, [1948] 2 All E.R. 767; [1949] 1 K.B. 227; [1949] L.J.R. 323; 2nd Digest Supp.
- (4) *Pease & Partners, Ltd. v. Birch*, [1941] 1 All E.R. 343; *sub nom.*, *Birch v. Pease & Partners, Ltd.*, [1941] 1 K.B. 615; 110 L.J.K.B. 273; 165 L.T. 146; 34 B.W.C.C. 37; 2nd Digest Supp.
- (5) *Bob Guinness, Ltd. v. Salomonsen*, [1948] 2 K.B. 42; 2nd Digest Supp.

ACTION for arrears of annual sums claimed to be due under the terms of an undertaking entered into by the defendant.

On Feb. 1, 1943, the plaintiff obtained a decree *nisi* against the defendant, her husband. In view of an undertaking given by the husband's solicitors on his behalf that he would pay her £100 a year free of income tax by quarterly instalments of £25 each and knowing that he was not in a good financial position, the wife forbore to apply for an order for permanent maintenance and took no other steps regarding that matter until May, 1950, when, the husband being in arrear with the payments, she brought the present action to enforce the terms of the undertaking. It was contended on behalf of the husband that the undertaking was unenforceable because it was not supported by consideration. The wife

contended that the undertaking constituted an unequivocal acceptance of liability intended to be binding and to be acted on, and that by her forbearance it had been acted on, and was, therefore, enforceable. The facts appear in the judgment.

P. A. G. Rawlinson for the plaintiff.

Kee for the defendant.

BYRNE, J.: The wife's case is that the husband, after the decree *nisi* had been made, agreed to pay her an allowance at the rate of £100 per annum free of income tax, and that as a result of that agreement she forbore from applying to the court, which she had a perfect right to do, for an order for permanent maintenance. Her contention is that the promise made by the husband was intended to create a legal relationship between herself and him, that that promise was acted on by her to his knowledge, and that it was a valid promise binding on him.

In December, 1942, the wife instructed her solicitors to apply for permanent maintenance in the event of the decree being obtained. There came into existence two letters, the first being dated Feb. 9, 1943, from the wife's solicitors to the husband's solicitors. In the last paragraph of that letter the plaintiff's solicitors say:

"With regard to permanent maintenance, we understand that your client is prepared to make [the wife] an allowance of £100 per year free of income tax. Will you confirm this."

The second letter is dated Feb. 19, 1943, and is from the husband's solicitors to the wife's solicitors in reply to the letter of Feb. 9, and in the last paragraph, dealing with the question of maintenance, they say:

"The respondent has agreed to allow your client £100 per annum free of tax."

When those letters passed, the husband was in the army, and was not very well off. The wife was aware of that. She knew also that ultimately the husband went on half pay, and later was discharged from the army on medical grounds. Knowing that he was not in a very good financial position, she took no steps with regard to permanent maintenance, but allowed the matter to rest as it was. The matter was in abeyance from August, 1944, until May, 1945, and there was another gap between June, 1945, and May, 1950, when the wife decided to press her claim and this action was instituted.

By the letter of Feb. 9, 1943, the wife's solicitors were pointing out that they understood that the husband was willing to pay permanent maintenance at the rate of £100 a year free of income tax, and by their letter of Feb. 19, his solicitors were agreeing to that on his behalf. It is contended by counsel for the husband that this was *nudum pactum*. Further, he submits that, even if there were to be read into the agreement an implied term that the wife, in consideration of the payment, would not apply for permanent maintenance, that would not be a consideration which would enable her to succeed in this action. In support of his argument counsel cited *Gaisberg v. Storr* (1), in which a wife had petitioned for divorce in respect of her husband's adultery and also for alimony *pendente lite*, and the husband had signed a document or agreement saying:

"I . . . agree and undertake to pay to my wife . . . the sum of £3 per week alimony as from the date of the decree *nisi* being pronounced in these proceedings."

The husband paid his wife £2 10s. under a separation agreement of a date earlier than the petition for divorce until the date of decree *nisi*, and £3 a week pursuant to the undertaking contained in the document from the date of the decree *nisi*

up to the date when the decree was made absolute and thereafter until his former wife re-married about eleven months after the date of the decree absolute. He then ceased making any payment to his wife, who claimed payment of £3 a week under her former husband's undertaking. It was held that the only consideration moving from the wife for the husband's undertaking which could be deduced by inference from the circumstances was an undertaking by the wife not to apply to the court for alimony *pendente lite* or for permanent maintenance, but that any promise by the wife to refrain from so applying was void and unenforceable.

At first sight that would appear to be conclusive, but counsel for the wife pointed out that the whole matter to which the court was directing its attention in *Gaisberg v. Storr* (1) was whether forbearance to apply for permanent maintenance was good consideration. In the present case, however, counsel for the wife says that it is not suggested that there was an implied term that the wife would not apply for permanent maintenance in consideration of the husband's making her an allowance of £100 a year. What is said is that a promise was made by the husband for the purpose of making an arrangement about maintenance, that he intended to be bound by it and knew that it was going to be acted upon by the wife, and that the evidence demonstrates that the wife acted on it.

In those circumstances counsel says that the law applicable is to be found in three cases which he has cited. The first is *Central London Property Trust, Ltd. v. High Trees House, Ltd.* (2), in which DENNING, J., reviewed the law with regard to the circumstances in which a promise is made with the intention of creating a legal relationship—a promise that is intended to be acted on, and a promise which is acted on. The learned judge put the law very simply, and, if I may say so with great respect, very succinctly, in another case, *viz., Robertson v. Minister of Pensions* (3), where, after dealing with the facts, he said ([1948] 2 All E.R. 769):

“What then is the result in law? If this was a question between subjects, a person who gave such an assurance as that contained in the War Office letter would be held bound by it unless he could show that it was made under the influence of a mistake or induced by a misrepresentation or the like, none of which appears here. There are many cases in the books which establish that an unequivocal acceptance of liability will be enforced if it is intended to be binding, intended to be acted on, and is, in fact, acted on. I may instance the cases under the Workmen's Compensation Act, 1925, the latest of which is *Pease & Partners, Ltd. v. Birch* (4). These cases are often not cases of estoppel in the strict sense, because estoppel strictly only applies to representations of facts, not of law. Here all the primary facts were known to both parties and the only question was: what was the proper conclusion to be drawn from them?”

In another case, *Bob Guinness, Ltd. v. Salomonsen* (5), DENNING, J., once more stated that proposition of law.

It appears to me that the present case comes exactly within the words used by DENNING, J., in *Robertson v. Minister of Pensions* (3), that is to say, there is in the present case an unequivocal acceptance of liability. It seems to me to be hopeless to suggest that the two letters which passed between the solicitors contained anything other than something which was intended to be binding. As regards the question whether the agreement was intended to be acted on, it is very difficult to imagine that if parties reach the conclusion which is arrived at in those two letters, they can intend to do anything other than to act on the agreement arrived at.

The remaining question is whether the agreement was acted on? In the present case that is made clear by the evidence of the wife who has acted with great forbearance throughout, and, knowing the financial position of the husband, she has not, for a number of years, applied to the court for permanent maintenance.

In my view, she is entitled to succeed on the principles of law which were stated by DENNING, J., in the cases referred to, and she is entitled to recover the arrears of the amount which the husband undertook to pay her.

Judgment for the plaintiff.

Solicitors: *Lee & Pembertons* (for the plaintiff); *Braikenridge & Edwards* (for the defendant).

[Reported by F. A. AMIES, Esq., Barrister-at-Law.] A

NOTE.

GILLOOLY v. GILLOOLY.

[COURT OF APPEAL (Bucknill, Singleton and Birkett, L.JJ.), October 31, November 1, 1950.]

Divorce—Discretion—Lack of frankness—Incomplete disclosure in first statement C
—Complete confession in second statement and in court.

Divorce—Appeal—Court of Appeal—Undefended petition by husband—Right of wife to appear in Court of Appeal.

APPEAL by the husband against the order of His Honour JUDGE RHODES sitting as divorce commissioner, dated June 21, 1950, dismissing the husband's petition for dissolution of marriage on the ground of the wife's desertion. D

The petition was undefended. The commissioner found the desertion proved, but he refused to exercise his discretion in the husband's favour on the ground that the husband had shown lack of frankness. In his first discretion statement the husband had disclosed various acts of adultery, but he did not mention his adultery with a German woman. In his second discretion statement he admitted that he was the father of a child born to this woman in June, 1950, and said that he intended to marry her. The husband appealed, and on being served with the notice of appeal the wife entered a memorandum of appearance limited to the appeal. The case is reported on two points only—(i) the right of a spouse who has not defended a divorce petition to appear as respondent to an appeal to the Court of Appeal, and (ii) the exercise of the discretion of the court where a full confession is made after an incomplete one. E

Cases referred to:

- (1) *Re Evans*, [1893] 1 Ch. 252; 62 L.J.Ch. 413; 68 L.T. 271; Digest, Practice, 969, 5050.
- (2) *Blunt v. Blunt*, [1943] 2 All E.R. 76; [1943] A.C. 517; 112 L.J.P. 58; 169 L.T. 33; 2nd Digest Supp. F

Wilmers for the husband.

Cridlan for the wife. G

BUCKNILL, L.J.: After the husband's legal advisers had served on the wife a notice of appeal, her solicitors prepared the usual memorandum of appearance by a wife respondent. The Divorce Registry refused to accept it in its ordinary form because she had not appeared at the hearing, and the memorandum of appearance was altered to make it an appearance only in regard to the appeal. If the matter rested on the Matrimonial Causes Rules, 1947, I should have considerable difficulty in saying that a wife who acted as the wife did in this case had any right to argue on the husband's appeal, but I think the matter is made clear by the Rules of the Supreme Court which apply to the Divorce Court except in so far as they are amended by, or are in direct variance with, the Matrimonial Causes Rules. By R.S.C., Ord. 58, r. 1: H

"All appeals to the Court of Appeal shall be by way of re-hearing . . ."

By r. 2:

"The notice of appeal shall be served upon all parties directly affected by the appeal . . ."

A notice of appeal was quite properly served on the wife. The fact that she had not appeared did not take her out of the category of a "party." In *Re Evans* (1),

A LINDLEY, L.J., said ([1893] 1 Ch. 264):

"The defendant has not appeared, and it has been contended that he therefore is not a party to the action; but I think that he became such when he was served."

The wife in this case was served with the petition and with the notice of appeal.

B Is she directly affected? She is still the husband's wife and does not cease to be so until the decree absolute is made. The result of this appeal, if successful, will be that a decree *nisi* may be made against her followed by a decree absolute and she will cease to be a wife and to have the rights which she has as a wife. It is quite impossible to argue that she is not a party directly affected by the appeal. I think, therefore, that we were right in allowing counsel for the wife to

C address us on the merits.

The learned judge, in his judgment, said:

"The husband puts in a discretion statement which he knew was untrue and which he cannot explain by saying that he overlooked the fact of the later adultery. The second discretion statement, in which the later adultery is disclosed, would appear to give the reason for his seeking the dissolution of the marriage—so that he may marry the girl who is about to bear a child of which he is the father. I have but little doubt that that was really the reason of his seeking for a dissolution of his marriage, and that he kept it back, not because, as he said, he overlooked it, but because he determined not to be frank. . . . Where the court is asked to exercise its discretion in favour of the petitioner the discretion statement . . . must be a frank one.

E I have no hesitation in refusing to exercise my discretion in favour of the petitioner.

I think that the learned judge fell into two errors. It is frankness at the hearing which is required of the petitioner. If he tries to deceive the court at the hearing, there may be good reason for refusing to grant him a decree, but in this case

F there was no concealment by the husband at the hearing. It is true that when he filed his first statement he made no reference to the German girl, but he corrected that in the later statement. I think that the judge has been too hard in refusing the husband a decree merely because in his first statement he tried to conceal his association with this girl whom he hoped to marry and whose name, no doubt, he wished to keep out of court. Also, in my opinion, the judge

G failed to take into account the important considerations which were enumerated by LORD SIMON, L.C., in *Blunt v. Blunt* ([1943] 2 All E.R. 78) with regard to the exercise of the discretion. If he had done so, I feel sure he would have granted a decree. This appeal should be allowed and a decree *nisi* granted to the husband, but we should order that the *décreé nisi* be not made absolute until two months from to-day.

H SINGLETON, L.J., and BIRKETT, L.J., concurred.

Appeal allowed.

Solicitors: *A. M. V. Panton*, Law Society Services Divorce Department (for the husband); *Kimbers, Williams, Sweetland & Stinson*, agents for *A. V. Gregory, Phelps & Co.*, Cheltenham (for the wife).

J.D.P.

GREENHALGH *v.* ARDERNE CINEMAS, LTD. AND OTHERS.

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Asquith and Jenkins, L.J.J.), November 8, 9, 10, 1950.]

Company—Private company—Articles of association—Fraud on minority shareholders—Restriction on transfer of shares—Special resolution enabling sale to outsiders with sanction of an ordinary resolution—Impeachment—Discrimination between majority and minority shareholders—Intention of voters—Sale price of majority holding to be paid partly out of assets of company.

A., Ltd. was a private limited company of which the capital consisted of certain preference shares and 205,000 ordinary shares of 2s. each. All the ordinary shares were issued, 155,000 being fully paid up, and 50,000 (held by J.M. the managing director of A., Ltd., A., and H. as nominees of T.C., Ltd.) partly paid up. Of the fully paid up ordinary shares, J.M. held five hundred, his aunt D. held 30,620, his father 23,690, his wife 27,500, and T., the secretary of A., Ltd., 3,505—85,815 shares in all. The articles of association of A., Ltd. provided, by art. 10, that a member could sell his shares to another member by private arrangement, but otherwise in order to sell he must give notice to the company and the shares would be offered to other members, *pro rata*, at a price fixed by the auditors. Any shares not taken up could then be sold to non-members, subject to the directors' right to refuse registration. In June, 1948, J.M. agreed with S. (who then held no shares in A., Ltd.) to arrange for S. to acquire the shares in A., Ltd. which J.M. controlled (*i.e.*, those in the names of himself and his relatives and those held by T.C., Ltd.) numbering 135,815, at 6s. a share. It was agreed that the existing board of directors should resign and that S. should pay no compensation to them but should "request the company to pay [J.M.] the sum of £5,000 for [J.M.] to resign" which sum J.M. agreed to accept. To effectuate his bargain (having regard to the restrictions on transfer contained in the articles), J.M. arranged for an extraordinary general meeting of A., Ltd. to be called for the purpose of passing this special resolution: "That the articles of association of the company be altered by adding at the end of art. 10 the following additional clause: 'Notwithstanding the foregoing provisions of this article any member may with the sanction of an ordinary resolution passed at any general meeting of the company transfer his shares or any of them to any person named in such resolution as the proposed transferee, and the directors shall be bound to register any transfer which has been so sanctioned.'"

The special resolution was passed, and an ordinary resolution was later passed sanctioning the sale to S. A minority shareholder, G., sought to impeach the transaction with S. on the ground that the interests of the minority had, by means of the special resolution, been sacrificed to the interests of the majority shareholders without any reasonable prospect of advantage to A., Ltd., and a fraud on the minority was thereby constituted. The £5,000 agreed to be paid to J.M. was to be divided among three persons (H. and T., and a Mrs. Q. who was not a shareholder) who were servants of A., Ltd. or T.C., Ltd.

HELD: (i) the £5,000 was part of the purchase price which S. was to pay for the control of the company, and, although the purchase price was to that extent agreed to be paid out of the assets of the company, it did not follow that the special resolution was a fraud on the minority, and, even if the majority vote were analysed on the basis that the vote could be invalidated if some or one of the voters (having a large number of votes) were tainted in some way, it appeared that H. had voted correctly as nominee of T.C., Ltd., T.'s holding was insignificant, and no other voters received a benefit that all could not have had.

(ii) although a special resolution would be liable to be impeached if its

effect were to discriminate between the majority shareholders and the minority shareholders so as to give to the former an advantage of which the latter were deprived, it was not necessary that the voters should dissociate themselves altogether from the prospect of personal benefit as a result of the passing of the resolution and consider merely whether the proposal was for the benefit of the company as a going concern.

(iii) merely because it was not directed to a single transaction, the special resolution did not prejudice the minority shareholders, because they were in no worse position in regard to obtaining leave to sell to any purchaser than they would have been, having regard to directors' power to refuse registration, had it not been passed, and, although the resolution deprived the minority of their right of pre-emption under the articles, a shareholder had no right to assume that the company's articles would always remain in a particular form and he could not object to such an alteration as was made here as being fraudulent providing the resolution were passed *bona fide* and did not unfairly discriminate.

(iv) although J.M. had acted with grave indiscretion in some respects in the transaction, he had received no more than any other seller of shares to S. (who was prepared to take all the shares in A., Ltd. which any member cared to offer him at 6s. a share) and bad faith could not be imputed to him.

[AS TO PROTECTION OF MINORITIES, see HALSBURY, 1949 Edn., Vol. 5, pp. 384-386, 471, 472, 617, 618, paras. 619, 749, 970; and FOR CASES, see DIGEST, Vol. 9, pp. 559, 560, Nos. 3700-3704.]

Cases referred to:

- (1) *Foss v. Harbottle*, (1843), 2 Hare 461; 67 E.R. 189; 9 Digest 481, 3160.
- (2) *Sidebotham v. Kershaw, Leese & Co.*, [1920] 1 Ch. 154; 89 L.J.Ch. 113; 122 L.T. 325; 9 Digest 559, 3704.
- (3) *Dafen Tinsplate Co. v. Llanelly Steel Co.*, [1920] 2 Ch. 124; 89 L.J.Ch. 346; 123 L.T. 225; 9 Digest 559, 3703.
- (4) *Shuttleworth v. Cox Bros. & Co. (Maidenhead), Ltd.*, [1927] 2 K.B. 9; 96 L.J.K.B. 104; 136 L.T. 337; Digest Supp.

APPEAL by the plaintiff from an order of ROXBURGH, J., dated July 5, 1950, dismissing his action for a declaration that certain resolutions passed at an extraordinary general meeting of Arderne Cinemas, Ltd., constituted a fraud on the minority shareholders of whom the plaintiff was one.

R. W. Jennings, K.C., and *Lindner* for the plaintiff.

Harold Christie, K.C., and *Hillaby* for the defendants other than the second defendant (Arderne Cinemas, Ltd., Tegarn Cinemas, Ltd., and persons interested in the majority holdings of shares, whether as nominees or beneficially).

Pennycuik, K.C., and *E. B. Stamp* for the second defendant, Joseph Thomas Leslie Mallard.

Counsel for the defendants were not called on to argue.

SIR RAYMOND EVERSLED, M.R.: This action is one of considerable complexity, not the less so because it is, as I understand, the last (at the moment) of a series of actions which have concerned the affairs of the first defendant, Arderne Cinemas, Ltd., and represent engagements in an unfortunate warfare which has continued for a long time between Mr. Greenhalgh, the plaintiff, and those who support him, on the one hand, and Mr. Mallard, the second defendant, and those who support him, on the other. I hope without offence I may refer to the two conflicting interests as the Greenhalgh faction and the Mallard faction. I do not desire to go beyond the particular matters which are involved in this case, and, since we have not heard the defendants, it would be wrong for me to say more than is absolutely necessary about the conduct, in relation to these matters, of the leader of the Mallard faction, Mr. Mallard junior, himself. There seems no doubt, from what has been said in this case

and from references to other cases, that Mr. Greenhalgh has, at any rate, grounds for saying that he has been, in regard to this company, somewhat hardly treated, and it can be, I think, stated as an assertion that he feels very strongly indeed a sense of grievance that he has been deprived of certain rights and privileges which were promised to him at a time when his aid was sought by other persons concerned with the Arderne company. He, therefore, has lost no opportunity of trying to vindicate his rights, or what he says are his rights, by this series of actions. That preliminary statement is not by any means irrelevant to the consideration of the matters here involved, because there can, I think, be no doubt whatever that Mr. Mallard, in regard to these same matters, thought fit to display towards Mr. Greenhalgh (who, like himself, was a shareholder in this company) a singular lack of courage and candour. Certain things to which I shall have to allude were well calculated to raise and bring about the head of Mr. Mallard a cloud of suspicion as to his good faith. I think fear of further litigation may well have been the main reason for the unfortunate taciturnity on Mr. Mallard's part.

It will be convenient if, first, I say something about the Arderne company. It is a private company, and its share capital now issued includes a number of preference shares which do not figure in the matter with which we are concerned. In addition, the capital includes 205,000 ordinary shares of 2s. each. One hundred and fifty-five thousand of that number have been issued and are fully paid up. The remaining 50,000 were issued in order that they might be allotted to another defendant in the action, Tegarn Cinemas, Ltd., or its nominees, and the circumstances surrounding the issue of those shares have been the subject of other proceedings. For present purposes, suffice it to say that those 50,000 are only partly paid up. The Tegarn company itself had three shareholders, Mr. Mallard junior, Mr. Mallard senior, and the penultimate defendant, Mr. Arnison, who hold their shares in the proportion of two, two, one. The 50,000 partly paid shares in the Arderne company stand in the names of Mr. Mallard junior as to 2,500, the defendant Arnison as to 22,500, and the last defendant, Gifford Hallam, as to the remaining 25,000. Neither of the last two defendants holds any shares at all in the Arderne company in his own right. They are mere nominees of the Tegarn company.

[HIS LORDSHIP stated the shareholdings in the Arderne company of Mr. Mallard junior and his supporters and relatives, and continued:] Mr. Mallard junior, whom it will be convenient to refer to hereafter as the defendant Mallard (because his father is not a defendant) was at all relevant dates the chairman of the Arderne company, and, I think, also of the Tegarn company. Putting it for the moment in the briefest terms, the problem presented by this action is whether a transaction which was effected in the summer of 1948, whereby the controlling interest in the shares of the Arderne company passed to the hands of the third defendant, Sol Sheckman, can be successfully impeached by Mr. Greenhalgh on the ground that, in the circumstances of the case, the resolutions, and, particularly, the special resolution, passed on June 30, 1948, were such that the interests of the minority of the shareholders (which means, for present purposes, the Greenhalgh faction) were sacrificed to the interests of the majority without any, or any reasonable, prospect of advantage to the Arderne company or its minority shareholders and constituted a fraud on that minority.

I will next proceed to state briefly the narrative which ended with the passing of the resolutions impugned. By a letter of Apr. 23, 1948, written by the defendant Mallard to the defendant Sheckman, the matter is stated thus:

"My solicitor suggests that after a basic agreement is reached between us, you, your accountant and your solicitor meet myself and accountant in my solicitor's office and draft heads of agreement. I want to repeat that after agreeing on price and terms, etc., I want to have an indemnity from you that you will not tie up with Greenhalgh in any scheme to start

a law suit against me or my co-directors, which, if I still held control of the shares of the company, I could stop. The issued ordinary share capital of Arderne is 205,000 shares . . . My control is 135,815. There are a number of small shareholders whose combined holding is 24,972 2s. shares. Most, or all, of these will want to be sold along with mine, but I am not approaching them until final details are settled between us. If you would like a bigger control than this, you can have the share capital increased by any amount you like, the whole of the new shares being allotted to you at par."

On Apr. 30 Mr. Sheckman wrote in response to that letter:

"I note from the final paragraph that you hope to be able to acquire and turn over to me 160,787 shares of the above company, and confirm that we have agreed to-day the price of these shares will be 6s. per 2s. share."

The last letter I want to read was written on the same day, also by Mr. Sheckman to Mr. Mallard, and it says:

"With reference to the discussions between us, I confirm that in the event of us acquiring control of the above company we will require the whole of the existing board, including you, to resign their respective offices. I have agreed that I am not prepared to pay compensation to any of the directors, but in respect to your office I am prepared to request the company to pay you the sum of £5,000 for you to resign, which sum you have agreed to accept."

I have read those letters not only because something turns on the particular matters in them, but also because they sufficiently adumbrate the deal that the defendant Mallard was negotiating with Mr. Sheckman. The matter had obviously reached the stage of accord, and so I can turn at once to the three more formal agreements in which the arrangement was precisely set forth. The parties to these agreements were the defendant Mallard, as vendor, and the defendant Sheckman, as purchaser. The most important for the present purpose is that which related to the Arderne shares. These agreements are dated June 4, 1948, though it is probable that they were not executed until, perhaps, three weeks later.

The agreement as regards Arderne, after recitals which are not pertinent, states in the fourth of such recitals:

"The vendor [the defendant Mallard] by himself and others owns and/or controls 85,815 of the said ordinary shares of 2s. each . . . and 50,000 ordinary shares partly paid registered in the names of Arnison and Hallam but belonging to Tegarn Cinemas, Ltd."

The operative part of the agreement is an agreement by the vendor to sell or procure the sale of the 85,815 fully paid ordinary shares which have been identified. It is convenient to interpolate that the second of the agreements relates to the sale of the assets and undertaking of the Tegarn company. By that means Mr. Sheckman acquired the Tegarn company as an undertaking and thereby, incidentally, became the proprietor of the 50,000 partly paid shares. The other paragraph in the first agreement to which I want to refer is that numbered 5 (a). It provides:

"The purchaser hereby undertakes and binds himself to procure that within four weeks of the completion of the sale and registration of the transfer of the said minimum number of shares (sixty-seven per cent.) to him the company shall pay to the vendor the sum of £5,000 as compensation for loss of office as managing director of the company."

[His LORDSHIP referred to the restrictions on the transfer of shares contained in art. 10 of the articles of association of the Arderne company and stated the facts relating to the resolutions passed by the company to effectuate the agreements with Mr. Sheckman, and continued:] As will be seen from what

I have said, the defendant Mallard obtained an assurance from Sheckman that Sheckman would indemnify him in any action and he also made it clear that he did not propose to disclose to the Greenhalgh faction a single word of this transaction more than was absolutely necessary. In addition to those steps, the defendant Mallard carefully prepared a speech, which he delivered to the shareholders of the Arderne company on the occasion of the passing of the resolution. He discussed at some length the problems which were then confronting the cinema trade, and the relevant part at the end of the speech is:

"The price we have been offered for our ordinary shares is 6s. per 2s. share, and we have worked it out that, if the dividend stays as it is and income tax stays as it is, we are getting our own money back plus twenty-four years net dividend. It is because of this fact that my family and friends desire to sell their shares. As you know, I haven't many shares and I shall be losing my office. Mr. Sheckman has promised me that, if I do go, I shall receive £5,000 compensation for loss of office. The present board of directors will, of course, cease and be replaced by Mr. Sheckman and his associates. If any member here wishes to sell, Mr. Sheckman has offered to buy his or her shares at the same price, namely, 6s. per 2s. share, provided notice is given . . . "

Mr. Greenhalgh had obviously divined that something was in the wind before this occurred, because he served a notice of his intention to transfer one hundred shares at 10s., and the result was that the auditor said he thought a fair value was 4s. 6d. That is, I think, a relevant fact in considering Mr. Sheckman's 6s. Of course, I do not wish Mr. Greenhalgh to suppose that I do not fully understand that if you want to get control you may well have to pay more than the fair value of the individual shares. However, Mr. Greenhalgh attended the meeting, and, apparently, a certain amount of commotion occurred. He asked questions, and Mr. Mallard, so far as he could, I gather, avoided answering them. Certainly he did not give many good answers. Particularly, it is said against him that the statement that he would receive £5,000 for loss of office failed to disclose that it was part of the bargain that it was not Sheckman but the Arderne company that was going to pay the £5,000 at the instigation of Mr. Sheckman. It follows that, if Mr. Greenhalgh did not sell, he would himself contribute, in a sense, to that £5,000, though his contribution would not amount to more than about £10. The defendant Mallard further forebore to disclose that it was part of the arrangement that Mr. Sheckman was buying the assets of the Tegarn company so that he would, in that capacity, be able to vote in respect of 50,000 Tegarn shares. Why that was withheld I cannot understand, but it was. The resolution was passed by the requisite majority, and on the following day the writ was issued.

Put in its briefest form, the effect presented by the judgment is, if I may say so with all possible respect to ROXBURGH, J., a little disconcerting at first sight, because he found as a fact that the scheme enshrined in the agreements I have mentioned was a scheme to commit a fraud on the minority. He said that if the defendant Mallard controlled a majority of the shares, it would follow that the special resolution operated to effect a fraud on the minority. He passed then to consider whether Mallard in truth controlled the majority in a sense which made it equivalent to ownership, and he came to no conclusion on that because he stated that, assuming it were so, the matter which made all this a fraud on the minority, viz., the payment of the £5,000, was not pleaded, and on that ground he dismissed the action. With every respect to the judge, I can well understand that that conclusion would leave Mr. Greenhalgh feeling uncertain and aggrieved. I think that the learned judge was right in saying that this matter of the £5,000 was not pleaded. I think that, when this pleading was amended, as it was after the trial, then if the claim which was going to be the main plank in the plaintiff's platform was the impropriety connected with

this £5,000, it should assuredly have been pleaded, whereas in fact, I think it was, by inference, really negatived as a ground of attack.

[HIS LORDSHIP considered the statement of claim, and continued:] I would be most unwilling on the ground that the matter was not pleaded to deprive Mr. Greenhalgh of the rights to which he would be entitled on the footing that the £5,000 vitiated the transaction—though I wish to make it clear that, in a case in which bad faith is alleged, the office of the statement of claim is to state in unmistakable terms the charge which the defendant has to meet. On examination, I have come to the conclusion that this claim cannot (apart from any pleading point) be sustained on the basis of the £5,000 transaction. I must observe, and it is only fair to the defendant Mallard that this should be said, that the judge used this language:

“I do not think that either Mr. Sheckman or Mr. Mallard, in dealing with this matter as they did, were guilty of anything in the nature of deliberate dishonesty.”

He says that they forgot the distinction between the company as such and Sheckman, the buyer of the shares. The learned judge observed that the £5,000 was part of the price which Sheckman was willing to pay to gain control, and was a sum of money which the defendant Mallard, from quite disinterested motives, was insisting on as part of the price for selling the control. I do not feel any hesitation in holding that the real transaction was that this £5,000 was part of the purchase price which Sheckman was to pay for the passing of the control, but I do not think it follows that, if this was part of the purchase price for the passing of the control, it would, therefore, be a fraud on a dissentient minority because it was contemplated that that part of the purchase price would come out of the assets of the company.

It is to be observed that there is here no question in the judge's mind of dishonesty. Technically, he is saying, the making of the £5,000 payable out of the company's assets amounted to a fraud on the minority because it was a deprivation of an interest the minority had in the assets. With all respect, I doubt the validity, as a general proposition, of that conclusion. I think it may well be that, if objection is made, this £5,000 cannot be paid out of the company's assets. In fact, it has not been paid, and it may well be that, if what I have said is right, Mr. Sheckman will have to pay it himself. It does not matter very much one way or the other, in the circumstances. It may be proper that some part of the £5,000 should be paid by the company, but in any case I am not satisfied that the promise of Mr. Sheckman to provide this sum of £5,000 in the way he did operates, in all the circumstances, in such a way and with such emphasis that one can say that this was an unfair discrimination. Even if the agreements could, for the technical reasons stated, be regarded as agreements to commit a fraud on the minority, it does not, in my judgment, follow that the passing of the special resolution altering the articles falls by the same disorder. In truth, I venture to think there has been some misapprehension about this £5,000.

I will assume, in the plaintiff's favour, that you can analyse the majority votes, and if you find some, or, perhaps, even one, of its big enough voters tainted in some way as regards the casting of his vote, that may operate to invalidate the whole of the resolution, but it is not necessary to pursue this rather interesting topic in its most extreme form, as posed by JENKINS, L.J. ROXBURGH, J., applied himself, in this connection, to the position of Hallam. Hallam was the recipient of £2,000, but he had, himself, no beneficial interest in any share in the Arderne company. He was a mere nominee of Tegarn. He was asked in the course of his evidence whether he was ever instructed how to vote in respect of those shares, to which he replied, “No, there were only three directors. I knew perfectly well what they desired done, and I did it.” Therefore, although it is true that Mr. Hallam was going to receive £2,000,

it is plain, to my mind, that that fact was wholly irrelevant and could not in the least degree affect how he voted the Tegarn shares, which he had to vote as the Tegarn company desired to vote, whether he received £2,000 or not. Another £2,000 went to Mrs. Quinlan, who was not a shareholder at all. There only remains Titterton. Assuming everything else in the plaintiff's favour, Titterton's shareholding of three thousand odd shares is insignificant for the purpose in hand, and whatever can be said of the claim for compensation of Hallam, Titterton was, at least, one who, according to the evidence, had a claim of some sort for compensation, because the arrangement Mr. Sheekman insisted on would involve Mr. Titterton's retirement as secretary. He was going to lose in salary, as he, in fact, has. I think he has been re-appointed as an assistant secretary, but at a less remuneration. For those reasons, I cannot see that the £5,000 has any bearing on the question we have to decide. If it could be said that, to use ASQUITH, L.J.'s phrase, the bread of certain shareholders had been buttered in this way, then one could, no doubt, have said that there was a lack of good faith, that the voter was voting for a private gain, and on that ground impeach the resolution, but, for the reasons I have stated, I do not think it is possible to impeach this resolution by reliance on the £5,000, or the part that it played at all in the hands of the defendant Mallard, on the one hand, or of the three actual beneficiaries, on the other.

I now come to the case as it has been presented in this court. I have stated that the burden of the case is that the resolution was not passed *bona fide* and in the interests of the company as a whole, and there are, as counsel for the plaintiff has urged, two rather distinct approaches. The first line of attack is one to which, counsel complains, ROXBURGH, J., paid no regard. This is a special resolution, and, on authority, counsel says, the validity of a special resolution depends on the fact that those who passed it did so in good faith and for the benefit of the company as a whole. The cases to which counsel referred are *Sidebotham v. Kershaw, Leese & Co.* (2); the decision of PETERSON, J., in *Dafen Tinplate Co. v. Llanelly Steel Co.* (3); and, finally, *Shuttleworth v. Cox Bros. & Co. (Maidenhead), Ltd.* (4). Certain things, I think, can be safely stated as emerging from those authorities. In the first place, it is now plain that "*bona fide* for the benefit of the company as a whole" means not two things but one thing. It means that the shareholder must proceed on what, in his honest opinion, is for the benefit of the company as a whole. Secondly, the phrase, "the company as a whole," does not (at any rate in such a case as the present) mean the company as a commercial entity as distinct from the corporators. (It means the corporators as a general body. That is to say, you may take the case of an individual hypothetical member and ask whether what is proposed is, in the honest opinion of those who voted in its favour, for that person's benefit. I think the thing can, in practice, be more accurately and precisely stated by looking at the converse and by saying that a special resolution of this kind would be liable to be impeached if the effect of it were to discriminate between the majority shareholders and the minority shareholders so as to give to the former an advantage of which the latter were deprived.) When the cases are examined where the resolution has been successfully attacked, it is on that ground that it has fallen down. It is, therefore, not necessary to require that persons voting for a special resolution should, so to speak, dissociate themselves altogether from the prospect of personal benefit and consider whether the proposal is for the benefit of the company as a going concern. If, as commonly happens, an outside person makes an offer to buy all the shares, *prima facie*, if the corporators think it is a fair offer and vote in favour of the resolution, it is no ground for impeaching the resolution because they are considering the position of themselves as individual persons.

But, accepting all that, as I think counsel for the plaintiff did, he said that there are still grounds for impeaching this resolution—first, because when you look at it the resolution goes further than was necessary to give effect to the

sale of the shares, and, secondly, because it prejudiced the plaintiff and minority shareholders in that it deprived them of the right which, under the subsisting articles, they would have of buying the shares of the majority if the latter desired to dispose of them. Counsel says that if you pass a resolution altering the articles merely to give effect to a particular transaction, it is quite sufficient (and generally is the case) to limit it to that transaction, but this resolution provides that anybody who wants at any time to sell his shares can go direct to an outsider, provided that there is an ordinary resolution of the company approving the proposed transferee. He says that if it is one of the majority who is selling, of course he will get the resolution. It, so to speak, franks the shares for holders of majority interests, but makes it more difficult for a minority shareholder, because the majority will probably look with disfavour on his choice. But, after all, this is merely a relaxation of the very stringent restrictions on transfer in the existing article, and it is to be borne in mind that the directors, as the articles stood, could always refuse to register a transfer. A minority shareholder, therefore, who produced an outsider was always liable to be met by the directors (who presumably act according to the majority view), saying: "We are sorry, but we will not have this man in." Although I follow the point, and it might, perhaps, have been possible to do it the other way, I think this is very far removed from the type of case in which what is proposed, as in the *Dafen* case (3), is to give a majority the right to expropriate a minority shareholder, whether he wanted to sell or not, merely on the ground that the majority shareholders wanted the minority man's shares.

As to the second point, I felt at one time sympathy for the plaintiff's argument, because, after all, as the articles stood Mr. Greenhalgh could have said: "Before you go selling to Mr. Sheckman you have to offer your shares to the existing shareholders, and that will enable me, if I feel so disposed, to buy in, in effect, the whole of the shareholding of the Arderne company." I think the answer to that is that, when a man comes into a company, he is not entitled to assume that the articles will always remain in a particular form, and, so long as the proposed alteration does not unfairly discriminate in the way I have already indicated, I do not think it is an objection, provided the resolution is *bona fide* passed, that the right to tender for the majority holding of shares would be lost by the lifting of the restriction. I do not think it can be said that that is such a discrimination as falls within the scope of the principle I have tried to state.

Then, says counsel for the plaintiff: If that is wrong, I fall back on my other point, that the defendant Mallard acted in bad faith. He concealed all these matters to which I refer. He confessed to feelings of envy and hatred against Mr. Greenhalgh. He desired to do something to spite Mr. Greenhalgh, even if he cut off his own nose in the process. Following the judge's line of reasoning, it is said that the defendant Mallard did control all these other submissive persons who supported him, so that they are equally tainted with his bad faith. I agree with counsel that, if an ordinary shareholder chooses to give what counsel called "*carte blanche*" to the promoter of a scheme and that promoter is then found to have been acting in bad faith, the persons who gave him *carte blanche* cannot say that they exercised any independent judgment, and they would likewise be tainted with the evil of their leader. Early in his argument counsel had formulated his grounds for bad faith against the defendant Mallard at greater length, and I need not go through the several heads. Much turned at one stage on what was said about the £5,000—that it had not been disclosed before the meeting, that it was concealed at all the various stages of the transaction, the way in which it was referred to in the speech, and so on. I have already alluded to the disastrous lack of candour at the meeting of June 30 in regard to the Tegarn sale, and, counsel says: "Observe the disingenuousness of Mr. Mallard's statement, that all he had was an interest of five hundred shares in this company"—a very stupid thing to have said, as it was, I think, stupid to refrain from any mention of the

Tegarn transaction. Finally, the point was made that, if you look right back to the inception of this scheme, the defendant Mallard was saying: "If there is any difficulty, although we are going to sell our shares at 6s. each, nevertheless we will issue as many more as will give you a majority and only at par." Counsel says that all these things cast such doubt on the transaction that the defendant Mallard must be taken to have been acting in bad faith. I think he acted with grave indiscretion in some respects, but the judge has said he was in no way guilty of deliberate dishonesty, and, despite all these things, I cannot see where and how it can be suggested that the defendant Mallard was grinding some particular axe of his own. He was getting 6s. a share, but he was getting no more and no less than anyone else would get who wished to sell, and I am unable and unwilling to put on the actions of the defendant Mallard, because of his unfortunate secrecy and all the rest of it, so bad a complexion as to impute bad faith in the true sense of the term, of which, indeed, ROXBURGH, J., acquitted him.

A word, lastly, about control. I think the word "control" has been used rather loosely, and I cannot see that very much turns on all this, but, for what it is worth, I will state my opinion. It is true that Hallam was controlled in a strict, true sense by the defendant Mallard in that Mallard, as the moving spirit and chairman of Tegarn, was in a position to tell Hallam how to vote and Hallam was bound so to vote, and so was the penultimate defendant, Mr. Arnison. The judge thought that the secretary was in a like situation, and we have been referred to the evidence. With respect, I have some doubt about him. There is no evidence that I can find that the defendant's aunt, his father and his former wife were so dominated and under the thumb of Mallard that they would do what he told them without demur, nor am I willing to regard the defendant Mallard, or any other defendant in this action, as estopped from asserting the contrary. I can see no basis for such a claim, and I am, therefore, unwilling to reach the conclusion that there was such a measure of domination and control that all these members of the family and friends of the defendant Mallard should be treated as mere dummies and that on that ground the matter must be regarded as though the whole of the 85,815 votes and the Tegarn votes must be treated as being Mallard's and Mallard's only. However, for reasons I have already indicated, I do not think it would make the smallest difference if they were, because, as I have said, I do not think that such a case of bad faith, in the ordinary signification of those words, has been made out against Mallard as to vitiate the resolution.

In my opinion, in spite of all these complexities, this was, in substance, an offer by an outside man to buy the shares of this company at 6s. a share from anybody who was willing to sell them. As commonly happens, the defendant Mallard, as the managing director of the company, negotiated and had to proceed on the footing that he had with him sufficient support to make the negotiation a reality. That was the substance of what was suggested. It discriminated between no types of shareholder. Any who wanted to get out at that price could get out, and any who preferred to stay in could stay in. That being the substance of the thing, and the evidence, to my mind, clearly suggesting that 6s. per share (allowing for the privilege of control) was a fair price, I can see no ground for saying that this resolution can be impeached, and I would dismiss the appeal.

ASQUITH, L.J.: I entirely agree.

JENKINS, L.J.: I also agree.

Appeal dismissed with costs.

Solicitors: *S. A. Bailey & Co.* (for the plaintiff); *Billinghurst, Wood & Pope*, agents for *Keenlyside & Forster*, Newcastle (for the defendants other than the second defendant); *Pritchard, Englefield & Co.* (for the second defendant).

[*Reported by F. GUTTMAN, ESQ., Barrister-at-Law.*]

Re A DEBTOR (No. 21 of 1950). *Ex parte* THE DEBTOR *v.*
BOWMAKER, LTD. AND ANOTHER.

[CHANCERY DIVISION (Harman and Danckwerts, JJ.), November 13, 1950.]

Bankruptcy—Bankruptcy notice—Validity—Formal defect—Copy served on debtor entitled in the wrong court—Bankruptcy Act, 1914 (c. 59), s. 147 (1).

A Owing to a mistake on the part of the judgment creditor's solicitor, which was not noticed by the registrar, one of the three copies of a bankruptcy notice issued out of the Windsor County Court on May 19, 1950, was entitled "In the Redhill County Court." This copy was sealed with the seal of the Windsor County Court. On May 31 the copy of the notice which was wrongly entitled was served on the debtor. On Aug. 9, the debt not having been paid, the creditors issued a bankruptcy petition against the debtor, and on Sept. 27 a receiving order was made against him.

B HELD: the mistake in the copy of the bankruptcy notice served on the debtor was one which could have misled him, and, therefore, it was not a formal defect or irregularity which could be remedied under the Bankruptcy Act, 1914, s. 147 (1), and, as a result the notice was bad, the petition founded on it failed *in limine*, and the receiving order should be rescinded.

C *Re A Judgment Debtor* (No. 530 of 1908) ([1908] 2 K.B. 474), *Re A Debtor* (No. 478 of 1908), *Ex p. Debtor* ([1908] 2 K.B. 684), and *Re Evans, Davies v. Evans* ([1931] B. & C.R. 48), *applied*.

D [AS TO BANKRUPTCY NOTICE, see HALSBURY, Hailsham Edn., Vol. 2, pp. 41-43, para. 52, and p. 421, para. 576; and FOR CASES, see DIGEST, Vol. 4, pp. 94-98, Nos. 852-881, and pp. 99, 100, Nos. 893-900.]

Cases referred to:

- (1) *Re O.C.S., Ex p. Debtor*, [1904] 2 K.B. 161; 73 L.J.K.B. 585; 91 L.T. 224; 4 Digest 99, 896.
- (2) *Re Collier, Ex p. Dan Rylands, Ltd.*, (1891), 64 L.T. 742; 4 Digest 111, 994.
- E (3) *Re Beach*, (1905), cited [1908] 2 K.B. at p. 688; 4 Digest 100, 900.
- (4) *Re Threadkell*, (1906), cited [1908] 2 K.B. at p. 689; 4 Digest 99, 897.
- (5) *Re A Judgment Debtor* (No. 530 of 1908), [1908] 2 K.B. 474; 77 L.J.K.B. 968; 99 L.T. 126; 4 Digest 97, 874.
- (6) *Re A Debtor* (No. 478 of 1908), *Ex p. Debtor*, [1908] 2 K.B. 684; 77 L.J.K.B. 981; 99 L.T. 458; 4 Digest 99, 898.
- F (7) *Ex p. Johnson, Re Johnson*, (1883), 25 Ch.D. 112; 53 L.J.Ch. 309; 50 L.T. 157; 4 Digest 186, 1721.
- (8) *Re Evans, Davies v. Evans*, [1931] B. & C.R. 48; Digest Supp.

APPEAL by the debtor from an order of the registrar of the Windsor County Court, made on Sept. 27, 1950, whereby he made a receiving order against the debtor.

G The bankruptcy notice was issued out of the Windsor County Court, but, owing to an oversight, the copy served on the debtor was wrongly entitled "In the Redhill County Court," although it was sealed with the seal of the Windsor County Court. It was contended by the debtor that the receiving order should be rescinded on the ground, *inter alia*, that a true copy of the bankruptcy notice had not been served on him. The facts appear in the judgment of HARMAN, J.

H C. H. Duveen for the debtor.
Jupp for the creditors.

HARMAN, J. : In 1948 the debtor purchased a fairly expensive motor-car on the hire-purchase system. He paid some comparatively small sum on account of his indebtedness, and failed to pay any more. On Sept. 30, 1948, the petitioning creditors, Bowmaker, Ltd., who were the company financing the hire-purchase, obtained judgment in the King's Bench Division of the High Court against him

for the sum of £509 1s. 4d., which represented the sum which he then owed to them plus certain costs. Thereafter, the judgment debtor paid £100 of that sum, leaving £409 1s. 4d. due. As he paid no more, the creditors determined to enforce the judgment, if they could, by bankruptcy proceedings, and they instructed their solicitor to obtain the issue by the appropriate court of a bankruptcy notice to found the petition. The solicitor thought that such a notice should issue out of the Redhill County Court and prepared a notice on that footing. Finding that the Redhill County Court had no bankruptcy jurisdiction, he then repaired to the Windsor County Court, which was one of the appropriate courts for his purpose, and on May 19, 1950, a bankruptcy notice was issued by the registrar of that court.

On these occasions three copies of the notice are made. One goes on the file of the court and two are handed to the applicant, one of them to be served on the respondent and the other to be annexed to the affidavit of service which has to be filed. In issuing the three copies of the notice the registrar did not observe that the one handed in to him and on which he founded the other two was entitled "In the Redhill County Court." He entitled the other two "In the Windsor County Court." The one that went on his file had at the top of it the title "Windsor County Court." Of the two which were issued out to the creditors' solicitor, one was entitled "In the Redhill County Court" and the other "In the Windsor County Court", and, as chance would have it, on May 31 the process server served on the debtor the copy which was entitled "In the Redhill County Court."

The bankruptcy notice, assuming it to be a good notice, expired on June 8. The debtor did not take any steps about it until after it had expired. On or about June 11 he wrote to the creditors' solicitor acknowledging the receipt of the notice and asking the solicitor to let him know the latest day on which he could pay, where he had to pay, and what were the costs to be paid. Whether that was a reference to any doubt in his mind as to where he was to attend, I do not know. There is no evidence that that is so. There ensued certain further correspondence between the solicitors for the parties out of which there arises the second point argued before us. It is enough now to say that no part of the sum demanded was paid and on Aug. 9 a petition was issued, and was filed on Aug. 16 in the Windsor County Court. That petition stated the indebtedness as £409 1s. 4d. and prayed for a receiving order to be made against the debtor. On Sept. 16 notice of intention to oppose the petition was filed by the debtor's solicitors, and on Sept. 27, at the hearing of the petition, notwithstanding the objections taken on the debtor's behalf a receiving order was made against which the debtor now appeals.

The points taken before us are: (i) that a true copy of the notice was never served on the debtor, and (ii) that certain costs were demanded which were not due, and that there was extortion in the sense that, by the pressure which their solicitor had put on the debtor, there was an attempt to obtain for the creditors a collateral advantage, or an advantage to which they were not entitled in law. I propose to deal with the first point, namely, that the petition cannot be a good ground for a receiving order because it is founded on that which is invalid, *viz.*, a bankruptcy notice which is not a true copy of the notice on the file. There is no doubt that it is not a true copy, as it is headed "In the Redhill County Court," whereas, to be a true copy, it should be headed "In the Windsor County Court." It is contended by the creditors that a mistake of this kind is covered by the Bankruptcy Act, 1914, s. 147 (1), and that the mistake is one which the court should overlook because it is a mere irregularity. Section 147 (1) provides:

"No proceeding in bankruptcy shall be invalidated by any formal defect or by any irregularity, unless the court before which an objection is made to the proceeding is of opinion that substantial injustice has been caused

by the defect or irregularity, and that the injustice cannot be remedied by any order of that court."

It was suggested at one time that the defect or irregularity could be remedied by an amendment of the bankruptcy notice, but, in my judgment, that point does not really arise here, because no amendment can cure the fact that the notice which was served on the debtor, and which is the foundation of the

A petition, was not a true copy. Therefore, in my judgment, the question is merely whether this is a formal defect or an irregularity which we ought to brush aside on the ground that no substantial injustice has been done.

I do not think that the mistake in this case can be called a formal defect. It is more than that. The copy of the notice served on the debtor is, on the face of it, puzzling, because "Redhill" is mentioned at the top of it and, a few lines

B further down, is a round stamp, such as county courts put on their documents, and on which "Windsor" is mentioned. On the other hand, I seek in vain for any real evidence that an injustice has been done. If I were unconstrained by authority, I should be inclined to hold that this was a defect or irregularity which could be cured or overlooked under s. 147 (1) of the Act of 1914. The matter is, however, by no means free from authority, and it seems that a bank-

C ruptcy notice, being the document setting in motion the whole process leading to bankruptcy, which is in the nature of a criminal matter, must be strictly and narrowly construed on the footing that it is a penal matter, and it is, apparently, easier to cure a defect in a petition than in a bankruptcy notice.

In *Re O.C.S., Ex p. Debtor* (1), VAUGHAN WILLIAMS, L.J., who was a great authority in bankruptcy, said ([1904] 2 K.B. 162) in the course of the argument:

D "In *Re Collier* (2) a rule was laid down by the Divisional Court, and I think that rule has ever since been acted on. In that case CAVE, J., said [8 Morr. 83]: 'Due service of a bankruptcy notice is necessary in order to constitute an act of bankruptcy, and it is more important that the rules and regulations should be properly complied with than in the case of a petition for adjudication. When the act of bankruptcy has been committed then the

E petition is a less formal matter and one as to which it is not necessary to take exactly the same view. Very soon after [the Bankruptcy Act, 1883], came into operation several cases were brought before the court with reference to a bankruptcy notice, and on more than one occasion the Court of Appeal expressed the opinion that, since the commission of an act

F of bankruptcy was a serious matter and involved consequences of what has been called a penal nature it was important to see that the necessary preliminaries were complied with.' In that decision I concurred. I have ever since declined to allow an amendment of a bankruptcy notice, except in the case of a merely formal defect."

Those are very weighty words, and, as I have said, it does not seem to me that

G the mistake in the case now before us is a merely formal defect.

The provision which is now contained in s. 147 (1) of the Act of 1914 has been part of our bankruptcy law since 1869 [the Bankruptcy Act, 1869, s. 82], and, consequently, one must look at the authorities to see what view the court has taken of it. There is a number of cases in which the facts are similar to, but not the same as, the facts here, and it is difficult to find one which is exactly in point.

H In *Re Beach* (3) and *Re Threadkell* (4) the amount of the debt, in each case, was not exactly stated in the bankruptcy notice, and it was held, in each case, that the mistake was fatal. It was as a result of these and similar decisions that proviso (ii), dealing with a defect of that kind, was added to s. 2 of the Bankruptcy Act, 1914.

In *Re A Judgment Debtor* (No. 530 of 1908) (5), it was held that a bankruptcy notice was calculated to embarrass the debtor because it did not follow the terms of the judgment in that, although the judgment debt was due to two

persons trading as a firm, the notice required that payment should be made to them, not in their capacity as partnership traders, but as individuals. COZENS-HARDY, M.R., said ([1908] 2 K.B. 476):

"I approach this question impressed with the idea that a bankruptcy notice, which is the foundation of a bankruptcy, attended as a bankruptcy is with penal consequences, is a matter in which great strictness is required and, so far as I am aware, always has been required since the Bankruptcy Act of 1883. I need not quote authorities on that point, because that is really admitted by both sides."

Later he said (*ibid.*, 478):

"Here I think the notice was very much more calculated to puzzle and perplex the debtor, because the debtor was told that he must pay two people when he was under no obligation to pay more than one. That does seem to me to be a substantial matter—'substantial,' I mean, in the sense in which it is right to use that word when dealing with such a technical matter as a bankruptcy notice."

BUCKLEY, L.J., dissented. KENNEDY, L.J., agreed with COZENS-HARDY, M.R., and said (*ibid.*, 481):

"In the first place one has not to determine the validity or invalidity of the notice by considering whether the debtor to whom the notice is given has in fact been misled. It is sufficient that there is good ground for saying that the debtor might be misled. That is, I think, settled by authority. Secondly, in judging of the probability of the debtor being misled, one is bound not to deal too liberally with the requisites of the notice because of the *quasi* penal consequences which a bankruptcy involves. My own view is that in considering this particular notice one may take into account the position of a debtor who is not necessarily learned in the law."

At the end of his judgment KENNEDY, L.J., came to this conclusion (*ibid.*, 483):

"Here is a possibly misleading notice, which was not in accordance with the terms of the judgment. I think we ought to follow the practice of the court in such cases and hold this notice to be invalid, although the objection to the validity may be in a sense a technical one, and although there is no evidence that the debtor was in fact actually misled."

That was a very strong case.

Re A Debtor (No. 478 of 1908) (6), where the mistake was as to the amount of interest due, is a decision to the same effect. As I have said, the law on that point is not the same now as it was then, as the Bankruptcy Act, 1914, s. 2, proviso (ii), provides that a notice

"... shall not be invalidated by reason only that the sum specified in the notice as the amount due exceeds the amount actually due ..."

unless certain conditions are fulfilled. Nevertheless, the observations of the Court of Appeal in that case are valuable although the law on the particular subject-matter has been altered. The interest had been wrongly calculated and a mistake to the amount of £1 5s. 6d. was in question. It was contended by the petitioning creditors that the principle *de minimis non curat lex* should be applied, but the Court of Appeal held that the mistake invalidated the notice. COZENS-HARDY, M.R., said ([1908] 2 K.B. 687) that the mistake was not a mere formal defect within s. 143 (1) of the Bankruptcy Act, 1883 (which was in the same terms as s. 147 (1) of the Act of 1914). FARWELL, L.J., agreed with that opinion. KENNEDY, L.J., pointed out (*ibid.*, 691) that in *Re Johnson* (7), which was a decision under the Bankruptcy Act, 1869, s. 82,

the mistake was obviously a clerical mistake—£24 being written for £74—because the notice went on to refer to the particulars, and the particulars stated the amount of the debt correctly. KENNEDY, L.J., said (*ibid.*):

A “That was a mere clerical error. It was a defect in form and not in substance, and a defect which could not mislead or embarrass the debtor, because he could see on the face of the document what was the nature of the claim and what was the amount which was really claimed from him.”

Therefore, the question is: Is this a mistake which could not possibly mislead the debtor? I am to ask myself, not whether it has misled him, but whether it could mislead him. The bankruptcy notice served on the debtor is in the common form and tells the debtor that he must pay a certain sum to the creditors or their solicitors:

B “... or you must secure or compound for the said sum to their satisfaction, or to the satisfaction of their said agent, or to the satisfaction of this court, or you must satisfy this court that you have a counterclaim, set-off or cross-demand against them ...”

C The debtor has seven days in which to do that. How is he to do it? He is told “this court.” When he looks further at the notice, he may take his choice whether it is the Redhill County Court or the Windsor County Court. Suppose that he chooses the wrong one and goes to Redhill at the end of the seventh day with an affidavit to prove that he has a good set-off, there finds that he has gone to the wrong place and cannot get to Windsor that day, and, when he gets to Windsor, is told that he is too late because the period of seven days has expired, D it cannot be said that he is not embarrassed. Therefore, according to the authorities, I feel myself constrained to hold that this is not an error which we can correct.

E *Re Evans, Davies v. Evans* (8), a decision of a Divisional Court in Bankruptcy (LUXMOORE and FARWELL, JJ.), seems to me a similar case, as the mistake there was rather like the mistake here. The bankruptcy notice was intended to be issued out of the Glamorganshire County Court, but the original notice on the file of the county court was entitled “In the High Court of Justice,” though sealed with the county court seal. LUXMOORE, J., said [1931] B. & C.R. 58):

F “The notice directs the debtor to pay to the creditor or his agent or to secure or compound to the satisfaction of this court, *i.e.*, the High Court. The original bankruptcy notice is a High Court form and not a county court form at all. The deponent to the affidavit of service deposes to the fact that he had served the debtor with a copy of the above-mentioned bankruptcy notice duly sealed with the seal of the court and the copy which is exhibited to the affidavit is not a true copy of the bankruptcy notice at all. This makes the bankruptcy notice quite hopelessly bad. The appeal will be allowed and the receiving order will be rescinded.”

G Even if I did not feel constrained by the earlier cases, I should feel constrained by *Re Evans* (8) to say that, in my judgment, for the reasons which I have stated, the receiving order in the case now before us was bad and must be rescinded.

H That makes it unnecessary. I think, for me to consider the other point which was taken by counsel for the debtor, namely, that there has been extortion, and I say no more about it. I do not wish to give a decision on that question because, in my judgment, the notice being bad, the petition founded on it fails *in limine*, and, therefore, the receiving order should be rescinded.

DANCKWERTS, J.: I agree.

Appeal allowed with costs here and in the court below.

Solicitors: *Isadore Goldman & Son* (for the debtor); *Peacock & Goddard*, agents for *W. Parkinson Curtis*, Bournemouth (for the creditors).

[Reported by R. D. H. OSBORNE, Esq., Barrister-at-Law.]

COCHRANE v. CHANCTONBURY RURAL DISTRICT COUNCIL.

[COURT OF APPEAL (Somervell and Denning, L.JJ., and Lloyd-Jacob, J.), November 14, 1950.]

Housing—Insanitary house—Notice to execute work—Appeal to county court—Owner's undertaking to do part of work—Power of court to quash notice as a whole—Housing Act, 1936 (c. 51), s. 9 (1), s. 15 (2).

On May 4, 1950, a local authority served on the owner of a dwelling-house a notice under s. 9 (1) of the Housing Act, 1936, requiring her to execute certain works to render the house fit for habitation. The owner appealed to the county court against the notice under s. 15 (1) (a) of the Act on the ground that the work required to be executed was unnecessary and unreasonable having regard to the age and character of the premises. At the hearing she admitted that some of the work was necessary and reasonable, and undertook to execute it. The council did not ask that the order should be varied, and not quashed, having regard to the admissions of the owner, and in the result the appeal was allowed and the notice quashed *in toto*.

HELD: (i) as no submission had been made to the county court judge that as a matter of law the notice should not be quashed in respect of the work which the owner was prepared to do, that point could not be taken in the Court of Appeal.

(ii) even assuming that the point could have been taken, the judge was not bound to confirm the notice in respect of the work not disputed by the owner; he had power under s. 15 (2) of the Act to vary the notice or confirm it subject to variations, but, if he thought that the major requirements were excessive, he could quash the notice altogether.

(iii) if a local authority required work to be done which was altogether excessive the county court judge was not bound to amend the notice so as to specify the less work which would make it good. He might, if he thought fit, quash the notice, and leave the local authority to serve a fresh notice, specifying more limited work.

[AS TO REPAIR OF INSANITARY HOUSES, see HALSBURY, Hailsham Edn., Vol. 26, pp. 550-554, paras. 1162-1166; and FOR CASES, see DIGEST, Vol. 38, pp. 214, 215, Nos. 489-502, Digest Supp., and 2nd Digest Supp.]

APPEAL by the Chanctonbury Rural District Council against an order made by His Honour JUDGE ARCHER, K.C., at Brighton County Court on June 29, 1950.

By a notice dated May 4, 1950, under the Housing Act, 1936, s. 9 (1), the council required the respondent house-owner, as a person having control of a house occupied, or suitable for occupation, by persons of the working classes within the meaning of the sub-section, to execute the works specified in the notice. The house-owner appealed to the county court under s. 15 (1) (a) of the Act, and the learned county court judge made an order quashing the notice. The council appealed.

Scott Henderson, K.C., and H. B. Grant for the local authority.

R. M. Bell for the owner.

SOMERVELL, L.J.: This is an appeal from a decision of His Honour JUDGE ARCHER, K.C., on an application under the Housing Act, 1936. Leaving out unnecessary words, s. 9 (1) of the Housing Act, 1936, reads thus:

"Where a local authority ... are satisfied that any house which is occupied ... by persons of the working classes is in any respect unfit for human habitation, they shall, unless they are satisfied that it is not capable at a reasonable expense of being rendered so fit, serve upon the person having control of the house a notice requiring him, within such

reasonable time, not being less than twenty-one days, as may be specified in the notice, to execute the works specified in the notice and stating that, in the opinion of the authority, those works will render the house fit for human habitation."

Sub-section 3 provides that the authority are to have regard to the estimated cost of the works necessary to render the house fit and the value which the house will have when the works are completed. Section 15 (1) gives a person aggrieved by a notice requiring the execution of works a right within twenty-one days of appeal to the county court within the jurisdiction of which the premises are situate. Sub-section 2 provides:

"On an appeal to a county court under this section—(a) the judge may make such order either confirming or quashing or varying the notice, demand or order as he thinks fit, and he may, if he thinks fit, accept from an appellant any such undertaking as might have been accepted by the local authority . . ."

[His LORDSHIP referred to the evidence; said that on May 4, 1950, the local authority served on the respondent house-owner a notice under s. 9 (1) requiring the owner to do certain works, and that the owner admitted the necessity of some of the items of work and undertook to execute them; and continued:] When the learned judge indicated in his judgment that he was going to quash the notice the local authority might have reminded him of the admission with regard to those items and submitted that the notice ought to have effect with regard to them. There might then have been further investigation or a formal undertaking might have been given, but, as no submission was made to the judge that as a matter of law the notice could not be quashed in respect of items of work which the owner said she was prepared to execute, I do not think that that point can be taken in this court. After hearing the evidence the judge found that the house was not unfit for human habitation, and he allowed the appeal and quashed the notice.

The first submission of counsel for the local authority was that the judge went wrong in law in that he looked at the house as a whole, asking the question: "Is this house as a whole unfit for human habitation," whereas the words of the Act are "is in any respect unfit for human habitation." Counsel submitted that where on the evidence certain new floor boards are required or some boards require renewing, that makes the house "in a respect" unfit for human habitation. Secondly, he submitted that, there thus being a defect which makes the house unfit in a respect for human habitation, as a matter of law the judge is wrong if he quashes instead of varying. I do not accept either of those propositions. I will take the second first. I think that in this class of case, where there is some admitted defect specified, the judge is entitled to say: "This notice is, in my view, on the wrong basis. It requires the execution of unnecessary work. I am not required under the Act to re-draft it for the local authority so as to specify what works, on the view I take, may be necessary. Let them, if so minded, serve a fresh notice." In the present case the judge was entitled to take that line, and, that being so, it is unnecessary for us to decide whether the defect which was disclosed in the evidence was one which, within s. 9 (1), renders the house "in any respect unfit for human habitation." For these reasons I think the appeal fails.

DENNING, L.J. : I do not wish it to be supposed that the courts are not anxious to see defective houses repaired, but it is very important to keep the right balance between the local authority and the owner. Since 1936 the county courts have been entrusted with the task of keeping the balance. They must see that defects are made good, but they must also protect the owner from undue burdens. There is one point which I must mention at once. In serving a notice the local authority are not bound to specify the particular respects in

which they say the house is unfit for human habitation. They are only bound to specify the works which they require the owner to execute. That is what the local authority have done in this case, leaving the owner to find out for herself what the defects are. This method of giving notice is, no doubt, valid and, indeed, necessary, but it may have the consequence that, even if defects exist, the notice may be bad because the works required may be more than is reasonably necessary. Much less work may be sufficient to make good the defects without going to the expense which the notice involves. If a local authority requires work to be done which is altogether excessive, the judge is not bound to amend the notice, in their favour, so as to specify less work which would make it good. He may, if he thinks fit, quash it and leave the authority to serve a fresh notice specifying more limited work.

In this case the local authority required the owner to "take up and remove all decayed and dry rot affected floor timbers, excavate and remove earth to a suitable depth, and provide and lay four inches of cement concrete over the whole of the site, construct a new floor employing new timbers adequately supported, provide efficient means of sub-floor ventilation." The owner's surveyor took a different view about this room. He said: "Floor requires repair, but what is required is unreasonable. Some boards require renewing. New boards will make all as good as the existing good ones, which have probably been there for fifty years." There was, therefore, a difference as to what was reasonably necessary. The local authority required concrete over the whole of the site and a new floor, whereas the owner's surveyor said that new boards, where necessary, would suffice. That was a question of fact which the judge decided in favour of the owner. The requirements of the local authority in that respect, therefore, could not stand. Some of the other requirements were reasonable and were not disputed by the owner. She said she would do them, but that does not mean that in point of law the judge was bound to confirm the notice. He had, no doubt, power under the Act to vary the notice and to confirm it subject to variations, but he was not bound to do so. He was entitled to look at the notice as a whole, and if he thought the major requirements were altogether excessive, he might decide not to confirm it, even with variations, but to quash it altogether. That is what he chose to do, and I do not think we can say that in point of law he was wrong in so doing. I agree that the appeal should be dismissed.

LLOYD-JACOB, J. : I agree. Of the three courses open to the judge, that is to say, either confirming, quashing, or varying this notice, the local authority invited the judge to confirm it. The owner invited the court to quash it. It was only in this court that it was really suggested that his proper duty was to vary it. Without expressing any concluded opinion, I should be disposed to regard the inclusion of the power to vary in s. 15 (1) as giving the county court judge power to order what was found to be necessary as a result of the hearing before him, but certainly not as imposing on him any obligation to discover what was necessary for himself.

Appeal dismissed with costs.

Solicitors: *Hubbard (Chalton) & Co.*, agents for *Marsh & Ferriman*, Worthing (for the local authority); *Gibson & Weldon*, agents for *H. G. Bellamy-Knights*, Shoreham (for the owner).

[*Reported by F. GUTTMAN, ESQ., Barrister-at-Law.*]

MINISTRY OF HEALTH v. SIMPSON AND OTHERS.

[HOUSE OF LORDS (Lord Simonds, Lord Normand, Lord Oaksey, Lord Morton of Henryton and Lord MacDermott), October 9, 10, 11, 12, 16, 17, 18, 19, November 23, 1950.]

Mistake—Money paid under mistake—Recovery—Claim in equity—Residue of testator's estate paid to charitable institutions by executors—Directions in will void for uncertainty—Rights of those entitled under intestacy to recover from institutions sums paid.

Limitation of Action—Recovery of sum paid under invalid residuary bequest—Action by next of kin—Limitation Act, 1939 (c. 21), s. 20.

By his will, dated Nov. 3, 1919, a testator, who died on Mar. 23, 1936, directed his executors to apply his residuary estate "for such charitable institution or institutions or other charitable or benevolent object or objects in England" as they in their absolute discretion should select. On June 4, 1936, the deputy chairman of the Westminster Hospital applied to the executors for a contribution towards the fund for the erection of new buildings for the hospital. On Mar. 20, 1937, a cheque for £4,000 was sent to the treasurer of the hospital by the executors, and on Mar. 23, 1937, the cheque was paid into the "Westminster Hospital Re-building Fund Current Account" at a bank which showed at the close of business on that day a credit balance of £15,268. In 1939 certain of the testator's next of kin challenged the validity of the direction in the will, and on Oct. 18, 1939, the executors' solicitors wrote to the Westminster Hospital informing it of the challenge and asking that the sum paid should not be dealt with until further communication was received from the executors, but already by that date all moneys in the account in question had been applied in payments relating to the erection of new hospital buildings, and the account showed a debit balance of £9,508. In 1944 the House of Lords held that the residuary bequest was void for uncertainty. The next of kin, who had exhausted their remedy against the executors, did not assert any right to follow the £4,000 into assets held by the hospital, but they claimed that the hospital was under an equitable liability to refund to the estate the money wrongfully paid.

HELD: (i) even if in the Spiritual Courts (where the jurisdiction to administer the assets of a deceased person originally lay) the right of executors to require a legatee who was paid a legacy to give security was limited to the purpose of providing for the contingencies of further creditors appearing or there being a deficiency of assets to pay all legacies of equal rank *pari passu*, there was no reason why the remedy given by the Court of Chancery should be limited similarly.

(ii) there was no basis for the view that the equitable doctrine by which an unpaid legatee or creditor could recover from a person wrongfully paid by executors was only available to an unpaid legatee or creditor if the estate had been administered by the court, although it might be that where the executors had distributed the estate under an order of the court the unpaid person would not be required to bring a further action against them before proceeding against persons wrongfully paid, and there was no difference in the application of the doctrine whether the claimant beneficiary claimed as a residuary legatee or as next of kin, or whether or not the person paid was a "stranger" to the estate having no title to the money paid to him.

David v. Frowd (1833) (1 My. & K. 200), applied.

(iii) it was irrelevant to the application of the doctrine whether the executors paid wrongfully under a mistake of law or under a mistake of fact, and it was no answer to its application that the defendant had received

the payment in good faith and had spent it without knowledge of any flaw in its title.

Rogers v. Ingham (1876) (3 Ch.D. 351), and *Re Robinson* ([1911] 1 Ch. 502), distinguished.

Dictum of ROMER, J., in *Re Mason* ([1928] 1 Ch. 391), criticised.

(iv) the action was in respect of a claim to personal estate within the Limitation Act, 1939, s. 20, and, therefore, the limitation period applicable was twelve years, and the claim was not barred.

Decision of the COURT OF APPEAL (sub nom. Re Diplock's Estate) ([1948] 2 All E.R. 318, 429), affirmed.

[AS TO MISTAKE OF LAW, see HALSBURY, Hailsham Edn., Vol. 23, pp. 131, 132, paras. 181, 182; and FOR CASES, see DIGEST, Vol. 35, pp. 91-95, Nos. 9-44.]

Cases referred to:

- (1) *Harrison v. Kirk*, [1904] A.C. 1; 73 L.J.P.C. 35; 89 L.T. 566; 24 Digest 791, 8222.
- (2) *Noel v. Robinson*, (1682), 1 Vern. 90; 23 E.R. 334; 23 Digest 428, 4988.
- (3) *Orr v. Kaines*, (1750), 2 Ves. Sen. 194; 28 E.R. 125; 23 Digest 430, 5013.
- (4) *David v. Frowd*, (1833), 1 My. & K. 200; 2 L.J.Ch. 68; 39 E.R. 657; 24 Digest 793, 8240.
- (5) *Peterson v. Peterson*, (1866), L.R. 3 Eq. 111; 36 L.J.Ch. 101; 23 Digest 431, 5025.
- (6) *Re Rivers*, [1920] 1 Ch. 320; 88 L.J.Ch. 462; 121 L.T. 57; 24 Digest 596, 6298.
- (7) *Farmer v. Arundel*, (1772), 2 Wm. Bl. 824; 96 E.R. 485; 35 Digest 158, 543.
- (8) *Bize v. Dickason*, (1786), 1 Term. Rep. 285; 99 E.R. 1097; 35 Digest 147, 460.
- (9) *Brisbane v. Dacres*, (1813), 5 Taunt. 143; 128 E.R. 641; 35 Digest 159, 545.
- (10) *Bilbie v. Lumley*, (1802), 2 East. 469; 102 E.R. 448; 35 Digest 158, 544.
- (11) *Baylis v. London (Bp.)*, [1913] 1 Ch. 127; 82 L.J.Ch. 61; 107 L.T. 730; 35 Digest 156, 526.
- (12) *Rogers v. Ingham*, (1876), 3 Ch.D. 351; 35 L.T. 677; 35 Digest 93, 25.
- (13) *Re Robinson*, [1911] 1 Ch. 502; 80 L.J.Ch. 381; 104 L.T. 331; 43 Digest 960, 4002.
- (14) *Hodges v. Waddington*, (1683), 2 Vent. 360; 86 E.R. 485; 23 Digest 430, 5011.
- (15) *Harris v. Harris (No. 2)*, (1861), 29 Beav. 110; 54 E.R. 568; 32 Digest 506, 1665.
- (16) *Re Mason*, [1928] 1 Ch. 385; 97 L.J.Ch. 321; 139 L.T. 477; *affd.*, [1929] 1 Ch. 1; Digest Supp.
- (17) *Moses v. Macferlan*, (1760), 2 Burr. 1005; 97 E.R. 676; 35 Digest 154, 511.
- (18) *Sinclair v. Brougham*, [1914] A.C. 398; 83 L.J.Ch. 465; 111 L.T. 1; 35 Digest 167, 8.
- (19) *Re Blake*, [1932] 1 Ch. 54; 100 L.J.Ch. 251; 145 L.T. 42; Digest Supp.
- (20) *Hilliard v. Fulford*, (1876), 4 Ch.D. 389; 46 L.J.Ch. 43; 35 L.T. 750; 23 Digest 431, 5020.
- (21) *Re Hatch*, [1919] 1 Ch. 351; 88 L.J.Ch. 147; 120 L.T. 694; 35 Digest 95, 36.

APPEAL by the Ministry of Health against an order of the Court of Appeal dated July 9, 1948.

The decision is reported *sub nom. Re Diplock's Estate, Diplock and Others v. Wintle and Others* at [1948] 2 All E.R. 318, and the supplementary judgment of the Court of Appeal in an associated action is reported *sub nom. Re Diplock's*

Estate, Simpson and Others v. Lilburn, at *ibid.*, 429. The Court of Appeal thereby reversed an order of WYNN-PARRY, J., dated Mar. 11, 1947, and reported at [1947] 1 All E.R. 522. The decisions of the Court of Appeal and WYNN-PARRY, J., related to a number of associated actions brought by persons entitled to share in such part of an estate as to which the testator died intestate to recover certain sums of money paid to the defendants, charitable institutions, by the executors of the testator's will under a direction which was subsequently declared by the House of Lords to be void for uncertainty: *Chichester Diocesan Fund v. Simpson* ([1944] 2 All E.R. 60). WYNN-PARRY, J., held, *inter alia*, that the rule that money paid under a mistake of law was irrecoverable was of general application, and that the plaintiffs could not maintain a claim for the return of the money as money had and received. The Court of Appeal allowed the appeals on the general grounds: (i) that the plaintiffs had a right *in personam* in equity against the recipients which was not liable to be defeated by the fact that the payment to them had been made under a mistake of law by the executors, and (ii) that the plaintiffs had a right *in rem* to the money recognised by equity which would enable them to trace the money, providing only that it was possible to identify or disentangle it where it had been mixed with assets of the recipients.

Upjohn, K.C., Denys B. Buckley and Dunbar for the appellant, the Ministry of Health.

Pascoe Hayward, K.C., and J. L. Arnold for the respondents.

The House took time for consideration.

Nov. 23. LORD SIMONDS read the following opinion. My Lords, on Mar. 23, 1936, Caleb Diplock died intestate as to his residuary estate, which amounted to over £250,000. He had, by his will dated Nov. 3, 1919, purported to dispose of it by directing his executors to apply it "for such charitable institution or institutions or other charitable or benevolent object or objects in England" as his acting executors or executor might in their or his absolute discretion select. The invalidity of this disposition was finally established by this House in 1944. The proceedings in which this decision was given had been commenced on June 10, 1940, by the testator's executors by way of originating summons issued in the Chancery Division of the High Court of Justice, but in the meantime, on Jan. 3, 1940, an action had been commenced in the same division by the first three respondents to the present appeal together with another person, claiming to be four of the next of kin of the testator, against the executors or their personal representatives, certain selected charitable institutions which had received donations from the executors, and the Attorney-General, claiming administration of the testator's estate. In this action—and it is for this purpose only that I think it necessary to mention it to your Lordships—an order was made on Apr. 5, 1944, by which the court approved a compromise of the claims of the plaintiffs against the executors and directed that such compromise should be binding on all persons beneficially entitled to the property of the testator. Under this order (*inter alia*) a sum of £15,000 was to be paid by the executors to the fourth respondent to this appeal, who had been appointed judicial trustee of the testator's estate. This order is relevant to the present appeal because its admitted effect is that by it the first three respondents and all other next of kin must be deemed to have exhausted whatever remedy they had against the executors in respect of the wrongful distribution of the estate. On July 28, 1945, the respondents issued the writ in the action in which this appeal arises. The original defendants were the president, vice-presidents, treasurer and governors of Westminster Hospital, a corporation incorporated by private Act of Parliament. This corporation was dissolved under the provisions of the National Health Service Act, 1946, and replaced by a new corporation created under that Act. It is, however, common ground between the parties that the appellant, the Ministry of Health, which was added as a defendant to the action by an order

of the Court of Appeal, is, under s. 6 (1) of the same Act, liable to pay any sum due in respect of the respondents' claim. By their action the respondents claimed a declaration of the liability of the defendants to refund to the estate of the testator the sum of £4,000 which they had received out of that estate from the executors, with interest thereon, and an order for payment accordingly.

The relevant facts are not in dispute. On June 4, 1936, the deputy chairman of the hospital applied to the executors for a contribution towards the fund for the erection of new buildings for the hospital. On Mar. 20, 1937, a cheque for £4,000 was sent to one of the treasurers of the hospital by or on behalf of the executors under cover of a letter which, as is now admitted, did not affect the recipient with notice of the invalidity or possible invalidity of the residuary bequest in the will. On Mar. 23, 1937, the cheque was paid into the "Westminster Hospital Re-building Fund Current Account" at a branch of Barclays Bank, Ltd., which at the close of business on that day showed a credit balance of £15,268 1s. 10d. It was not until Oct. 18, 1939, that the defendants had notice of the claim of the next of kin and already by that date all moneys to the credit of the account in question had been applied in payments relating to the erection of the new hospital buildings, and the account showed a debit balance of £9,508 3s. 9d. In these circumstances it is not contended that the respondents can assert any right at law or in equity to follow or trace the sum of £4,000 into assets held by the appellant. The single question to be determined in this appeal is whether the original defendants were, and the appellant is, under a personal liability to refund to the estate of the testator the money wrongfully paid to them. This question has been answered in the negative by WYNN-PARRY, J., and in the affirmative by the Court of Appeal (LORD GREENE, M.R., and EVERSLED and WROTTESELEY, L.JJ.).

My Lords, I think that the reasoning and conclusion of the Court of Appeal are unimpeachable, and it is right to add that, if WYNN-PARRY, J., had had the advantage of the citation of authorities and of the argument based on them which the Court of Appeal and your Lordships have had, he might have come to a different conclusion. The problem for determination can be simply stated, and it is, perhaps, surprising that the sure answer to it is only to be found by an examination of authorities which go back nearly three hundred years. Acting under a mistake the personal representatives of a testator whose residuary disposition is invalid distribute his residuary estate on the footing that it is valid. Have the next of kin a direct claim in equity against the persons to whom it has been wrongfully distributed? I think that the authorities clearly establish that, subject to certain qualifications which I shall state, they have such a claim. I think that it is important in the discussion of this question to remember that the particular branch of the jurisdiction of the Court of Chancery with which we are concerned relates to the administration of assets of a deceased person. While in the development of this jurisdiction certain principles were established which were common to it and to the comparable jurisdiction in the execution of trusts, I do not find in history or in logic any justification for an argument which denies the possibility of an equitable right in the administration of assets because, as it is alleged, no comparable right existed in the execution of trusts. I prefer to look solely at the authorities which are strictly germane to the present question. It is from them alone that the nature and extent of the equity are to be ascertained.

Before I turn back to the seventeenth century when the Court of Chancery was gradually wresting from the Spiritual Courts the jurisdiction in administering the assets of deceased persons and framing apt rules to that end, I will first refer to a statement made by LORD DAVEY early in this century, which, as I think, illuminates the position. In *Harrison v. Kirk* (1) LORD DAVEY says ([1904] A.C. 7):

"But the Court of Chancery, in order to do justice and to avoid the evil

of allowing one man to retain what is really and legally applicable to the payment of another man, devised a remedy by which, where the estate had been distributed either out of court or in court without regard to the rights of a creditor, it has allowed the creditor to recover back what has been paid to the beneficiaries or the next of kin who derive title from the deceased testator or intestate."

- A The importance of this statement is manifold. It explains the basis of the jurisdiction, the evil to be avoided, and its remedy. Its clear implication is that no such remedy existed at common law. It does not suggest that it is relevant whether the wrong payment was made under error of law or of fact. It is immaterial whether those who have been wrongly paid are beneficiaries under the will or next of kin. It is sufficient that they derive title from the deceased. It is true
- B that LORD DAVEY expressly dealt with the case of a claimant creditor, not a beneficiary or next of kin. I shall show your Lordships that what he said of the one might equally well be said of the other. It would be strange if a court of equity, whose self-sought duty it was to see that the assets of a deceased person were duly administered and came into the right hands and not into the wrong hands, devised a remedy for the protection of the unpaid creditor, but left the
- C unpaid legatee or next of kin unprotected.

I think, my Lords, that it is not necessary for me to review all the authorities. This has been done with exhaustive accuracy by the Court of Appeal. I will refer only to certain cases which appear to me to be landmarks in the history of the equitable doctrine. In any such history the name of LORD NOTTINGHAM, L.C., must have first place. In *Noel v. Robinson* (2) the Lord Chancellor, after referring to the practice of the Spiritual Courts under which the executor was entitled to demand security of the legatee before paying his legacy in case the amount was required in discharge of debts, said (1 Vern. 93, 94):

- "... but in this court, though there be no provision made for refunding, yet the common justice of this court will compel a legatee to refund. It is certain that a creditor shall compel the legatee to refund, and so shall one legatee compel the other, where the assets become deficient ..."
- E

I pause here for two purposes. First, I point out that already in 1682 a creditor and a legatee shared the remedy established by the common justice of the Court of Chancery. Secondly, it is a proper moment at which to deal with an argument which was put forward by learned counsel for the appellant. They urged that

F it was only in a limited class of cases that the Spiritual Court required a legatee, who was paid his legacy, to give security—first, to meet the contingency of further creditors appearing, and, secondly, to meet the case of a deficiency of assets to pay all legacies of equal rank *pari passu*—and that the remedy which the Court of Chancery gave should be similarly circumscribed. The purpose and effect of the argument, if accepted, would be to deny any remedy against persons

G wrongly paid to next of kin rightfully entitled. I cannot accept this argument. In the first place, I am by no means satisfied that the practice of the Spiritual Court was so limited. The contention was largely based on the fact that the only two precedents of bonds which had been discovered did not cover any other than the contingencies already mentioned. At this distance of time I do not think that this can be regarded as conclusive evidence of the practice. But, in

H the second place, I see no justification for regarding the equitable doctrine of the Court of Chancery as limited to the previous practice, if it was the practice, of the Spiritual Court. That it was not so regarded will appear from a later case to which I will shortly refer.

I pass over numerous cases in which the equitable remedy was refined and elaborated. Their effect is stated in the judgment of the Court of Appeal and summarised in the passage from *ROPER ON LEGACIES*, 4th ed., which is cited in that judgment ([1948] 2 All E.R. 327), but I should in passing mention *Orr v.*

Kaines (3) in which it was clearly established that the right of an underpaid legatee to claim directly against the overpaid legatee is subject to this qualification, that he must first exhaust his remedy against the executor who has made the wrongful payment. It was for this reason that I mentioned at an earlier stage of this opinion that the next of kin must be deemed to have recovered from the executors all that they could recover. They had then no other way to recover the balance that was due to them than by proceeding directly against the appellant and other institutions among which the executors had distributed the estate. It must at this point be said that a distinction on which WYNN-PARRY, J., relied has no validity. Not having had his attention called to the earlier authorities, the learned judge was disposed to think that the equitable remedy, even where it existed, was only available to an unpaid creditor or legatee if the estate had been administered by the court. There is no ground for this broad distinction, though it may well be that a distinction exists, *viz.*, that, where the executor has distributed the estate under an order of the court the unpaid creditor would not be required to bring a further action against him before proceeding against persons wrongfully paid.

I go forward nearly a century, during which the equitable doctrine had been recognised by successive Lord Chancellors and Masters of the Rolls, and come to *David v. Frowd* (4), a case on which the respondents rely as most nearly resembling the present case. The resemblance lies in the fact that, there too, the plaintiff was next of kin of an intestate who claimed against the defendants that the estate of the intestate should have been paid to her, but had been wrongfully paid to them. The distinction, if it is a material one, is that there the payment had been due to a mistaken view (whether of fact or law) that the defendants were the true next of kin, while here it was due to a mistaken view as to the validity of the residuary bequest. My Lords, I think that, subject always to one point to which I shall presently refer, *David v. Frowd* (4) is an authority strongly in favour of the respondents. It is fatal to the appellant's argument, which I have already mentioned, that the equitable remedy was confined to the cases of unpaid creditor or legatee, and is consistent only with the view that the remedy was one (to adapt LORD DAVEY's words) devised by the Court of Chancery in the administration of assets of a deceased person to avoid the evil of allowing one man to retain money legally payable to another and was applicable wherever it could appropriately be applied. Two other cases on which the respondents relied I will mention before I examine those which the appellant cited as supporting his contention—the first *Peterson v. Peterson* (5) in which LORD ROMILLY, M.R., once more asserted the equity, making no distinction between claimant residuary legatees and next of kin, and, the second, *Re Rivers* (6), where EVE, J., recognised and applied it.

Here then, my Lords, is a long line of authority extending over more than 250 years, resting on decisions of judges of the highest authority and broken by no dissentient voice. Why should it not cover the present case? Three arguments put forward by the appellant I have already mentioned and disposed of, the first founded on a supposed relation between the assumed practice of the Spiritual Court and the scope of the remedy provided by the Court of Chancery, the second based on a distinction between wrongful payments made when there has and when there has not been administration by the court, and the third (which is bound up with the first) that there is a distinction between claimant residuary legatees and next of kin. It remains to deal with two other arguments. It was said that the equity was not applicable against a "stranger," and that the appellant (or the hospital through whom it claimed), having been paid money to which it was not lawfully entitled, since the disposition under which it took was invalid, was to be regarded as a stranger. This argument is wholly without substance. The hospital received £4,000 for no other reason than that the executors thought that it was a proper object for the testator's bounty. It was

treated as a beneficiary under the testator's will, and, to use LORD DAVEY's words, derived title under it. It does not appear to me that a person so receiving money from the estate of a testator is in a different position from any other person to whom money is paid on the footing that under the testator's will money can be lawfully paid to him though, in fact, the payment is wrongful.

- I come, finally, to the argument on which counsel for the appellant laid the greatest stress, relying not only on the judgment of WYNN-PARRY, J., but on the other cases which have yet to be examined. It was that the equitable remedy was subject at least to this qualification—that it was not applicable where the wrongful payment was made in error of law. It was said that in every case where it had been applied the wrongful payment had been made under a mistake of fact, and that, wherever the principle had been stated without any such qualification, it must be read, nevertheless, as subject to it. I think, my Lords, that this argument, which found favour with the learned judge, is misconceived. In the first place, though in almost all the reported cases the probability is that the wrongful payment was made under a mistake of fact, that is not true of all of them, and in many of them, while the probability is in one direction, there can be no certainty without further information which is not now available. This leads directly to the second reason. In not one of the many cases where the equity was applied was any suggestion made in argument or judgment that the issue depended on the nature of the mistake under which the wrongful payment had been made. It is not credible that, if the distinction between mistake of fact and law was relevant, it would never have been mentioned, particularly at a time when in the courts of common law it was being established. And here it may be observed that the equitable doctrine was well settled before that event took place, for such cases as *Farmer v. Arundel* (7), *Bize v. Dickason* (8), *Brisbane v. Dacres* (9), *Bilbie v. Lumley* (10), show that up to the end of the eighteenth century there were in high places doubts as to the validity of the distinction in the common law. In the third place, the most satisfactory reason for the distinction rests in the maxim, itself probably taken from the criminal law, *ignorantia juris neminem excusat*: see *Baylis v. London (Bp.)* (11). The man who makes a wrong payment because he has mistaken the law may not plead his own ignorance of the law and so cannot recover what he has wrongfully paid. It is difficult to see what relevance this distinction can have where a legatee does not plead his own mistake or his own ignorance, but, having exhausted his remedy against the executor who has made the wrongful payment, seeks to recover money from him who has been wrongfully paid. To such a suit the executor was not a necessary party and there was no means by which the plaintiff could find out whether his mistake was of law or of fact or even whether his wrongful act was mistaken or deliberate. He could guess and ask the court to guess, but he could prove nothing. I reject, therefore, the suggestion that the equitable remedy in such circumstances was thus restricted, and repeat that it would be a strange thing if the Court of Chancery, having taken on itself to see that the assets of a deceased person were duly administered, was deterred from doing justice to a creditor, legatee, or next of kin because the executor had done him wrong under a mistake of law. If, in truth, this were so, I think that the Father of Equity would not recognise his child.

- I turn now to the cases on which the appellant relies. The first of these is *Rogers v. Ingham* (12), and, as it is placed in the forefront of the appellant's argument (as it was in the judgment of the learned judge), it is worth examining in some detail. The headnote reads as follows (3 Ch.D. 351):

“The court will not in all cases relieve against a payment of money under mistake of law. An executor, acting on the advice of counsel on the construction of a will, proposed to divide in certain proportions a fund between two legatees. One of the legatees being dissatisfied took the opinion of counsel, which agreed with the former opinion. The executor then divided

and paid over the fund in accordance with the opinions. Two years afterwards the dissatisfied legatee filed a bill against the executor and the other legatee, alleging that the will had been wrongly construed, and claiming repayment from the other legatee: *Held* (affirming the decision of HALL, V.-C.), that the suit could not be maintained."

As appears from the headnote, the case came first before HALL, V.-C., and, though there is no note of the argument before him, it is clear from his judgment how he regarded the issue. He said (*ibid.*, 353):

"It seems to me that the fund was divided as a matter of arrangement between the parties, and that having taken place more than two years before the bill was filed, I ought not to give the assistance of this court for the purpose of recalling that fund from the defendant, who received it upon the faith and footing of what took place on that occasion."

From his judgment the plaintiff appealed, and again it is clear how the issue was regarded both by counsel and by the court.

"Payment by my trustee is payment by me, and I ought to recover the money. A court of equity can relieve against the consequences of a mistake of law; moreover this is hardly a pure question of law."

Thus argued counsel for the appellant (*ibid.*, 354). He made no reference to the long line of authority which confirmed the equitable right that arises in an administration of assets, perhaps because the act of wrongful distribution was done by Ingham, the surviving executor and trustee, not in his capacity of executor (in this respect the headnote is misleading), but in his capacity of trustee distributing a trust fund. He may have thought, and he may have rightly thought (I do not think it necessary to decide it), that the cases had no relevance to an alleged breach of trust. Nor, on the other hand, did counsel for the respondent legatee point out that according to the established rule the plaintiff could not recover from him until she had exhausted her remedy against Ingham or his estate. Ingham had, in fact, died and his executor was a party to the suit, but he seems to have taken no part in the proceedings, and there was no evidence that Ingham's estate was insolvent. It was in these circumstances that JAMES, L.J., almost in the opening words of his judgment said (*ibid.*, 355):

"When a trustee, by the direction or with the authority of his *cestui que trust*, pays money to a third person, no matter under what claim of right or under what circumstances, it is exactly the same as if the *cestui que trust* had received the money from the trustee, and had herself paid it to that person. It is simply a question of money paid by the lady, or the lady's direction, out of money of hers which the trustee had in hand to a person who said that he had a claim to the money."

Already it is sufficiently clear what are the facts to which the relevant law must be applied, but I will cite a few lines more which are a clue to the whole judgment. The lord justice goes on (*ibid.*):

"That being so, it is reduced, as it appears to me, to a mere action for money had and received, and it is the same as if A through a third person had paid money to B, thinking that B was entitled to it, B thinking also that he was entitled to it; there having been, as it is now said, a mistake of law which was common to both parties."

It is in this context that he later uses the words so much relied on by the appellant (*ibid.*):

"I have no doubt that there are some cases which have been relied on, in which this court has not adhered strictly to the rule that a mistake in law is not always incapable of being remedied in this court; but relief has never been given in the case of a simple money demand by one person against

another, there being between those two persons no fiduciary relation whatever, and no equity to supervene by reason of the conduct of either of the parties."

It is, I think, clear that the learned lord justice, whose every word on a question of equitable principle is weighty, was dealing solely with a case where (in his own language) a trustee by the direction or with the authority of his *cestui que*

A *trust* pays money to a third person, and was not dealing with a case where, without his acquiescence or even his knowledge, an executor wrongs a creditor or beneficiary by paying to another money which should be paid to him.

The next case to be considered is *Re Robinson* (13). Two preliminary observations may be made—first, that the case was not concerned with a wrongful distribution of assets in the administration of an estate, and, secondly, that the

B sole question was what, if any, statute of limitations was applicable to the claim. The claim was by a beneficiary under a trust, who alleged that he had been underpaid, directly against a beneficiary under the same trust who had been overpaid. The learned judge had first to determine its nature. It was, he said, a "mere money demand by the plaintiff against the defendant." He then states the rival contentions, the defendant saying that it was in reality a common

C law action for money had and received, and, therefore, barred by the lapse of six years under the statute of James I (21 Jac. 1, c. 16), the plaintiff, on the other hand, saying that, where a trust fund had by mistake been paid by the trustee to the wrong beneficiary, there was not in the old Court of Chancery any bar by lapse of time to the recovery of lost money. He says that the defendant's contention would *prima facie* appear to be right, analysing the position and

D saying that the party whose money had been wrongly paid away could, at all events, have maintained a suit in equity for it—a statement which points the contrast between such a suit and one by a legatee against a legatee in which the joinder of the executor as plaintiff was fatal: see *Hodges v. Waddington* (14), and he concludes ([1911] 1 Ch. 508):

E "But whether the action is treated as a strict claim in law for money had and received, or whether it is brought as a claim in equity through the medium of a trustee—in whichever way it is regarded—at first sight, inasmuch as the court has always acted by analogy to the statute, one can see no reason why the period fixed by the statute should not bar the right of the plaintiff to recover."

F The learned judge then deals with certain cases on which the plaintiff had relied and sums up by a classification of the cases in which mistakes have been made by trustees in payment of trust funds. I doubt with respect whether the classification is exhaustive, but in any case it is made for no other purpose than to show in what cases a court of equity regarded a claim by a *cestui que trust* as not barred by any lapse of time. The learned judge concludes thus (*ibid.*, 513):

G "The present case resolves itself into this—that although, owing to the fact that the plaintiff is not the person who paid the money, the action is one which could not have been maintained at common law, it is in substance a mere money demand to which a court of equity, acting by analogy to the statute, would apply the same period of limitation."

H I have been led to examine this case at some length because of the emphasis laid on it by the appellant. Having done so, I find in it no support for the contention that the equity which is the foundation of the present claim is qualified by the condition that the wrongful payment must not have been made under a mistake of law. The learned judge was not considering that question. With great respect I cannot (notwithstanding the subsequent approval of ROMER, J., in the case to which I next refer) accept his reading of the decree made by LORD ROMILLY, M.R., in *Harris v. Harris* (No. 2) (15), for it is, I think, clear that the

defendant in that suit was, in effect, held liable to repay moneys which he had been wrongly paid, though in form the liability was declared to be to replace certain annuities of which he had received the proceeds of sale. Nor, with respect, can I assent to the view first expressed by the learned judge that the action is *prima facie* "in reality a common law action for money had and received," though I would be inclined to accept the modified statement already cited with which he concludes his judgment. I see no reason to doubt that to a claim, whether made by legatee against legatee, or by *cestui que trust* against *cestui que trust*, in respect of a payment made under a mistake of fact or of law, a court of equity could properly, before the Limitation Act, 1939, came into force, apply by analogy the statute of James I. Nor do I understand that counsel for the respondents on this appeal dissents from that proposition.

I am brought now to *Re Mason* (16). The judgment of ROMER, J., in that case, so far as it was in any way relevant to the matter under appeal, was that a petition of right presented by the next of kin of a lunatic who had died in 1798 was barred by the statute of James I. I do not doubt that the decision was correct for the same reasons that I have given in regard to the decision in *Re Robinson* (13), but the appellant relies on certain statements by the learned judge which, in his contention, militate against the view that the equitable doctrine relied on by the respondents was applicable where the wrongful payment was made under a mistake of law. The learned judge makes the assumption that the whole of the estate of the lunatic had come into the hands of King George III and says ([1928] 1 Ch. 391):

"On that assumption the claim of the suppliants is one to recover from the Crown moneys that in fact belonged to Maria L'Epine's next of kin, but was wrongfully paid over by her administrators to King George III. It is, in other words, a claim by a *cestui que trust* to recover from a third party money which his trustee has by mistake paid to that third party. Such a claim is one for money had and received."

I pause to observe that the learned judge, who had had cited to him none of the long line of cases involving claims for refund in the administration of assets, treated the claim as if it were a claim by one *cestui que trust* against another and then referred to such a claim as one for money had and received, and it was on that footing that, after referring to *Re Robinson* (13), he said that, if the claim of the trustee would be barred in an action at law by any statute of limitations, the claim of the *cestui que trust*, so far as it was for money had and received, would be equally barred. My Lords, I must with the greatest deference to the learned judge observe that an action by a legatee or next of kin to recover money paid to the wrong person in the administration of assets is not a claim by one *cestui que trust* against another, and that, whatever may be said of the latter, it cannot with any formal accuracy be said that the former is an action for money had and received. Such an action is an action at common law deriving from *indebitatus assumpsit*. I will not embark on the rather arid dispute whether its gist was an implied promise, but it has, I think, no relation to the equity by which for three hundred years such a claim as the respondents now make has been supported. It is true that in *Moses v. Macferlan* (17) LORD MANSFIELD said (2 Burr. 1012):

"In one word, the gist of this kind of action is, that the defendant . . . is obliged by the ties of natural justice and equity to refund the money,"

but this broad statement contained, perhaps, less the basis on which the action at common law was founded than an aspiration as to the area over which it might one day extend. There remained a field over which "this essentially common law action" (as LORD SUMNER in *Sinclair v. Brougham* (18) called it) did not extend. The plaintiff in *David v. Frowd* (4), for instance, could not, I think, have maintained an action for money had and received in a court of

common law. If this is so, the fact that, as the common law action developed, it was established that a mistake of law would not support a claim for repayment, appears to me to afford no justification for saying that this equitable right was similarly limited. Therefore, while, as I have said, I do not question the decision, which was, indeed, affirmed by the Court of Appeal, I do not think that it helps the appellant's case. In the Court of Appeal LAWRENCE, L.J., [in *Re Mason*] agreed that the proceedings were "in effect" proceedings for money had and received. My respectful comment would be that this is not an inaccurate statement since the effect of the action, if it succeeds, would be the same.

The appellant next relied on some observations made by MAUGHAM, J., in *Re Blake* (19), a case not unlike *Re Mason* (16) in that here, too, it was pleaded by the Crown that a claim made by petition of right was barred by the statute of James I. In the course of his judgment, the learned judge said ([1932] 1 Ch. 60):

"An action in the Chancery Division brought by the next of kin against a person to whom the administrator had wrongly paid part of the personal estate of the intestate under a mistake of fact (not joining the administrator and seeking administration) would be in the nature of a common law action for money had and received, and the court acting on the analogy of the statute of James I (21 Jac. 1, c. 16) would hold the claim to be barred after the lapse of six years from the date of payment . . ."

It would, I think, be hypercritical to quarrel with this statement in which the learned judge so guardedly refers to such an action as being "in the nature of a common law action." In my judgment, it gives no support to the appellant's contention. Two other cases I will do no more than mention—*Hilliard v. Fulford* (20), and *Re Hatch* (21)—for I am fully satisfied with the observations of the Court of Appeal on them.

Finally, my Lords, I must say some words on an argument of a more general character put forward on behalf of the appellant. The Court of Chancery, it was said, acted on the conscience, and, unless the defendant had behaved in an unconscientious manner, would make no decree against him. The appellant, or those through whom he claimed, having received a legacy in good faith and having spent it without knowledge of any flaw in their title, ought not in conscience to be ordered to refund. My Lords, I find little help in such generalities. On the propriety of a legatee refusing to repay to the true owner the money that he has wrongly received I do not think it necessary to express any judgment. It is a matter on which opinions may well differ. The broad fact remains that the Court of Chancery, in order to mitigate the rigour of the common law or to supply its deficiencies, established the rule of equity which I have described, and this rule did not excuse the wrongly paid legatee from repayment because he had spent what he had been wrongly paid. No doubt, the plaintiff might by his conduct, and, particularly, by laches, have raised some equity against himself, but, if he had not done so, he was entitled to be repaid. In the present case the respondents have done nothing to bar them in equity from asserting their rights. They can only be defeated if they are barred at law by some statute of limitation. It is common ground between the parties that the only statute now applicable is the Limitation Act, 1939, which came into operation on July 1, 1940, and the question is: Which of the sections of this Act is applicable to the present case? I hope I shall not be thought wanting in respect to the elaborate argument of counsel for the appellant if I deal with this question very shortly. I do so because on the main point, *viz.*, the applicability of s. 20, which the respondents assert and the appellant denies, I am in complete agreement with the reasoning and conclusion of the Court of Appeal and cannot usefully add anything of my own. The present action is precisely within the language of the section.

It is in respect of a claim to the personal estate of Caleb Diplock, and there is nothing in the ancestry of the section which justifies, much less requires, a narrower meaning being given to its words than they ordinarily bear. It is suggested that there is something awkward or inapposite in the *terminus a quo*, inasmuch as the relevant period is to run from the date when the right to receive the share accrued. I think that this criticism is ill-founded. There is nothing inappropriate in a legatee or next of kin who has brought no action for twelve years after the executor's year has expired being barred from such action whether against the executor himself or against the person to whom the executor has made wrongful payment. At the least, there is nothing so inappropriate in such a result as to deprive the substantive words of the section of their plain meaning. Section 20 applying to this action, and it being conceded that the relevant period had not expired before it was brought, the defence under the statute fails. I think it, therefore, unnecessary to say anything about s. 26 by way of approval or disapproval of what fell from the Court of Appeal. It is a section which presents many problems.

One thing only remains to be said. The action was brought by three only of the next of kin who are said to be a numerous body and their claim was not that their share of the £4,000 wrongfully paid away should be paid to them, but that the whole of that sum should be paid to their co-plaintiff the judicial trustee to be dealt with by him in due course of administration of the estate. No objection was taken by the appellant to this course at any stage of the action, and his counsel has expressly disclaimed any wish to do so now. Accordingly, this appeal must be dismissed. But he has at the same time properly said that his present disclaimer should not prejudice any other of the numerous charitable institutions against whom similar actions are pending. I agree, and express no opinion whatever whether any such objection could be sustained. I move, my Lords, that the appeal be dismissed with costs.

LORD NORMAND: My Lords, I concur.

LORD OAKSEY: My Lords, I agree.

LORD MORTON OF HENRYTON: My Lords, I also agree.

LORD MACDERMOTT: My Lords, I also agree.

Order accordingly.

Solicitors: *Trollope & Winckworth* (for the appellant); *White & Leonard* (for the respondents).

[*Reported by J. D. PENNINGTON, Esq., Barrister-at-Law.*]

Re ROBINSON (deceased). DAVIS AND ANOTHER *v.* ROBINSON AND OTHERS.

[CHANCERY DIVISION (Vaisey, J.), November 23, 1950.]

Charity—Benefit to community—Aged persons—Gift to persons in certain parish over sixty-five years of age—Charitable Uses Act, 1601 (43 Eliz., c. 4), preamble.

The words "aged, impotent and poor people" in the preamble to the Charitable Uses Act, 1601, are to be read disjunctively so that, for example, aged people need not also be poor to be objects of charity.

By his will, dated Sept. 11, 1947, a testator, who died on May 8, 1948, after bequeathing certain legacies, gave his residuary estate to "the Little Sisters of the Poor of Longton and Stoke-on-Trent and the old people over sixty-five years of Hazel Slade near Hednesford to be given as my trustees think best."

HELD: on the true construction of the will the Little Sisters of the Poor were entitled absolutely to one moiety of the residuary estate, and the remaining moiety was the subject of a good charitable bequest to a class of persons in the parish specified who were qualified by their age to participate, and a scheme would be directed in respect thereof.

Re Glyn's Will Trusts (p. 1150, *post*) and *Re Bradbury* (p. 1150 *post*), followed.

- A [AS TO BENEFIT OF A SECTION OF THE PUBLIC, see HALSBURY, Hailsham Edn., Vol. 4, pp. 126, 127, para. 167; and FOR CASES, see DIGEST, Vol. 8, pp. 255-257, Nos. 161-185.]

Cases referred to:

- (1) *Re Glyn's Will Trusts*, p. 1150, *post*.
 B (2) *Re Bradbury*, p. 1150, *post*.
 (3) *Re Lucas*, [1922] 2 Ch. 52; 91 L.J.Ch. 480; 127 L.T. 272; Digest Supp.

ADJOURNED SUMMONS to determine, *inter alia*, the construction of the residuary gift contained in the will of John Robinson, deceased. The facts and relevant part of the will are stated in the judgment of VAISEY, J.

A. A. B. Fuller for the plaintiffs, two of the executors of the will.

- C H. G. Watson for the first to eighth defendants, persons interested on the deceased's intestacy.

A. F. M. Berkeley, R. L. Stone and P. W. E. Taylor for the ninth, tenth and eleventh defendants respectively, each of whom claimed to be interested under the trusts of the will.

Denys B. Buckley for the Attorney-General.

- D VAISEY, J.: This summons raises a very short question of construction, although it is not, perhaps, an easy one. The testator, whose religious associations were, I think, properly described as inter-denominational, because he gave gifts to the Primitive Methodist Chapel, the Wesleyan Chapel and, I think, the Church of England, gave the remainder of his estate in these words:

- E "I give the remainder of my estate to the Little Sisters of the Poor of Longton and Stoke-on-Trent and the old people over sixty-five years of Hazel Slade near Hednesford to be given as my trustees think best."

Although there are no words of severance, I think that this gift ought to be construed as a gift in equal shares between the two objects, each of which, in my judgment, is plainly charitable. I think one half of the ultimate residue

- F goes to that branch of the institution known as the Little Sisters of the Poor which is represented here by the mother superior of the institution and identified by her evidence as St. Augustine's, Hanley, near Stoke-on-Trent.

That disposes of half of the estate because, in my judgment, the concluding words, "to be given as my trustees think best," although grammatically they might be held to give some discretion to the trustees over and in respect of

- G the whole of the residue, refer only to the second half of the estate which the testator gives to the "old people over sixty-five years" of Hazel Slade, near Hednesford. I think they give the trustees a discretion as to the manner in which these old people are to be benefited. A pleasant little organisation has been carried on for many years called the Hazel Slade Old Folks Entertainment and Tea Fund, and there is a defendant before me representing it. The rule,

- H as stated in a minute book, is that all old people who have resided for at least three months in the village are entitled to go to the Christmas party which the organisation arranges and to have entertainment. Various moneys are collected in the village and those who are qualified by their age share any surplus money there may be. This yearly entertainment, which provides social entertainment for the recipients and promotes good feeling among them, leads to the formation and cementing of friendships. It is suggested that when the testator said "the old people over sixty-five years," he was referring to that organisation and that

the gift was to the tea and entertainment fund. I do not think so. I think that, according to the proper construction of the will, the gift is to the old people direct as a class, not as individuals, but as a group of people who are, within the Charitable Uses Act, 1601, qualified, not by poverty, sickness, or impotence, but by age. It has been held by DANCKWERTS, J., recently that the Charitable Uses Act, 1601, brought within the ambit of "charity" those who satisfy any one of the three qualifications of age, poverty, impotence or sickness. He took that view in *Re Glyn's Will Trusts* (1)* and I followed that decision recently in *Re Bradbury* (2)*. In *Re Bradbury* (2) the testatrix directed that her residuary fund should be applied for the maintenance of an aged person or persons in a nursing home approved by her trustees. Although I conceive the aged person in a nursing home may not be in the least in need of any sort of pecuniary assistance, I nevertheless held, following the decision in *Re Glyn's Will Trusts* (1), that it was a good charitable gift.

In the present case I think that "the old people over sixty-five years" in a particular parish are a class of persons just as much objects of charity, having regard to the preamble of the statute, as the poor of the parish or the sick of the parish. They are, I think, proper objects of the charitable purposes of the testator in regard to the second half of his estate. It will be observed that the testator appears to place great confidence in the discretion of his trustees, and, while I think it would be proper in this case for a scheme to be brought into chambers and settled for the administration of the second half of the charitable gift, I see no reason why there should be any objection to leaving a proper discretion in the hands of the trustees. I hold that this is a good charitable gift, but require it to be defined by the appropriate method of a scheme which will be sanctioned by the court.

Order accordingly. Costs of all parties down to and including the order to be taxed as between solicitor and client and to be paid out of the estate in due course of administration.

Solicitors: *Gibson & Weldon*, agents for *Lloyd & Robinson*, Stafford (for the plaintiffs and all defendants except the ninth and twelfth defendants); *Simmonds, Church, Rackham & Co.* (for the ninth defendant); *Treasury Solicitor*.

[Reported by H. McL. MORRISON, Esq., Barrister-at-Law.]

* In *Re Glyn's Will Trusts*, heard by DANCKWERTS, J., on July 7, 1950, the testatrix bequeathed her residuary estate, subject to a life interest, to trustees on trust to build and endow free cottages for old women of the working classes of the age of sixty or upwards. DANCKWERTS, J., held that the trusts were valid charitable trusts, saying that the words "aged, impotent and poor" in the preamble to the Charitable Uses Act, 1601, were to be read disjunctively, so that aged people need not also be poor to come within the preamble. A trust for the relief of aged persons was, therefore, charitable.

In *Re Bradbury, decd.*, heard by VAISEY, J., on Nov. 17, 1950, the testatrix directed: "My trustees shall invest the residue of my estate on deposit in their names as trustees of the Frances Bradbury Bequest for the Aged and shall pay from this bequest fund sum or sums for the maintenance of an aged person or persons in a nursing home approved by my trustees until the said fund shall be exhausted." The "Frances Bradbury Bequest for the Aged" was not an existing organisation, but one which the testatrix wished to found posthumously. The question arose whether the terms of the residuary bequest constituted a good charitable gift.

Cases referred to:

- (1) *Re Roadley*, [1930] 1 Ch. 524; 99 L.J.Ch. 232; 144 L.T. 64; Digest Supp.
- (2) *Re Glyn's Will Trusts*, *supra*.

McMullen for the plaintiffs, the executors of the will.

T. A. C. Burgess for the first and second defendants, persons interested on the deceased's intestacy.

Denys B. Buckley for the Attorney-General.

VAISEY, J. (having stated the facts and the terms of the residuary bequest): The first of the two cases which appear to come nearest to this case is *Re Roadley* (1),

HILL-VENNING v. BESZANT.

[COURT OF APPEAL (Somervell, Cohen and Denning, L.J.J.), October 25, 26, 27, 1950.]

Negligence—Highway—Unlighted motor-cycle stationary at night.

A The defendant, a motor-cyclist, stopped at night on a highway because the lighting system of his motor-cycle had failed. He alighted, leaving the motor-cycle, which was about three feet in breadth at its broadest point, on the highway. There was a grass verge, level with the surface of the highway, to which the defendant could have wheeled his motor-cycle without difficulty. He did not do so, however, as he assumed that all that was needed was to change the bulb in the headlight. He then discovered that the fault was in the electric wiring, and when he was about to do the necessary repairs he noticed the light
B of an approaching vehicle, which was the plaintiff's motor-cycle. The plaintiff, who had his headlight dipped, failed to observe the defendant's motor-cycle in time to avoid it, and he came into collision with it. It was not disputed that the plaintiff had been negligent. On the question whether the defendant had also been negligent in not removing his motor-cycle from the highway on to the grass verge,

C HELD (SOMERVELL, L.J., *dissenting*): the defendant, by failing to remove his motor-cycle off the highway, had not taken all reasonable precautions to prevent danger to other traffic. He was, therefore, negligent, and the blame for the accident must be apportioned as to two-thirds to the plaintiff and one-third to the defendant.

D [AS TO NEGLIGENCE IN REGARD TO VEHICLES ON HIGHWAYS, see HALSBURY, Hailsham Edn., Vol. 23, pp. 637-644, paras. 894-904; and FOR CASES, see DIGEST, Vol. 36, pp. 59-66, Nos. 366-428.]

Case referred to:

(1) *Henley v. Cameron*, [1949] L.J.R. 989; 2nd Digest Supp.

E APPEAL by the plaintiff from an order of PARKER, J., made on May 24, 1950, dismissing the plaintiff's claim for damages for personal injuries on the ground of the defendant's negligence.

On June 24, 1948, after lighting-up time, the plaintiff was riding his motor-cycle on a road leading from Guildford to Farnham when he came into collision with the defendant's motor-cycle which was stationary at the side of the road owing to a failure of the lighting system. The road at this point was wide and
F

decided by BENNETT, J., where the gift was for the payment of the expenses and maintenance of patients from the two named parishes to and at two named hospitals or either of them. It was held that the gift was a trust for the relief of impotent and poor people within the purposes set out in the preamble to the statute 43 Eliz. c. 4, and was a valid charitable bequest. The other case, *Re Glyn's Will Trusts* (2), was recently before DANCKWERTS, J. There there was a trust for founding and endowing free cottages for old women of the working classes of the age of sixty years or upwards. That was held to be a good charitable bequest, having regard to the fact that the preamble to the statute of Elizabeth included the relief of aged, impotent and poor people. He pointed out that these words must be read disjunctively, because otherwise those who were poor could not be the objects of charity unless they were also aged and impotent. Therefore, DANCKWERTS, J., thought that, so long as a person was either aged, or impotent, or poor, or any two of those designations, he was a proper
G object of charity. I think that the present case is very near the line, and that where a case is near the line there must be a bias in favour of doing what the testatrix obviously wanted to be done. On the whole I think, relying on the observations of the judges in the two cases to which I have referred, I must hold that this gift is validly given for a charitable purpose.

Order accordingly.

Solicitors: *Gregory, Rowcliffe & Co.*, agents for *Ernest Higginbottom*, Stockport (for all parties except the Attorney-General); *Treasury Solicitor*.

H. McL. M.

straight and bordered by a grass verge level with its surface, and the defendant would have had no difficulty in moving his motor-cycle on the verge. He did not do so, thinking that all that was required was to change the bulb in his headlight. He then discovered that the tail light was also out and that there was a fault in the electric wiring. Still being of the opinion that the fault could be quickly repaired, he did not move his motor-cycle, but left it standing with its off-side some three feet from the verge. While repairing the wiring, he observed the light of the plaintiff's motor-cycle approaching from behind. The plaintiff had his headlight dipped and failed to see the defendant's motor-cycle in time to avoid it. PARKER, J., held that the defendant had not been guilty of negligence, or not of sufficient negligence for the blame to be apportioned otherwise than 100 per cent. to the plaintiff.

Glyn-Jones, K.C., and *G. G. Baker* for the plaintiff.

E. Richardson for the defendant.

COHEN, L.J., stated the facts and continued: The question is whether the defendant was negligent in not removing his motor-cycle from the highway. I agree with the learned judge that negligence is a failure to take due care in all the circumstances of the case, and that we have to look at all the circumstances in reaching a conclusion. On the facts of this case I am unable to acquit the defendant from all negligence. He was, no doubt, justified in stopping where he did, and, though I feel some doubt about it, I should be prepared to accept that it may not have been unreasonable on his part to try to fit the bulb before he moved the motor-cycle off the road on to the grass verge, but when he discovered that it was not merely the failure of the headlight, but observed that the tail-light was also out and that it was a question of finding where the breakdown in the electrical wiring was, the position was entirely different.

In those circumstances, there being no difficulty in moving the motor-cycle off the road, that was a precaution which it was plainly the defendant's duty to take, even if he had not seen the light of the plaintiff's motor-cycle. When he saw the light, however, and knew that there was some vehicle behind him, it seems to me to reinforce the view that he should have taken the easy precaution of moving the motor-cycle off the road. I do not think the reasons that he gave for not doing so can be accepted as satisfactory. He says that he thought he could complete the work before the plaintiff's motor-cycle came along. Having regard to the fact that he knew by this time that both lights were out and that there was a failure of the electrical system, I do not think it was a conclusion to which he was justified in coming or that he took the action appropriate to the circumstances. We have to be very careful before we take the view that there is no negligence in leaving a stationary obstacle on the road after lighting-up time when it is not plainly visible to approaching vehicles without the aid of full headlights and when it could easily be moved off the road. In those circumstances, some responsibility must rest on the defendant for leaving this obstacle on the side of the road. The learned judge based his conclusions in part on the difference between a motor lorry and a motor-cycle. From some points of view it is much more serious to leave unlighted a large lorry than a motor-cycle, because of the consequences which will ensue in the event of an accident, but what has been said about a lorry applies with some force also to the case of a motor-cycle. It may be when we come to the question of degree of responsibility that the difference between the two vehicles will come into play, but that is a different question. For these reasons, therefore, in my view, the defendant cannot be acquitted of responsibility.

Anyone who finds himself after lighting-up time with an unlighted vehicle on the road is negligent if he does not take any reasonable precaution to avoid an accident. What it is reasonable to do must depend on the circumstances of each case. If this road had been bounded by a wall or a high hedge, it may well be that the defendant would not have been negligent, but that was not the case.

Once one recognises that there was negligence, the defendant must have a share of the responsibility sufficiently large to prevent him taking the advantage of the maxim *de minimis non curat lex*. The amount of the contribution is always a difficult matter, but I have come to the conclusion that the proper answer to the question as to the share of responsibility is that the plaintiff was responsible to the extent of two-thirds and the defendant to the extent of one-third.

- A **SOMERVELL, L.J.:** On the question of liability, I am in disagreement with my learned brethren. This was a straight road. It was open in the sense that it had a verge and was not one in which foliage or fencing came to the edge of the road where the bicycle was which in certain circumstances might have made it more difficult for the plaintiff to see an unlighted obstacle.
- B There was no other traffic on the road. The defendant reasonably thought he could do this repair in a few minutes. In my view, he was entitled to succeed on the basis that he was plainly visible for a considerable distance to any oncoming motor traffic with ordinary headlights. Reliance is placed on the fact that he saw some way off the lights of the plaintiff's motor-cycle. What he saw indicated to him that it was a machine with an ordinary headlight,
- C and I should have thought he was entitled to assume he would be plainly visible for a period long enough for the plaintiff to pass on some part of the road other than that on which he was, and so avoid a collision. I would have come to the conclusion that there was no negligence in the defendant failing to take the motor-cycle on the verge at that stage.

- D **DENNING, L.J.:** I start with the proposition, which is clear beyond controversy, that this unlighted motor-cycle was a danger in the road. Any unlighted obstacle on a fast motor road is a danger to traffic. That is a proposition, not of law, but of common sense. SINGLETON, L.J., expressed the same view in *Henley v. Cameron* (1) when he said ([1949] L.J.R. 997):

" . . . unlighted vehicles or obstacles on a highway at night-time are a danger . . . "

- E The presence of an unlighted vehicle in a road is *prima facie* evidence of negligence on the part of the driver, and it is for him to explain how it came to be unlighted and why he could not move it out of the way or give warning to oncoming traffic. In the present case I do not think that the defendant gave a sufficient explanation. I could understand that, if there was a ditch along-
- F side so that he could not move the motor-cycle off the road, that might have been some explanation. Here, however, the edge of the main road was level with the grass verge which ran alongside it, and the motor-cycle could easily have been run on the verge so as not to be a danger. He had been stopped there some five minutes when the oncoming motor-cycle ran into his unlighted machine, and, on his own evidence, the oncoming machine was about three
- G feet out into the road. So the off-side of his machine must have been three feet out also. That was an important cause of the accident, and the defendant cannot escape responsibility for it. In apportioning the blame, I should for myself have been inclined to take the same proportions as TUCKER and SINGLETON, L.J.J., took in *Henley v. Cameron* (1), two-thirds to the unlighted vehicle and one-third to the approaching motor-cycle; but in deference to my
- H brothers, who think the plaintiff was very considerably to blame, I do not dissent from the proportion which has been suggested by COHEN, L.J.

Appeal allowed.

Solicitors: *Lowe & Co.* (for the plaintiff); *White & Co.* (for the defendant).

[*Reported by C. N. BEATTIE, ESQ., Barrister-at-Law.*]

SCOTT v. SCOTT.

[COURT OF APPEAL (Somervell and Birkett, L.J.J.), November 17, 1950.]

Husband and Wife—Maintenance—Application to High Court—Injunction to prevent husband removing assets outside jurisdiction pending hearing of application—Law Reform (Miscellaneous Provisions) Act, 1949 (c. 100), s. 5 (1).

A
A wife, who had taken out an originating summons applying for maintenance under the Law Reform (Miscellaneous Provisions) Act, 1949, s. 5 (1), applied to the court for an injunction to prevent the husband from removing his assets outside the jurisdiction of the court pending the hearing of the application for maintenance.

B
HELD: although s. 5 (1) of the Act of 1949 gave a new right to a wife, viz., to apply to the High Court for maintenance by way of originating summons, and although, under s. 5 (2) of the Act, the court had power to secure any payments ordered to be made under s. 5 (1), the new legislation did not affect in any way the principle, which had been laid down by earlier authorities, that a court had no power to restrain a person from dealing with his property when no order against him had been made, and, therefore, the court had no jurisdiction to grant the injunction. C

Newton v. Newton (1885) (11 P.D. 11), *Burmester v. Burmester* ([1913] P. 76), and *Jagger v. Jagger* ([1926] P. 93), applied.

[AS TO INJUNCTION RESTRAINING HUSBAND FROM DEALING WITH PROPERTY, see HALSBURY, Hailsham Edn., Vol. 10, p. 795, paras. 1261, 1262; and FOR CASES, see DIGEST, Vol. 27, pp. 548, 549, Nos. 6001-6013.] D

FOR THE LAW REFORM (MISCELLANEOUS PROVISIONS) ACT, 1949, s. 5, see HALSBURY'S STATUTES, Vol. 42, p. 574.]

Cases referred to:

- (1) *Newton v. Newton*, (1885), 11 P.D. 11; 55 L.J.P. 13; 27 Digest 549, 6005.
- (2) *Noakes v. Noakes and Hill*, (1877), 4 P.D. 60; 47 L.J.P. 20; 39 L.T. 47; 27 Digest 518, 5582.
- (3) *Sidney v. Sidney*, (1867), 17 L.T. 9; 27 Digest 507, 5446.
- (4) *Burmester v. Burmester*, [1913] P. 76; 82 L.J.P. 54; 108 L.T. 272; 27 Digest 507, 5449.
- (5) *Jagger v. Jagger*, [1926] P. 93; 95 L.J.P. 83; 135 L.T. 1; 27 Digest 507, 5450; Digest Supp.

F
INTERLOCUTORY APPEAL by the wife from an order of WALLINGTON, J., dated Oct. 24, 1950, whereby he held that he had no jurisdiction to grant an injunction to prevent the husband from removing his assets outside the jurisdiction of the court pending the hearing of an application by the wife for maintenance under the Law Reform (Miscellaneous Provisions) Act, 1949, s. 5.

G
The parties were married in 1931 and there were four children. On Sept. 15, 1950, the wife left the husband, taking two of the children with her. The husband paid her £10 a week, although he denied that he was liable to do so. On Oct. 19 the wife took out an originating summons applying for maintenance under s. 5 (1) of the Act of 1949, alleging cruelty by the husband. On Oct. 20, on an *ex parte* application by the wife, WALLINGTON, J., granted an interim injunction with effect from Oct. 21, 1950, restraining the husband from removing any of his assets outside the jurisdiction of the court pending the hearing and determination of the wife's application, and gave leave for short service of the summons for an injunction, which was to be returnable on Oct. 24. The summons was heard in open court, and it was contended on behalf of the wife (i) that the Supreme Court of Judicature (Consolidation) Act, 1925, s. 45 (1), was wide enough to entitle the court to grant an injunction in the terms asked for, and (ii) that the principle laid down by the earlier authorities, that an H

injunction of this kind could not be granted, no longer applied because s. 5 (1) of the Act of 1949 conferred a new right on a wife which extended her power to make good her right to maintenance for herself and the children. WALLINGTON, J., held that, notwithstanding the fact that a new right had been conferred on a wife by s. 5 (1), he was bound by the earlier authorities which decided that s. 45 (1) of the Act of 1925 did not extend the jurisdiction of the court to grant an injunction and laid down the principle that the court had

A no power to grant an injunction of the kind which was sought unless there was a subsisting order against the husband for payment of a sum of money by way of maintenance.

John Latey for the wife.

H. V. Brandon and Wakley for the husband.

B **SOMERVELL, L.J.**, stated the facts and continued: The question before us is one of jurisdiction. The wife's application for maintenance was made under the Law Reform (Miscellaneous Provisions) Act, 1949, s. 5, which provides:

C "(1) Where a husband has been guilty of wilful neglect to provide reasonable maintenance for his wife or the infant children of the marriage, the High Court in England, if it would have jurisdiction to entertain proceedings by the wife for judicial separation, may, on the application of the wife, order the husband to make to her such periodical payments as may be just; and the order may be enforced in the same manner as an order for alimony in proceedings for judicial separation. (2) Where the court makes an order under this section for periodical payments it may,

D if it thinks fit, order that the husband shall, to the satisfaction of the court, secure to the wife the periodical payments, and for that purpose may direct that a proper deed or instrument to be executed by all necessary parties shall be settled and approved by one of the conveyancing counsel of the court."

E Unaided by authorities I would have said that the decision of WALLINGTON, J., that he had no jurisdiction to grant an injunction before any order as contemplated by s. 5 (1) had been made was plainly right. The general principle of our law, that an injunction of this kind cannot be granted *quia timet* before some right to relief has been established, is well known, and, therefore, reading s. 5 of the Act of 1949 by itself and notwithstanding the fact that sub-s. (2) gives the court the power to secure the payments where an order under sub-s. (1) has been made, I would have said that, if the legislature had intended that a

F wife should be entitled to the safeguard for which the wife in the present case is applying—which (as counsel for the wife submitted) may be a very important one in some cases—it would have expressly so provided.

We are, however, not unaided by authorities. It has been held that an injunction of this kind cannot be granted under statutory provisions which,

G I agree, were different, but which seem to me for this purpose to be analogous. In *Newton v. Newton* (1) the headnote is:

"The court will not, in order to protect a wife's right to alimony, restrain a husband from removing his property out of the jurisdiction of the court before an order for alimony has been made."

H In a considered judgment SIR JAMES HANNEN, P., overruled *Noakes v. Noakes and Hill* (2), in which he had previously given a decision in a contrary sense. After examining the authorities, he considered the matter in the light of the principle and said (11 P.D. 13):

"... I come to the conclusion that as it has been decided that the Judicature Act [1873, s. 25 (8)*] does not give any enlarged powers

* The Supreme Court of Judicature Act, 1873, s. 25 (8), was repealed and replaced by the Supreme Court of Judicature (Consolidation) Act, 1925, s. 45.

to the court in this respect, it is not competent for a court, merely *quia timet*, to restrain a respondent from dealing with his property. The case would be different, of course, if the circumstances were the same as in *Sidney v. Sidney* (3). In that case that decision would be binding on me."

In *Sidney v. Sidney* (3) a decree absolute of marriage had been made in the wife's favour and the court had ordered permanent maintenance to be secured to her. On an application to MALINS, V.-C., an injunction was granted for her benefit to restrain the husband from dissipating his property for the purpose of putting it out of the control of the court. SIR JAMES HANNEN, P., said (11 P.D. 12) in *Newton v. Newton* (1):

"It is to be observed that in that case [*Sidney v. Sidney* (3)] there was, what there is not in this case, a subsisting order for the payment of the annuity."

The principle laid down in *Newton v. Newton* (1) was followed by SIR SAMUEL EVANS, P., in *Burmester v. Burmester* (4), and by this court in *Jagger v. Jagger* (5), although in the latter case there were also other grounds on which SCRUTTON, L.J., and SARGANT, L.J., thought that the matter could be decided. In *Jagger v. Jagger* (5) SCRUTTON, L.J., said ([1926] P. 102):

"I am not aware of any statutory or other power in the court to restrain a person from dealing with his property at a time when no order against him has been made."

In my judgment, the principle which is there stated stands in the way of the wife in the case now before us, and counsel for the wife is in a difficult position in asking us to disregard what has been so plainly approved by this court. I do not think that the distinctions which he emphasised between the position as it was before the Act of 1949 was passed and as it now is under s. 5 of the Act affect in any way the principle which was laid down in the cases to which I have referred. On the other hand, I think that the learned judge was right in saying that he had no jurisdiction to grant an injunction at this stage in the proceedings. For the reasons which I have given the appeal must be dismissed and the interim injunction treated as dissolved.

BIRKETT, L.J.: I agree. Counsel for the wife contends that, whatever may be the effect of the earlier authorities which were cited to the learned judge and to us and with which SOMERVELL, L.J., has dealt, a new situation has arisen since the Law Reform (Miscellaneous Provisions) Act, 1949, came into force, because s. 5 (1) thereof gave a new right to a wife, *viz.*, to apply for maintenance in the High Court by way of originating summons. Because of this new right (counsel contends), the principle laid down by the earlier decisions no longer applies and the injunction should be granted. That a new right was given to a wife by the Act of 1949 admits of no doubt, but I do not think that it affects in any way the principle which has been laid down in the cases which have been cited. Therefore, I am of the opinion that WALLINGTON, J., had no jurisdiction to grant the injunction which was sought.

Appeal dismissed.

Solicitors: *Rider, Heaton, Meredith & Mills*, agents for *Bellyse & Eric Smith*, Nantwich (for the wife); *Robinson & Bradley*, agents for *A. E. Whittingham & Son*, Nantwich (for the husband).

[Reported by J. D. PENNINGTON, Esq., Barrister-at-Law.]

THOMAS v. CUNARD WHITE STAR, LTD.
THE QUEEN MARY.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Willmer, J.), November 2, 1950.]

Costs—Taxation—Fatal accident—Action by administrator under Law Reform (Miscellaneous Provisions) Act, 1934—Grant of administration obtained solely for purpose of action—Administration expenses, incidental to increased value of estate, incurred after judgment—R.S.C., Ord. 65, r. 27 (29).

A
B
C
D
A seaman lost his life as a result of a collision at sea for which the defendants were held partly to blame, and the administrator of his estate obtained judgment for damages and costs in respect of his death in an action brought against the defendants under the Law Reform (Miscellaneous Provisions) Act, 1934. Apart from the damages recovered in the action, the estate of the deceased was so small that no grant of administration would have been required, and the administrator obtained the grant solely to enable him to bring the action. As a result of the damages recovered under the Act of 1934, the estate of the deceased was so increased in value that it was necessary for the administrator to file a corrective affidavit and to incur additional expenses in connection with the administration of the estate, and he included these additional administration expenses in his bill of costs in the action. The registrar, while allowing the expenses incurred in obtaining the grant, disallowed the additional administration expenses incurred after the judgment. On appeal to the judge,

HELD: as the additional administration expenses incidental to the increase in value of the estate were incurred after the plaintiff had recovered judgment and were in no way necessary to enable him to conduct the litigation, they could not be allowed on taxation under R.S.C., Ord. 65, r. 27 (29), as costs of the action.

Smith v. Buller (1875) (L.R. 19 Eq. 473), *applied*.

E
[AS TO TAXATION OF COSTS, see HALSBURY, Hailsham Edn., Vol. 26, p. 102, para. 192.

FOR R.S.C., ORD. 65, r. 27 (29), see THE ANNUAL PRACTICE, 1949, p. 1587.]

Cases referred to:

- F
(1) *Feay v. Barnwell*, [1938] 1 All E.R. 31; Digest Supp.
(2) *Smith v. Buller*, (1875), L.R. 19 Eq. 473; 45 L.J.Ch. 69; 31 L.T. 873; Digest, Practice, 948, 4882.

SUMMONS on a review of taxation adjourned into court for judgment.

G
H
A seaman, who lost his life as the result of an accident for which the defendants were held partly to blame, died intestate, but his estate was so small that no grant of administration would have been required. The plaintiff obtained a grant solely to bring an action against the defendants in respect of the death of the deceased, and he obtained judgment for damages and costs under the Law Reform (Miscellaneous Provisions) Act, 1934. On taxation of the costs of the action, the registrar allowed the expenses incurred by the plaintiff in obtaining the grant, but disallowed additional administration expenses, incidental to the increase in value of the estate, which were incurred after the judgment was given. The plaintiff appealed to the judge.

R.S.C., Ord. 65, r. 27 (29) provides:

“ On every taxation the taxing master shall allow all such costs, charges and expenses, as shall appear to him to have been necessary or proper for the attainment of justice or for defending the rights of any party, but save as against the party who incurred the same no costs shall be allowed

which appear to the taxing master to have been incurred or increased through over-caution, negligence or mistake or by payment of special fees to counsel or special charges or expenses to witnesses or other persons, or by other unusual expenses."

Bucknill for the plaintiff.

Olson for the defendants.

WILLMER, J.: This was a summons for review of taxation in respect of the plaintiff's costs of an action brought by him, as administrator of the estate of a deceased seaman, against the defendants as owners of the steamship *Queen Mary*. The deceased seaman lost his life as a result of a collision between the *Queen Mary* and H.M.S. *Curacao*, for which collision the *Queen Mary* was held partly to blame. The question raised by the summons was one of some novelty, and it was represented to me that the same question was likely to arise in connection with a number of other similar claims pending against the defendants in connection with the same casualty. I have, therefore, thought it right to adjourn the summons into court for judgment, so that my decision may be given in public as a guide to those interested in similar claims.

The plaintiff recovered judgment for damages and costs in respect of the death of the deceased, under the Law Reform (Miscellaneous Provisions) Act, 1934. There was no recovery of damages under the Fatal Accidents Acts. All the damages recovered, therefore, were for the benefit of the estate of the deceased, of which the plaintiff was administrator. It appeared that, apart from the damages recovered in this action, the estate of the deceased was so small that no grant of administration would have been required. A grant of administration was, however, obtained by the plaintiff in 1945, solely to enable the present action to be brought. The expenses incurred in obtaining this grant were included in the plaintiff's bill of costs in the action and were allowed by the registrar as being costs necessarily incurred for the due prosecution of the action, and no question arises in relation to those costs. As a result, however, of the damages recovered under the Law Reform (Miscellaneous Provisions) Act, 1934, the estate of the deceased was materially increased in value. It became necessary for the plaintiff, as administrator of the estate, to file a corrective affidavit, and certain further expenses were necessarily and properly incurred in connection with the administration of the estate. These further expenses were also included in the plaintiff's bill of costs in the present action, but were disallowed by the registrar. The plaintiff now objects to the disallowance of these costs, which, it is contended, were properly incurred in the prosecution of the action.

According to the registrar's answers to the objections, the disallowance of the items in question is in accordance with the uniform practice of the taxing masters of the Supreme Court. No authority to the contrary was brought to my attention, and no reported case was cited in which expenses of this character have been allowed as part of the costs of an action brought by an administrator in similar circumstances, although since the Act of 1934 came into force there must have been many cases in which similar expenses had to be incurred. Notwithstanding the uniform practice to the contrary, however, it is contended on behalf of the plaintiff that, in this and similar cases, the additional administration expenses incidental to the increase in value of the estate ought to be allowed as part of the costs of an action brought by the administrator against the wrongdoer who caused the death. It is pointed out that it is normal practice, in cases like the present, for the administrator to be required, on taking out the grant, to give an undertaking to file a corrective affidavit in the event of damages being recovered for the benefit of the estate. Although I am informed that in the present case no such undertaking was required to be given by the plaintiff, it is contended that he ought to be put in the same position as if such an undertaking had been given at the time of taking out the grant. On this

basis it is argued that the expenses incurred after judgment in connection with the increased value of the estate ought to be counted as part of the expenses of obtaining the grant, and as such should be allowed as costs properly incurred for the purpose of prosecuting the action.

I was referred by both sides to *Feay v. Barnwell* (1), but it appears to me that the decision in that case has very little relevance to the question now under consideration. It is authority for the proposition that, in assessing the amount by which an award of damages under the Fatal Accidents Acts ought to be reduced where damages are also awarded under the Law Reform (Miscellaneous Provisions) Act, 1934, regard may properly be had to the administration expenses which must necessarily be incurred in connection with the estate of the deceased. No suggestion was made in that case that expenses of the kind here in question could be dealt with as part of the costs of the action.

In my opinion, it is impossible to get away from the fact that the expenses here in question were incurred after the plaintiff had successfully prosecuted his action to judgment, and were in no sense necessary to enable him to obtain that judgment. It appears to me to be impossible notionally to ante-date these expenses and to treat them as part of the expenses of obtaining the grant, which they clearly are not. To do so would, in my view, be quite contrary to the provisions of R.S.C., Ord. 65, r. 27 (29). It was laid down by SIR RICHARD MALINS, V.-C. (L.R. 19 Eq. 475), in *Smith v. Buller* (2):

“ . . . the costs chargeable under a taxation as between party and party are all that are necessary to enable the adverse party to conduct the litigation, and no more.”

The costs here sought to be included were in no wise necessary to enable the plaintiff to conduct the litigation. They were incurred after the litigation was over, so as to enable the estate, increased in value as it was as the result of the litigation, to be properly administered. The defendants, however, had no concern with that, any more than they would have had if expenses had to be subsequently incurred in consequence of disputes arising between rival claimants over the distribution of the assets. In my judgment, the learned registrar, in disallowing these costs, came to a correct conclusion, and, accordingly, I dismiss the plaintiff's objections.

Application dismissed with costs.

Solicitors: *Botterell & Roche* (for the plaintiff); *Hill, Dickinson & Co.* (for the defendants).

[Reported by R. HENDRY WHITE, ESQ., Barrister-at-Law.]

MINT AND ANOTHER v. GOOD.

[COURT OF APPEAL (Somervell, Dénning and Birkett, L.JJ.), November 16, 17, 1950.]

Nuisance—Premises adjoining highway—Dwelling-house—Weekly tenancy—Collapse of wall—No express provision as to repairs—No right of entry reserved to landlord—Liability of landlord—Implication of right—Effect of Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (c. 17), s. 16 (2).

A wall separating from a public highway the forecourt of two houses within the Rent Restrictions Acts collapsed on the public footpath and injured the infant plaintiff who was thereon. The defective condition of the wall, which was due to lack of repair, could have been ascertained by inspection. The houses were let on weekly tenancies under oral agreements

to different tenants. No express provision was made in the agreements with regard to the liability for repairs and the landlord reserved no right of entry to effect repairs, but he had from time to time carried out repairs. In an action for damages against the landlord,

HELD: in the absence of evidence or of express stipulation to the contrary it was to be implied in an agreement for a weekly tenancy which was silent on the matter a term that the premises let would be kept in a reasonable and habitable condition by the landlord and that he would have the right to enter and effect necessary repairs; the duty of the landlord in the present case was to see that the wall was as safe as reasonable care could make it, and it was immaterial whether or not he had knowledge of the danger of its collapsing; and, therefore, he was liable to the infant plaintiff in damages.

Heap v. Ind Coope & Allsopp, Ltd. ([1940] 3 All E.R. 634), *Wringe v. Cohen* ([1939] 4 All E.R. 241), and *dictum* of LORD PORTER in *McCarrick v. Liverpool Corpn.* ([1946] 2 All E.R. 647), *applied*.

Stocker v. Planet Building Society (1879) (27 W.R. 877) and *Sedleigh-Denfield v. O'Callaghan* ([1940] 3 All E.R. 349), *distinguished*.

Per SOMERVELL, L.J.: There is great force in the view that s. 16 (2) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, does not import into a tenancy to which it applies a condition which is equivalent in form and consequences to an express reservation by the landlord of a right of access and entry to effect repairs. The sub-section only applies to a tenancy under which the landlord is entitled to execute repairs. In the present case the landlord was not so entitled.

Per DENNING, L.J.: (i) Even if the landlord of premises let at a rack-rent has no strict right (express or implied) to enter, but has been given permission to enter whenever he has asked, he should be held liable for damage caused to a passer-by because of lack of repair.

(ii) It is doubtful whether a landlord can now exempt himself from liability to passers-by by taking a covenant from the tenant to repair the structure adjoining the highway.

Quaere whether *Pretty v. Bickmore* (1873) (L.R. 8 C.P. 401) is still good law.

[AS TO LANDLORD'S LIABILITY FOR DANGEROUS PROPERTY, see HALSBURY, Hailsham Edn., Vol. 20, pp. 206-208, paras. 225-227, and Vol. 24, pp. 29, 30, paras. 54, 55; and FOR CASES, see DIGEST, Vol. 31, pp. 347, 348, Nos. 4892-4905.]

Cases referred to:

- (1) *Heap v. Ind Coope & Allsopp, Ltd.*, [1940] 3 All E.R. 634; [1940] 2 K.B. 476; 109 L.J.K.B. 724; 163 L.T. 169; 2nd Digest Supp.
- (2) *Wilchick v. Marks & Silverstone*, [1934] 2 K.B. 56; 103 L.J.K.B. 372; 151 L.T. 60; Digest Supp.
- (3) *Wringe v. Cohen*, [1939] 4 All E.R. 241; [1940] 1 K.B. 229; 109 L.J.K.B. 227; 161 L.T. 366; 2nd Digest Supp.
- (4) *McCarrick v. Liverpool Corpn.*, [1946] 2 All E.R. 646; [1947] A.C. 219; [1947] L.J.R. 56; 176 L.T. 11; 111 J.P. 6; 2nd Digest Supp.
- (5) *Stocker v. Planet Building Society*, (1879), 27 W.R. 877; 31 Digest 343, 4866.
- (6) *Tarry v. Ashton*, (1876), 1 Q.B.D. 314; 45 L.J.Q.B. 260; 34 L.T. 97; 40 J.P. 439; 34 Digest 163, 1274.
- (7) *Sedleigh-Denfield v. O'Callaghan*, [1940] 3 All E.R. 349; [1940] A.C. 880; 164 L.T. 72; *sub nom.* *Sedleigh-Denfield v. St. Joseph's Society for Foreign Missions*, 109 L.J.K.B. 893; 2nd Digest Supp.
- (8) *Barker v. Herbert*, [1911] 2 K.B. 633; 80 L.J.K.B. 1329; 105 L.T. 349; 75 J.P. 481; 36 Digest 197, 374.

(9) *Pretty v. Bickmore*, (1873), L.R. 8 C.P. 401; 28 L.T. 704; 37 J.P. 552; 31 Digest 345, 4881.

(10) *Donoghue v. Stevenson*, [1932] A.C. 562; 101 L.J.P.C. 119; 147 L.T. 281; Digest Supp.

APPEAL by the plaintiff from an order of STABLE, J., dated May 3, 1950, dismissing his action for damages for personal injuries against the owner of certain premises adjoining the highway. The facts appear in the judgment of SOMERVELL, L.J.

Sir Godfrey Russell Vick, K.C., and *Buckee* for the plaintiff.

P. M. O'Connor for the defendant.

SOMERVELL, L.J.: This is an appeal from a decision of STABLE, J., in a claim made on behalf of the infant plaintiff for personal injuries caused by an alleged nuisance.

On Apr. 25, 1948, the infant plaintiff, who was then ten years old, was injured by the collapse of a wall on a footpath, which was a highway for the purposes of the law. It was a low wall separating the forecourt of two houses from the footpath. The defendant is the landlord of the houses, which were let on weekly tenancies, the occupiers, who are, *prima facie*, the persons liable in nuisance, not having been sued. The learned judge found that there was a nuisance, and (although this may not matter in view of the law which has been laid down and is binding on this court) that a reasonable examination would have detected the defective condition of the wall. It was not a latent defect, and it was due to lack of repair. There was no contract by the landlord with his tenant to do any repairs, and there was no obligation on the tenant to do any repairs. The learned judge held that the landlord was not liable, because he had not specifically reserved the right to enter on the property.

In *Heap v. Ind Coope & Allsopp, Ltd.* (1), in somewhat similar circumstances proceedings were brought in nuisance against a landlord for injury sustained by the plaintiff while on a highway. The headnote in the case says ([1940] 2 K.B. 476):

“In order that a person injured while proceeding along a highway by the defective condition of premises alongside it may be entitled to sue the landlord instead of the occupying tenant for personal injuries, it is not necessary that the landlord should have covenanted with the tenant to do the external repairs; it is sufficient that he has reserved the right to enter on and view the premises and to do all necessary repairs.”

The judgment of the court was given by *MACKINNON, L.J.*, and he said ([1940] 3 All E.R. 637):

“It was held by *GODDARD, J.*, in *Wilchick v. Marks & Silverstone* (2) that, where a third party had been injured by the lack of repair of a house, and the landlords had not covenanted to do the repairs but had reserved a right to enter and do the repairs if they thought fit, that was sufficient to give the damaged third party a direct right of action against the landlord, and it did not merely limit him to a right against the occupier. *GODDARD, J.*, added to that suggested rule of liability a proviso that it could arise only in a case where the landlord knew, or had notice, of the defect or lack of repair in the property in question. That qualification or condition that the landlord must know that repairs are wanted or that the defect is existing, has, I think, been said to be incorrect in *Wringe v. Cohen* (3). If that qualification is taken away, then the decision of *GODDARD, J.*, otherwise, I think, approved in this court, seems to me to cover the position of *Ind Coope & Allsopp, Ltd.*, in the present case. *GODDARD, J.*, said ([1934] 2 K.B. 67): ‘If I use a highway the duty I am under not to injure other persons is not special or contractual, but

general, arising from what LORD ESHER used to call proximity. A property owner knows that his house if not repaired must at some time get into a dangerous state: he lets it to a tenant and puts him under no obligation to keep it repaired: it may be the tenant is one who from lack of means could not do any repairs. The landlord has expressly reserved to himself the right to enter and do necessary repairs: why then should he be under no duty to make it safe for passers by when he knows that the property is dangerous? The proximity is there: he has the right to enter and remedy a known danger. Is the injured person to be left in such a case only to a remedy against the tenant? In view of the later expression of opinion in *Wringe v. Cohen* (3), that passage has to be read omitting the words which I read: 'When he knows that the property is dangerous.' If one omits those words, that statement of GODDARD, J., exactly covers the position in this case. 'The landlord has expressly reserved to himself the right to enter and do necessary repairs: why then should he be under no duty to make it safe for passers by? The proximity is there: he had the right to enter and remedy a known danger. Is the injured person to be left in such a case with a remedy only against the tenant?' "

That decision, of course, binds this court unless it is inconsistent with some other decision or cannot stand with some decision of the House of Lords. I propose to proceed on the basis, in the first instance, that it does bind this court. The important words for the purpose of this case are "the landlord has expressly reserved to himself a right to enter." No such right to enter was expressly reserved in this case.

Counsel for the defendant referred to those words, "the landlord has expressly reserved to himself." It seems to me that the same principle must apply if a landlord has reserved to himself the right, whether he has done so impliedly or expressly. I cannot envisage any principle by which a landlord should be in one position in the case of an express reservation and in a different position in the case of an implied reservation. The question, therefore, here is whether, in the circumstances, a right to enter on and view the premises and do necessary repairs is to be implied. I would have said that there is no term which would be more easily and more necessarily implied by law in a tenancy of this kind than a right in the landlord to enter, to examine the premises, and to do necessary repairs. It must be in the contemplation of both parties to a weekly tenancy that the tenant will not be called on to do repairs, although the Rent Restrictions Acts have rather altered the position. Both sides must contemplate as the basis of the contract that the house will be kept in a reasonable and habitable condition by the landlord and not by the tenant, and, although the landlord does not bind himself to do so, both sides contemplate that he will have the right to enter and look after his property by doing repairs.

Counsel for the defendant has referred us on another part of his argument to *McCarrick v. Liverpool Corpn.* (4) which contains a statement by LORD PORTER with regard to weekly tenancies which I think is useful. It bears out the line of approach which I have just indicated, although not with regard to the subject-matter with which we are dealing here. The House of Lords were there considering the construction of the Housing Act, 1936, which put on the landlord a liability to repair in certain circumstances, and the question was whether he came under any liability until he had notice. In the course of his speech LORD PORTER said ([1946] 2 All E.R. 647):

"My Lords, in construing this statute its exact terms must be considered. It does not impose extraneously a duty on the landlord. It merely inserts a term into the tenancy agreement, and this term then becomes part of the contract between the parties, whether they wish it or not. In such a tenancy there is no reason why any term should not be implied provided

it is necessary to secure the business efficacy of the contract and it is not contrary to the provisions of the Act."

A It seems to me necessary for the business efficacy of a contract for the weekly tenancy of a house that the landlord should have the right which I have defined, and in the present case I think that that receives additional support from the facts. Any house which has, as this house had, something adjoining the highway which may become a nuisance will render the occupier *prima facie* liable if the nuisance occurs and causes damage, and that gives the occupier another reason for desiring that the landlord should have the power to keep the place in proper repair and prevent his (the occupier's) becoming liable to passers-by for nuisance. That is the conclusion to which I would have come in the absence of authority, and I asked counsel for the defendant what B was the best authority he could find which would suggest that I would be wrong in coming to that conclusion. He referred us to *Stocker v. Planet Building Society* (5), the headnote of which states (27 W.R. 877):

C "A lessor who, in the absence of express power in the lease, enters upon the demised premises to repair them on breach of the lessee's covenant to repair, even though under a superior lease the lessor is liable to forfeiture for non-repair and though he enters by leave of weekly sub-tenants, commits a trespass which will be restrained by injunction."

D It is plain that in that case the lease which was being considered was in writing and contained covenants dealing with repair, usual, no doubt, in a lease of that length, the tenant having the liability to repair. There was a power of re-entry on breach, but no power for the lessor to do repairs on the tenant's default. JAMES, L.J., said (*ibid.*, 878):

E "Where a reversioner has granted a lease with no power of re-entry reserved on breach of a covenant to repair, can he give himself the right to enter and do the repairs? It is a plain invasion of the rights of property. He has no more right than any stranger has."

F I agree that, if he has not the right expressly or impliedly, he cannot do it. I am not dealing with tenancies longer than weekly tenancies or where there are written documents expressly dealing with repair and re-entry, particularly if they are in conveyancing terms, nor am I dealing with all weekly tenancies. With regard to some weekly tenancies there may be express evidence that the parties had contracted on the basis of certain terms which either would exclude, or make more difficult, the implication which I make in the present case, but there being, as I see, no authority which prevents the implication in a case of this kind, it seems to me proper that the landlord's right to enter should be implied, and I think the implication is reinforced by the fact that the evidence shows that the landlord had previously done repairs. I do not think it would be right to base one's self on that, because, no doubt, the repairs might have been done by licence. Whether or not there was a right of re-entry, the occupying tenant would be very unlikely to seek to exercise a right to prevent the landlord putting the house in a better condition than it would otherwise be. So much for the first point, assuming that *Wringe v. Cohen* (3) is applicable and binds this court.

H Council for the defendant, however, submits, in view of two decisions on which he relies, and on the basis of certain inconsistencies in *Wringe v. Cohen* (3), that we should not regard ourselves as bound either by that case or by *Heap v. Ind Coope & Allsopp, Ltd.* (1). In *Wringe v. Cohen* (3) it was held ([1940] 1 K.B. 229):

"If, owing to want of repair, premises on a highway become dangerous and constitute a nuisance, so that they collapse and injure a passer-by or an adjoining owner, the occupier or owner of the premises, if he has

undertaken the duty to repair, is answerable, whether he knew or ought to have known of the danger or not."

Counsel submits that the case must proceed on the basis that the landlord neither knew, nor ought to have known, and, therefore, if *Wringe v. Cohen* (3) is wrong, the defendant in this case should not be held liable.

I will deal first with the internal criticisms. Counsel submitted, I think rightly, that there is probably a mistake in a reference ([1939] 4 All E.R. 247) to a note in *POLLOCK ON TORTS*, 14th ed., p. 417, but the judgment does not base itself solely on that. He submitted (I did not think there was much force in this) that the court had not really understood the *ratio* of *BLACKBURN, J.*'s decision in *Tarry v. Ashton* (6), but, in any event, I do not think those are grounds, even if they were substantiated, and I do not think they were, which would entitle us to disregard this decision. It is a perfectly plain decision laying down perfectly plain principles, and even if it could be shown that, in reviewing the authorities to see whether any of them were inconsistent with the principles being laid down, there had been some misunderstanding of some earlier case, that would not affect the matter. Apart from the note in *POLLOCK*, counsel did not satisfy me that there was any misunderstanding. Counsel then said that *Wringe v. Cohen* (3) could not stand with the decision of the House of Lords in *Sedleigh-Denfield v. O'Callaghan* (7). That case dealt with a different type of nuisance, and the distinction has been pointed out in more than one passage in the cases which have been read to us. *Wringe v. Cohen* (3) related to a nuisance arising from a failure to maintain property in repair; *Sedleigh-Denfield v. O'Callaghan* (7) is an example of a case where the nuisance comes into existence by the act of a trespasser and the question is in what circumstances the occupier becomes liable? It seems to me that those two different classes of cases may raise different principles. One has only to study them to see that one class may fall on one side of a line, and the other class on the other. It would seem obvious in the case of a nuisance created by a trespasser that it would be very hard if the occupier was held liable half-an-hour afterwards if he had no knowledge of the existence of any danger. Therefore, having regard to the subject-matter, I do not think *Sedleigh-Denfield v. O'Callaghan* (7) could possibly be treated by this court as overruling *Wringe v. Cohen* (3).

Counsel also particularly relied on *McCarrick v. Liverpool Corpn.* (4), to which I have already referred in another connection. There, again, the court was dealing with a completely different subject-matter, *viz.*, the position as between landlord and tenant, a statute having imposed on the landlord obligations to repair in circumstances in which they were not already imposed by the contract of tenancy, and it was held that the landlord was under no liability until he had notice. Counsel submitted it would be illogical if the tenant could not make any claim in respect of damage for want of repair unless the landlord had notice, but a person on the highway could. I do not myself see any illogicality in that, but, even if there is illogicality, it would not, in my view, entitle us to disregard *Wringe v. Cohen* (3). At the highest it would be an argument which could be addressed to the House of Lords in the event of their ever being asked to consider what was laid down in *Wringe v. Cohen* (3). Counsel for the defendant has failed to satisfy me that we can do anything other than apply the law as laid down in *Wringe v. Cohen* (3) and *Heap v. Ind Coope & Allsopp, Ltd.* (1).

STABLE, J., having considered *Heap v. Ind Coope & Allsopp, Ltd.* (1), said:

"In this case I am quite satisfied that the landlord had reserved no right to enter on either No. 193 or No. 195 for the purpose of doing repairs, or, indeed, for any purpose at all."

That is where I part company with the learned judge. For the reasons which I have given, I think this right is to be implied.

In those circumstances, it becomes unnecessary to consider a further point which was raised under the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 16 (2), and it is unnecessary for me to say any more about it except that I think there is great force in the view which the learned judge expressed on that point.* For these reasons I think the appeal must be allowed.

DENNING, L.J.: The law of England has always taken particular care to protect those who use a highway. It puts on the occupier of adjoining premises a special responsibility for the structures which he keeps beside the highway. If those structures fall into disrepair so as to be a potential danger to passers-by, they become a nuisance, and, what is more, a public nuisance, and the occupier is liable to anyone using the highway who is injured by reason of the disrepair. It is no answer for him to say that he and his servants took reasonable care, for, even if he has employed a competent independent contractor to repair the structure, and has every reason for supposing it to be safe, the occupier is still liable if the independent contractor did the work badly: see *Tarry v. Ashton* (6). The occupier's duty to passers-by is to see that the structure is as safe as reasonable care can make it—a duty which is as high as the duty which an occupier owes to people who pay to come on his premises. He is not liable for latent defects which could not be discovered by reasonable care on the part of anyone, nor for acts of trespassers of which he neither knew nor ought to have known: see *Barker v. Herbert* (8); but he is liable when structures fall into dangerous disrepair, because there must be some fault on

* On this question, STABLE, J., said: Counsel for the plaintiff referred to the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 16 (2), which provides:

“It shall be deemed to be a condition of the tenancy of any dwelling-house to which this Act applies that the tenant shall afford to the landlord access thereto and all reasonable facilities for executing therein any repairs which the landlord is entitled to execute.”

He argued that this sub-section imports into the tenancy a condition exactly equivalent in form and in all its consequences to an express reservation by the landlord of a right of access and entry for the purpose of effecting repairs. That seems to me to be a most revolutionary alteration in the law. One cannot, unless one is driven to it, put such an interpretation on that sub-section if the effect is that in every case where there is house property within the scope of the Act, albeit the landlord has not covenanted to do any repairs nor reserved any right to enter the property for the purpose of repairing it or otherwise, and, perhaps, even where the tenant has expressly covenanted to do the repairs, the landlord is to be made responsible for the injuries sustained by third persons as a result of a nuisance arising from the defective state of the property, notwithstanding the fact that he might have no knowledge at all or only when told by the tenant that the property was defective. In my view, a sub-section of that kind in this highly specialised Act cannot possibly have been intended to affect, and does not affect, the position of a landlord in relation to third parties in a matter lying entirely outside the scope of the Rent Restrictions Acts. The condition of the tenancy that is imported is that the tenant should afford to the landlord access to the dwelling-house and all reasonable facilities for executing therein any repairs which he is entitled to execute. I think that, unless one can put one's finger on some repairs which the landlord is entitled to execute as a matter of right, this sub-section has no operation. In the present case the landlord had no right to execute any repairs. He had parted with the property which was in the exclusive occupation of the tenants and the tenancies were only weekly ones. So far as the authorities are concerned on this particular point, there are none, but I was referred to the judgment of LORD HANWORTH, M.R., in *Morgan v. Liverpool Corpn.* ([1927] 2 K.B. 131). LORD HANWORTH, M.R., said (*ibid.*, 140): “. . . throughout the whole code laid down by these [Rent Restrictions] Acts there does not appear to me to be an implication that one is to take those Acts as incorporated into tenancies and to find an alteration of the relation between landlord and tenant which is to be implied from their terms. The Acts appear to me to have been passed *alio intuitu*.” I may say that *a fortiori* it does not appear to me to be an implication that one is to take those Acts as effecting a substantial alteration of the relation between the owner of a reversion, or a landlord, and third parties who have been injured by the failure of the occupier to keep his property in such a state of repair as not to constitute a nuisance, including, of course, injury to third persons on a highway.

the part of someone for that to happen and he is responsible for it to persons using the highway, even though he was not actually at fault himself. That principle was laid down in this court in *Wringe v. Cohen* (3) ([1939] 4 All E.R. 243), where it is to be noted that the principle is confined to "premises on a highway."

The question in this case is whether the owner, as well as the occupier, is under a like duty to passers-by. I think he is. The law has shown a remarkable development on this point during the last sixteen years. The three cases of *Wilchick v. Marks & Silverstone* (2), *Wringe v. Cohen* (3), and *Heap v. Ind Coope & Allsopp, Ltd.* (1), show that the courts are now taking a realistic view of these matters. They recognise that the occupying tenant of a small dwelling-house does not in practice do the structural repairs, but the owner does, and that, if a passer-by is injured by the structure being in dangerous disrepair, the occupier has not the means to pay damages, but the owner has, or, at any rate, he can insure against it. If a passer-by is injured by the structure falling on him, he should be entitled to damages from someone, and the person who ought to pay is the owner, because he is in practice responsible for the repairs. Just as, in a practical world, masters are responsible to third persons for the faults of their servants, so also should owners, who let houses at a rackrent, be responsible to passers-by for the safety of the structures out of which the rent issues. Parliament has long made them responsible for nuisances under the Public Health Acts, 1875 to 1936, and I think the time has now come when the common law should make them responsible for public nuisances due to the disrepair of the structure.

This seems to me to be a logical consequence of the cases to which we have been referred. In *Wilchick v. Marks & Silverstone* (2) the landlord had covenanted to repair. In *Heap v. Ind Coope & Allsopp, Ltd.* (1) he had not covenanted to repair, but had reserved a right to enter. In the present case he has not reserved a right to enter, but he has in practice always done the structural repairs. I cannot think that the liability of the owner to passers-by depends on the precise terms of the tenancy agreement between the owner and the tenant. That is no concern of the passer-by. If a landlord is liable when he reserves an express right to enter, he is also liable when he has an implied right. Even if he has no strict right, but has been given permission to enter whenever he asks, it should make no difference. The landlord has in practice taken the structural repairs on himself and should be responsible for any disrepair.

That is sufficient for the decision of this case, but I venture to doubt in these days whether a landlord can exempt himself from liability to passers-by by taking a covenant from a tenant to repair the structure adjoining the highway. I know that in *Pretty v. Bickmore* (9) a landlord managed to escape liability for a coal-plate which was in dangerous disrepair, because he took from the tenant a covenant to repair. I doubt whether he would escape liability to-day. The liability of the owner is a liability in tort and cannot be affected by the terms of the agreement between himself and his tenant. Just as a manufacturer who is liable under the principle in *Donoghue v. Stevenson* (10) cannot exempt himself from liability to the public by the terms of his contract with the wholesaler, so also I should doubt whether a property owner could exempt himself by the terms of his contract with the tenant. In this case the learned judge found that the condition of the wall was a nuisance and that a reasonable examination by a competent person would have detected the condition in which it was. That means that the duty of the landlord to see that the structure was as safe as reasonable care could make it was not fulfilled. I agree, therefore, that the appeal should be allowed.

BIRKETT, L.J.: I agree. In the course of the argument counsel for the defendant, I thought, conceded that, save for one matter, the facts in this

case were on all fours with those in *Heap v. Ind Coope & Allsopp, Ltd.* (1). The one matter which differentiated the present case was that in *Heap v. Ind Coope & Allsopp, Ltd.* (1) the landlord had expressly reserved to himself the right to enter on the premises at any time to do the repairs, while in this case there was no such term. It was on that point that the decision in the court below turned. I understood counsel also to agree that if the obstacle in the present case that there was no express reservation, whereas in *Heap v. Ind Coope & Allsopp, Ltd.* (1) there was, could be surmounted, this case would be on all fours with *Heap v. Ind Coope & Allsopp, Ltd.* (1), with the consequence that that case would be binding on this court and would be fatal to counsel's contention. I am of opinion that in this case that obstacle is overcome by implying a term giving the right of entry. My Lord dealt in some detail with the reasons why that appears in this case to be a necessary implication, and I will not attempt to re-state them. It is enough for me to say that I most fully agree with them, and, that being so, the only difference between the present case and *Heap v. Ind Coope & Allsopp, Ltd.* (1) is removed.

I agree with what has been said about the importance of the public highway cases, and it is at least some satisfaction to think that in the case of a weekly tenancy of this kind an innocent member of the public who is injured on the highway through no fault of his own by a defect in the premises may, under our law, as it is now interpreted, be able to recover.

Appeal allowed.

Solicitors: *Halliday & Co.* for the plaintiff); *Hewitt, Woollacott & Chown* (for the defendant).

[*Reported by F. GUTTMAN, Esq., Barrister-at-Law.*]

BAILEY v. BULLOCK AND OTHERS.

[KING'S BENCH DIVISION (Barry, J.), October 5, 6, 13, 1950.]

Contract—Breach—Damages—Measure—Inconvenience and discomfort—Annoyance and mental distress—Loss of social prestige—Decision by husband and wife not to have child.

Solicitor—Breach of duty—Client's action founded in contract—Measure of damages.

The plaintiff owned a dwelling-house which he let to B., and he was also the proprietor of an hotel in which he resided. In 1947 he sold the hotel, giving up possession on July 6, 1947. He desired to regain possession of the house for his occupation, and in June, 1947, he instructed S., the managing clerk of the defendants (a firm of solicitors), to press urgently for possession. S., who had acted in the sale of the hotel, was aware of the fact that the plaintiff and his wife and child had no other living accommodation. The plaintiff sought temporary shelter in the small house of his wife's parents, where he, his wife, and their child shared one bedroom, but S. took no steps to obtain possession of the house until Dec. 31, 1948, when he served a notice to quit, having in the meanwhile followed an elaborate system of deception by means of which he persuaded the plaintiff that a summons had been issued and that there were genuine reasons for the failure of the matter to come before the court. On Mar. 31, 1949, the plaintiff, who had repeatedly pressed for information and expedition, discovered the deception and consulted other solicitors, obtaining posses-

sion of the house soon afterwards. In an action against the defendants for negligence, and/or breach of duty, in which the defendants admitted breach of duty, the plaintiff claimed damages for the inconvenience and discomfort to which he had been subjected.

HELD: (i) the plaintiff's claim was founded in contract rather than in tort.

Groom v. Crocker ([1938] 2 All E.R. 394), *applied*.

(ii) the plaintiff was entitled to recover damages for the inconvenience and discomfort which he had suffered as a direct result of the defendants' breach of contract.

Burton v. Pinkerton (1867) (L.R. 2 Exch. 340) and *Hobbs v. London and South-Western Ry. Co.* (1875) (L.R. 10 Q.B. 111), *applied*.

But (a) the plaintiff could not recover in respect of the annoyance and mental distress which he had suffered.

Groom v. Crocker (*supra*) and *Addis v. Gramophone Co., Ltd.* ([1909] A.C. 488), *applied*.

or (b) in respect of the fact that the plaintiff and his wife, in view of their lack of living accommodation, had not thought it possible for them to have another child.

[AS TO DAMAGES FOR PAIN AND SUFFERING, see HALSBURY, Hailsham Edn., Vol. 10, p. 111, para. 139; and FOR CASES, see DIGEST, Vol. 17, pp. 130-135, Nos. 380-412.]

Cases referred to:

- (1) *Groom v. Crocker*, [1938] 2 All E.R. 394; [1939] 1 K.B. 194; 108 L.J.K.B. 296; 158 L.T. 477; Digest Supp.
- (2) *Addis v. Gramophone Co., Ltd.*, [1909] A.C. 488; 78 L.J.K.B. 1122; 101 L.T. 466; 17 Digest 78, 1.
- (3) *Burton v. Pinkerton*, (1867), L.R. 2 Exch. 340; 36 L.J.Ex. 137; 17 L.T. 15; 31 J.P. 615; 17 Digest 97, 126.
- (4) *Hobbs v. London and South-Western Ry. Co.*, (1875), L.R. 10 Q.B. 111; 44 L.J.Q.B. 49; 32 L.T. 252; 39 J.P. 693; 17 Digest 95, 106.

ACTION for damages for negligence and/or breach of duty.

The plaintiff, an hotel proprietor, was the owner of a dwelling-house and property, subject to the Rent and Mortgage Interest Restrictions Acts, at 172, Woodcock Hill, Kenton, Middlesex, which he had let on a weekly tenancy to a tenant at a rent of £1 15s. a week. In 1946, wishing to sell the house at the enhanced price obtainable with vacant possession, he instructed the defendants to institute proceedings for possession. On Feb. 26, 1947, the action was dismissed owing to an omission to serve a valid notice to quit. The plaintiff assumed from a conversation with a managing clerk of the defendants, Mr. Simmonds, that fresh proceedings would be instituted. In 1947 the plaintiff sold his hotel (in which he was living), giving up possession on July 6. He informed Mr. Simmonds, who had acted for him in the sale, that he had nowhere to go except to his parents-in-law, and said that he wished to live in his own house as soon as an order for possession could be obtained. He emphasised that possession of his house was urgently required, repeatedly pressed for news of the progress of his action, and made plain the serious consequences of delay. He was assured that proceedings had been commenced, but, in fact, notice to quit was not served until Dec. 31, 1948, and the tenant's solicitors were not informed of the intention to commence proceedings until Jan. 6, 1949. On Mar. 31, 1949, the plaintiff discovered that no proceedings had been commenced. He instructed fresh solicitors, commenced proceedings, and in due course obtained possession of his house. He claimed damages against the defendants for breach of duty arising from the conduct of their managing clerk. The plaintiff claimed as special damages the cost of storing his furniture, garage

expenses and doctor's fees paid in respect of an illness of his wife which, he alleged, resulted from the strain of the difficult living conditions at his wife's parents' home, and he also claimed general damages in respect of the inconvenience and discomfort which he had suffered. The defendants admitted the breach of the contractual duty which they owed to the plaintiff, and disputed the claim for special damages (except those claimed in respect of the wife's illness) only as to amount, but they resisted the claim for general damages.

Scott Henderson, K.C., and Wilson, K.C., for the plaintiff.
P. M. O'Connor for the defendants.

Cur. adv. vult.

Oct. 13. **BARRY, J.**, stated the facts, held that the plaintiff was entitled to recover the reasonable cost of storing furniture and also his garage expenses reasonably incurred, subject to the deduction of an amount equivalent to that of the general and water rates which would have been payable by him in respect of his house during the relevant period if he had been in occupation of it, but that the expenses of the wife's illness were too remote, and continued: I now turn to the one important issue in this case. In addition to the items of special damage to which I have just referred, counsel for the plaintiff contends that his client is entitled to recover substantial damages for the inconvenience and discomfort to which he has been subjected as a result of this admitted breach of duty on the part of the defendants. Counsel for the defendants, on the other hand, submitted that the plaintiff's claim—however framed—was in essence a claim founded on contract, and that, in assessing the damages for this breach of contract, the court can compensate the plaintiff only for the actual pecuniary loss which he has sustained and proved and can allow him nothing by way of general damages in respect of the inconvenience and discomfort he has suffered, even though he establishes that this inconvenience and discomfort were the direct results of the defendants' breach.

That the plaintiff's claim is founded in contract rather than tort is, I think, beyond doubt. The Court of Appeal, following a number of earlier decisions, decided in *Groom v. Crocker* (1) that the mutual rights and duties of a solicitor and his client are regulated by the contract of employment, and that, in the absence of any duty other than that imposed by the contract, a solicitor is not liable to his client in tort. Counsel for the plaintiff did not seriously dispute this proposition, and I am satisfied that in the present case the plaintiff can only recover such damages as may be properly awarded for a breach or series of breaches of contractual duty.

In contending that damages for breach of contract may not include compensation for inconvenience and discomfort, however real and however serious, counsel for the defendants principally relied on certain passages in their lordships' judgments given in *Groom v. Crocker* (1). **SIR WILFRID GREENE, M.R.**, said ([1938] 2 All E.R. 401):

"It was said that, as the result of the negligence on the part of the appellants, the respondent was subjected to mental suffering, that he was held up to public disapproval, and that his reputation as a careful driver was destroyed, and that the jury were entitled to award damages in respect of these matters. It was said that the action was an action in tort and not in contract, and that, even if it were an action in contract, such damages were recoverable."

The Master of the Rolls goes on to discuss the question whether the claim is truly founded in contract or tort and says (*ibid.*, 402):

"No authority was cited to us which supports the proposition that, in an action based on breach of contract, damages can be recovered in respect of the matters to which I have referred. No pecuniary loss arose from

them, and no reasonable probability of pecuniary loss in the future could be shown."

SCOTT, L.J., said (*ibid.*, 415):

"As regards the £1,000 damages for which he got judgment, however, I feel bound to differ from the judge. I do not think there was any evidence of pecuniary loss such as might be recoverable as special damage for breach of contract; and against general damages for injury to his reputation or his feelings, *Addis v. Gramophone Co., Ltd.* (2) is, I think, a conclusive authority. The cases cited to us by Mr. Pritt do not, in my opinion, sustain his contentions that 'general' damages are recoverable even in contract so as to put the amount at large for the jury to assess as in tort for defamation or negligence."

He then refers to the somewhat peculiar case of a bank dishonouring a cheque, and goes on (*ibid.*):

"However serious to the respondent was the result of the very real breach of contract committed—and I have much sympathy with him—I think that the £1,000 must be reduced to 40s. as nominal damages, although I share the regret expressed by the Master of the Rolls."

Lastly, MACKINNON, L.J., says (*ibid.*, 418):

"Next, as to the £1,000 damages for breach of duty. I am clear that this is a claim for damages for breach of contract, and that the plaintiff can recover only the pecuniary loss that he can show that he has suffered. He can prove no such loss in this case. Therefore, the damages must be reduced to 40s."

The court was there considering a case in which the jury had awarded substantial damages for injuries to the plaintiff's reputation and feelings, and, reaching the conclusion that they did, they were guided by the authority of the House of Lords in *Addis v. Gramophone Co., Ltd.* (2). This was the second case on which counsel for the defendants relied in support of his argument, but again the damages which were sought to be recovered were damages for injured feelings and loss of reputation alleged to have arisen from wrongful dismissal of the plaintiff.

In my judgment, it is fallacious to divorce the judgments in these two cases from their particular context, and, to support a wider proposition of law to which the mind of the court was not directed, to rely on the generality of some of the expressions which may have been used. It is clear from these two authorities that the plaintiff cannot recover damages for the annoyance or mental distress which he may have suffered as a result of the defendants' default, nor can he be compensated for any loss of social prestige which may have fallen on him through being so long a lodger in his father-in-law's house instead of being an independent householder living with his family in his own establishment. Indeed, if I understand his argument aright, counsel for the plaintiff does not suggest that his client should be awarded damages under these heads. On the other hand, I am equally satisfied that in the two cases I have mentioned neither the House of Lords nor the Court of Appeal intended to, or did, in fact, overrule or question the authority of a number of earlier decisions, which, in my judgment, make it abundantly clear that damages may be recovered for substantial inconvenience and discomfort caused by a breach of contract. In particular, I refer to *Burton v. Pinkerton* (3) and *Hobbs v. London and South-Western Ry. Co.* (4), both of which cases were cited and relied on by counsel for the plaintiff.

To my mind, there is a very real difference between mere annoyance and injury to feelings, on the one hand, and physical inconvenience, on the other. This difference is made clear in a short passage in the judgment of MELLOR, J., in *Hobbs' case* (4), where he says (L.R. 10 Q.B. 122):

A "I quite agree with my brother PARRY, that for the mere inconvenience, such as annoyance and loss of temper, or vexation, or for being disappointed in a particular thing which you have set your mind upon, without real physical inconvenience resulting, you cannot recover damages. That is purely sentimental, and not a case where the word inconvenience, as I here use it, would apply. But I must say, if it is a fact that you arrived at a place where you did not intend to go to, where you are placed, by reason of the breach of contract of the carriers, at a considerable distance from your destination, the case may be otherwise. It is admitted that if there be a carriage you may hire it and ride home and charge the expense to the defendants. The reason why you may hire a carriage and charge the expense to the company is with the view simply of mitigating the inconvenience to which you would otherwise be subject; so that where the inconvenience is real and substantial arising from being obliged to walk home, I cannot see why that should not be capable of being assessed as damages in respect of inconvenience."

B
C The other members of the court deciding *Hobbs'* case (4) delivered judgments in the same sense, and the court was clearly of opinion that in a case based on a breach of contract alone damages could be awarded for serious physical inconvenience and discomfort.

D During the course of the argument before me, counsel for the defendants was disposed to admit that if in the present case the plaintiff had chosen to mitigate the discomfort to which he was subjected by taking rooms for himself and his family at an hotel or making other arrangements for his accommodation, it would have been extremely difficult for the defendants to have resisted a claim for special damages based on the cost of such accommodation. It would, indeed, be curious if, in the circumstances of this case, because the plaintiff suffered the inconvenience rather than incur expense to avoid it, he should be deprived of any remedy. Such, in my opinion, is not the law. I consider that *Hobbs'* case (4) and *Burton v. Pinkerton* (3) clearly establish that in a proper case damages for personal inconvenience may be recoverable in an action of this kind.

E It, therefore, remains for me to consider whether in the present case the plaintiff has proved that he did in truth suffer substantial inconvenience and that this inconvenience was a direct result of the defendants' breach, and, lastly, that the damage which he has suffered is not too remote to be recoverable, or, in other words, whether his inconvenience should have been reasonably contemplated by the defendants as a probable result of their failure to perform their contractual duties. On the evidence there can be only one possible answer to these three questions. The plaintiff has given me detailed evidence as to the conditions obtaining in his parents-in-law's house during the long period that he was forced to reside there. He and his wife had a small boy, then aged, F I think, about six. They were compelled, all three of them, to share one bedroom. Then, his father-in-law and mother-in-law were both elderly people, one seventy-one and the other seventy. He has described to me in detail the discomforts and inconveniences of the life which he was forced to live for so long a time. He has told me that as a result of this mode of life he and his wife did not think it possible for them to have another child, but that is not, G I think, a matter to which I can properly attach weight when assessing the damages which the plaintiff should receive. That this discomfort and inconvenience were the direct result of the defendants' negligence appears to me to be obvious. It was the duty of the defendants to take proper steps to obtain possession of the plaintiff's house. They failed to do so, and as a direct consequence he had either to live in discomfort or to spend money in obtaining alternative accommodation. That this inconvenience and discomfort were likely to arise from the defendants' breach of duty was brought home to them H

in no uncertain terms by letters written by the plaintiff. This is not a case in which they ought to have contemplated that these consequences would result from their breach; it is a case in which the consequences of the breach were brought to their notice in the clearest possible terms. In assessing the damages for discomfort and inconvenience of this nature, I must not be extravagant. Taking all the circumstances into account, I think that the proper sum to award the plaintiff under this head is the sum of £300.

Judgment for the plaintiff with costs. A

Solicitors: *Webb, Justice & Co.* (for the plaintiff); *Hewitt, Woollacott & Chown* (for the defendants).

[*Reported by F. A. AMIES, Esq., Barrister-at-Law.*] B

NOTE.

R. v. FRANKS. C

[COURT OF CRIMINAL APPEAL (Lord Goddard, C.J., Hilbery and Parker, JJ.), November 27, 1950.]

Customs—Indictment—Importing prohibited goods—Need to allege intent to evade prohibition—Customs Consolidation Act, 1876 (c. 36), s. 186. D

APPEAL against conviction and sentence.

The appellant, Henry Franks, was convicted at Southampton Quarter Sessions on an indictment which charged him with being concerned in importing prohibited goods, contrary to the Customs Consolidation Act, 1876, s. 186, and he was fined £25 and ordered to pay £42 costs.

[AS TO DEFECTIVE INDICTMENTS, see HALSBURY, Hailsham Edn., Vol. 9, p. 139, para. 182; and FOR CASES, see DIGEST, Vol. 14, pp. 231-234, Nos. 2175-2196.] E

Case referred to:

- (1) *Frailey v. Charlton*, [1920] 1 K.B. 147; 88 L.J.K.B. 1285; 121 L.T. 577; 83 J.P. 249; 14 Digest 37, 76.

Flowers, K.C., and *A. P. Fletcher* for the appellant. F
Molony for the Crown.

THE COURT, applying *Frailey v. Charlton* (1), a case under another branch of s. 186, held that the count on which the appellant was convicted was bad because it did not contain an allegation that what he did was done with intent to evade the prohibition imposed. G

Conviction quashed.

Solicitors: *Langhams & Letts*, agents for *Niedermayer & Dalton*, Eastbourne (for the appellant); *Solicitor, Customs and Excise* (for the Crown).

H. McL. M.

DEVINE v. LONDON HOUSING SOCIETY, LTD.

[KING'S BENCH DIVISION (Croom-Johnson, J.), November 2, 3, 10, 1950.]

Landlord and Tenant—Access to demised premises—Maintenance—Duty of landlord—Stairway—Lighting.

In an action against the landlord for damages for personal injuries resulting from a fall on a staircase during the hours of darkness the tenant of a flat contended that her accident was caused by a breach of the contract of tenancy. The flat was on the seventh floor of a block of flats, and in the tenancy agreement there was no express undertaking by the landlords to provide any means of access to the demised flat or to light or keep in order the staircase. Before September, 1939, the landlords kept the staircase lighted until late at night, but during the war only pin-point lamps outside the door of the lift were provided on each landing. In 1945, when war-time restrictions were removed, the lighting was partly restored, and by 1947 it was the same as before the war. In 1948, to save current, the landlords installed a system of automatic control by means of a clock, but this system worked erratically.

HELD: the stairway was a way of necessity to enable the tenant to reach the demised premises; there was an obligation on the landlords to keep the stairway reasonably safe for the use of the tenant; but in the circumstances of the present case there was not to be implied in the tenancy agreement a covenant by the landlords to maintain a reasonable standard of lighting on the staircase, and they were not liable for breach of the agreement.

Dunster v. Hollis ([1918] 2 K.B. 795), distinguished.

[AS TO AN IMPLIED UNDERTAKING BY THE LANDLORD OF FLATS TO LIGHT THE STAIRCASE, see HALSBURY, Hailsham Edn., Vol. 20, p. 337, para. 405; and FOR CASES, see DIGEST, Vol. 31, pp. 99-101, Nos. 2380-2388, Digest Supp., and 2nd Digest Supp.]

Cases referred to:

- (1) *Dunster v. Hollis*, [1918] 2 K.B. 795; 88 L.J.K.B. 331; 120 L.T. 109; 31 Digest 100, 2385.
- (2) *Miller v. Hancock*, [1893] 2 Q.B. 177; 69 L.T. 214; 57 J.P. 758; 31 Digest 99, 2380.
- (3) *Taylor v. Whitehead*, (1781), 2 Doug. K.B. 745; 99 E.R. 475; 43 Digest 416, 393.
- (4) *Huggett v. Miers*, [1908] 2 K.B. 278; 77 L.J.K.B. 710; 99 L.T. 326; 31 Digest 100, 2386.
- (5) *Dobson v. Horsley*, [1915] 1 K.B. 634; 84 L.J.K.B. 399; 112 L.T. 101; 31 Digest 100, 2383.
- (6) *R. v. Paddington and St. Marylebone Rent Tribunal, Ex p. Bedrock Investments, Ltd.*, [1947] 2 All E.R. 15; [1947] K.B. 984; 176 L.T. 562; 111 J.P. 367; *affd.*, [1948] 2 All E.R. 528; [1948] 2 K.B. 413; [1949] L.J.R. 284; 112 J.P. 367; 2nd Digest Supp.
- (7) *R. v. Croydon Rent Tribunal, Ex p. Chalkley*, (1948), 92 Sol. Jo. 720; 2nd Digest Supp.
- (8) *Broggi v. Robins*, (1899), 15 T.L.R. 224; 31 Digest 346, 4889.

ACTION for damages for breach of contract and, alternatively, for negligence.

The tenant was the weekly tenant of a one-roomed flat on the seventh floor of a block of flats at 50, Queen Alexandra Mansions, Judge Street, London. There was no undertaking by the landlords in the contract of tenancy to provide any means of access to the demised flat or to keep in order the common staircase or to light or to maintain a system of lighting. A lift was provided, but only to the sixth floor. To reach her flat, therefore, the tenant had to use the staircase. On May 28, 1949, she was ascending from the sixth to the seventh floors in the dark

when she stumbled on the stairs, fell, and was injured. The tenant contended that the failure to light the staircase was a breach of the contract of tenancy which imposed on the landlords the obligation to provide safe access to her flat. The alternative claim for negligence was dismissed on the facts and the case is only reported on the issue of the alleged breach of contract.

Croom-Johnson (R. Marven Everett with him) for the tenant.

Dare for the landlords.

Cur. adv. vult.

Nov. 10. **CROOM-JOHNSON, J.**, found as a fact that there was no contributory negligence on the part of the tenant when climbing the stairs, and continued: The question is whether, having regard to the obligations which the landlords have undertaken in letting these premises, they are liable to compensate the tenant or whether there is some other duty on them outside any resulting from the relationship of landlord and tenant between the parties. So far as the room let to the tenant is concerned, there is no covenant, express or implied, on the part of the landlords to do any repairs, whether structural or otherwise. In *FOA ON THE LAW OF LANDLORD AND TENANT*, 7th ed., p. 132, para. 215, the learned author says this in regard to a building let in floors:

"In the case of the letting of floors or flats in a building, where the only access to them is by a staircase which is not part of the property demised, but the legal possession and control of which remain in the landlord, the rule is that as between the parties themselves, the tenant having a contractual right with his landlord to use the staircase, there is a corresponding obligation on the latter to use reasonable care in providing safe access to the premises . . ."

The authority cited for that proposition is *Dunster v. Hollis* (1). One of the tenant's difficulties here is that this is not a case of non-repair. The learned author goes on:

" . . . knowledge by the tenant of any defect which may give rise to injury affords in itself no answer to a claim by him, though it may be evidence of contributory negligence on his part that may disentitle him to recover."

There it is called a "contractual" right. With great respect to those learned judges who have examined this problem, I prefer to deal with it on the basis that this was an easement of necessity. The tenant is entitled as against the landlords to exclusive possession of these premises so long as she remains the tenant, pays the rent, and does not offend against the relevant provisions in the Rent Restrictions Acts, 1920 to 1939. Accordingly, there is a way of necessity, which the landlords must provide for her to enable her to get to the premises.

Broadly speaking, a person who has a right of way must take it as he finds it, and, if he wants any repairs done to it, he must do them himself. That branch of the law falls into line with the general contractual view, which is that the landlord is not liable to repair premises which he has let, though it may be a nice question as to how far he is responsible for repairing the way of necessity. I propose to direct myself, following the passage in *FOA ON THE LAW OF LANDLORD AND TENANT*, already quoted, by the proposition that there is an obligation on the landlords to use reasonable care in providing safe access to the premises. It is admitted here that the staircase and the stairs were in good order.

Since 1923 the decision of the Court of Appeal in *Miller v. Hancock* (2) has been overruled, but the general statements contained in the judgments with regard to the law of landlord and tenant are still good and proper statements of the law. **BOWEN, L.J.**, said ([1893] 2 Q.B. 181):

"It appears to me obvious, when one considers what a flat of this kind is, and the only way in which it can be enjoyed, that the parties to the demise of it must have intended by necessary implication, as a basis without which the whole transaction would be futile, that the landlord should maintain the staircase, which is essential to the enjoyment of the premises demised, and should keep it reasonably safe for the use of the tenants . . ."

A and he went on to refer to the position of persons necessarily coming to the place, which in the light of later authorities is no longer good law. He continued (*ibid.*):

B "It seems to me that it would render the whole transaction inefficacious and absurd if an implied undertaking were not assumed on the part of the landlord to maintain the staircase so far as might be necessary for the reasonable enjoyment of the demised premises."

I think that statement is probably a little too wide. BOWEN, L.J., goes on:

C "If that be so, the case is brought within the *dictum* of LORD MANSFIELD in *Taylor v. Whitehead* (3), to the effect that by the common law he who has the use of a thing ought to repair it, but the grantor may bind himself."

As he has not done so in this case, it rests on the basis of an implied obligation by the landlords.

D In *Huggett v. Miers* (4), in which *Miller v. Hancock* (2) was discussed, the Court of Appeal dealt with the lighting of a staircase in a place where the tenants were using part of the premises let to them as offices. The question involved there was whether or not, in an action brought by the tenant against the landlord in respect of injuries arising from a fall, there was a duty on the landlord to light the premises. There was no express obligation, and it was held that there was no implied obligation, the implication being sought to be supported by a provision in the tenancy agreement that each tenant should maintain a light on the staircase outside the door of his premises. It is plain from the judgment of the Court of Appeal that in certain circumstances there might be an implied obligation. SIR GORELL BARNES, P., said ([1908] 2 K.B. 283):

F "It is clear that, as a general rule, the grant of an easement imposes no obligation on the owner of the servient tenement to do anything in the nature of repair."

Then he cited with approval the passage from *Miller v. Hancock* (2) and continued (*ibid.*):

G "It was, however, pointed out in *Miller v. Hancock* (2) that there may be cases in which, either by express agreement or by necessary implication, the landlord of premises, let as these were, contracts with the tenants to do any repairs which may be necessary to the staircase, or possibly to do something more than repairs . . ."

"... possibly to do something more than repairs." That, I think, might cover the case of lighting these stairs.

H This branch of this case was presented to me by counsel for the tenant boldly on the view that there was a necessary implication. In *Dobson v. Horsley* (5) all these matters were considered in the Court of Appeal, and BUCKLEY, L.J., said ([1915] 1 K.B. 640):

"What seems to flow from these cases as a matter of principle is this: that the lessor, the defendant, is liable in any case in which, by way of implied grant, he enters into an implied obligation to provide something and fails to provide it. But where that is not the case and where the lessor

simply offers to the tenant the right to use a particular sort of approach and the tenant accepts it, the tenant must accept the approach such as it is—say a plank with no handrail across a stream or steps protected only by a coping eight inches high. The tenant using it is not trapped in any way; he knows perfectly well that there is no handrail or railing, and he accepts the risk of using the access in the form in which it is provided.”

I shall have to examine whether an access was provided, and whether the tenant is entitled to insist as a matter of right—not as a matter of convenience—on this staircase being lighted at times other than those when the landlords without any express obligation lighted it. A

The question when a term of this sort is to be implied in a contract is extremely difficult. In two cases recently the King's Bench Division have considered the question of an implication where the duties of rent tribunals under the recent legislation were involved—*R. v. Paddington & St. Marylebone Rent Tribunal, Ex p. Bedrock Investments, Ltd.* (6) and *R. v. Croydon Rent Tribunal, Ex p. Chalkley* (7). The questions involved were whether an obligation on the landlord was to be implied from all the circumstances to provide certain amenities—whether they were things which the landlord, as a matter of good business, would continue to provide, or things which he had undertaken to provide and maintain. The decisions are, perhaps, not of great assistance here, but in his judgment in *R. v. Paddington & St. Marylebone Rent Tribunal, Ex p. Bedrock Investments, Ltd.* (6), LORD GODDARD, C.J., said ([1947] 2 All E.R. 17): B C

“There is no ground, in my opinion, for implying any covenant, and none ought ever to be implied unless there is such a necessary implication that the court can have no doubt what covenant or undertaking they ought to write into the agreement.” D

That passage was approved by the Divisional Court in *R. v. Croydon Rent Tribunal, Ex p. Chalkley* (7).

[HIS LORDSHIP found as a fact that before the war the premises were usually kept with the staircase lighted very late at night; that during the war the lighting consisted of a “pin-point” on each floor outside the door of the lift; that lighting was restored in 1947 when the landlords thought they were returning to pre-war lighting; that in 1948, as a result of requests to save electric current, the landlords, without giving notice to the tenants, installed a system under which the staircase lighting was automatically cut off at certain periods; and that this control system was erratic in its working so that it was never possible to know when the lights would be found on or off, but they were frequently on until twelve midnight. He continued:] E F

That presents me with the problem of examining whether I can spell out of those facts an implied covenant by the landlords to maintain a reasonable period of lighting. They did maintain it to some time every evening, but not at all hours of the night. It is suggested in FOA ON THE LAW OF LANDLORD AND TENANT that, where a landlord has for a long time done repairs to premises and maintained them in a particular condition, that is evidence on which, as I understood it, the court ought to imply a covenant by the landlord to do repairs or that the original performance of the repairs was the result of a legal obligation on the landlord to do them. The learned author cites for that proposition *Broggi v. Robins* (8), but he doubts the accuracy of the principle and I do not think the case decides anything of the sort. There was evidence in that case that the landlord had done the repairs, but the case did not proceed on that basis. There was evidence (which the trial judge accepted) of an express undertaking by the landlord's agent at the time of the letting that the premises should be kept in repair, and it was on that basis that the Court of Appeal came to the conclusion that there had been a failure by the landlord to discharge his contractual obligation. That being so, I do not feel G H

myself constrained to hold that, because the landlords before and after the war did light this staircase in the hours of darkness, therefore I must imply an obligation on their part to do it. If the implication is to be raised at all, it must be by virtue of something other than that particular circumstance.

I referred earlier to *Dunster v. Hollis* (1) which purported to deal with *Dobson v. Horsley* (5). There seems to have been some doubt in the minds of some of the judges who have dealt with this sort of matter (not always as between landlord and tenant, but as between the landlord and parties resorting to the let premises who were either invitees or supposititious licensees of the landlord), whether *Dunster v. Hollis* (1) was really based on *Miller v. Hancock* (2). With great respect I do not think it was. The lessor had let to a tenant rooms in a building, and, as here, had retained control of a common staircase and a flight of steps. It was held that the lessor's obligation was not an absolute obligation to the tenant to keep the steps reasonably safe. Nor was it merely to avoid exposing the tenant to a concealed danger or trap, but it was to take reasonable care to keep the steps reasonably safe, and, unless the tenant had been guilty of contributory negligence, the visibility of the danger was no defence to an action by the tenant against the lessor for damage caused by the steps not being reasonably safe. That was an entirely different case from the present one. It related to steps which had fallen out of repair, and LUSH, J., came to the conclusion that the defendant landlord had ample opportunity to ascertain that the steps needed repair and that negligence had been proved.

My difficulty in the present case, which is not a case of repair in that sense, is to decide what sort of obligation I am to imply. I am asked to imply an obligation to light the staircase at reasonable hours. Who is to be the judge of that? As I see it, the obligation must be something which is certain. It might vary from tenant to tenant. The landlord letting a block of flats would have to see whether his obligation as regards each individual was to leave lights on all night, or until four o'clock, twelve o'clock, or ten o'clock. I see the greatest difficulty in implying any such obligation. The tenant has not satisfied me that, if the obligation extends to ensuring reasonable safety, there was anything unreasonable in what the landlords did, or that an obligation to keep a means of approach reasonably safe or in good repair extends to the hour at which the lighting ought to be kept on. On that branch of the case, therefore, I think the tenant fails.

[HIS LORDSHIP said that the evidence did not substantiate the allegation of negligence, and he continued:] Accordingly I reject that contention also. The result is that this action fails, and there must be judgment for the landlords with costs.

Judgment for the landlords with costs.

Solicitors: *Murray Napier & Co.* (for the plaintiff); *Gardiner & Co.* (for the defendant).

[Reported by F. A. AMIES, ESQ., Barrister-at-Law.]

NOTE.

ARIS-BAINBRIDGE v. TURNER MANUFACTURING CO., LTD.

[KING'S BENCH DIVISION (McNair, J.), October 12, 13, 30, November 3, 17, 1950.]

"Turnover"—Turnover of "company's annual business"—Sums to be included. **A**
ACTION for damages for wrongful dismissal and for commission.

Under a contract of service, dated Aug. 30, 1945, the plaintiff was employed as a sales manager by the defendant company who were engaged on munition production for the Ministry of Supply and the Ministry of Aircraft Production. The contract provided that the plaintiff should be paid, *inter alia*, "a commission of one-tenth of one per cent. on turnover up to £500,000 and a commission of one-twentieth of one per cent. on turnover above £500,000 of the company's annual business to commence with the next financial year . . ." At that time the defendant company had still running certain government contracts which were subject to a break clause, under which the government department concerned could either (i) call for the completion of the articles, or part of the articles, manufactured, which would then be paid for at fair and reasonable prices, or (ii) call for reduction of manufacture and concentration on the completion of parts already partly manufactured and for handing over of all unused material at fair and reasonable prices. Provision was also made that in cases of hardship a reasonable allowance was to be paid to the defendant company. Notices under the break clause had been given to the defendant company before the commencement of the plaintiff's employment, and in the first two years of that employment the defendant company received sums representing lump sum settlements for articles taken over and payment of claims for hardship made under the break clause. The plaintiff claimed that the turnover on which his commission was based should include the sums paid in respect of the settlements under the break clause. **B**
C
D

Case referred to: **E**

(1) *Gliksten (J.) & Son, Ltd. v. Green*, [1929] A.C. 381; 98 L.J.K.B. 363; 140 L.T. 625; 14 Tax Cas. 364; Digest Supp.

Harvey, K.C., and *T. E. Jones* for the plaintiff.

O'Sullivan, K.C., and *J. C. B. W. Leonard* for the defendant company.

McNAIR, J., in a considered judgment, held, applying *Gliksten (J.) & Son, Ltd. v. Green* ([1929] A.C. 381), that these sums were part of the "turnover of the company's annual business," which must be taken to include all sums received and receivable in the year as the result of the defendant company's trading, whether normal or abnormal. Commission was, therefore, payable on the sums in question. **F**

Solicitors: *Harold Kenwright & Cox* (for the plaintiff); *Preston, Lane-Claypon & O'Kelly*, agents for *Ansell & Sherwin*, Birmingham (for the defendants). **G**

F.A.A.

R. v. PARRY AND OTHERS.

[COURT OF CRIMINAL APPEAL (Lord Goddard, C.J., Hilbery and Parker, JJ.), November 27, 1950.]

Criminal Law—Sentence—Probation order—Power of court also to fine—Criminal Justice Act, 1948 (c. 58), s. 3 (1), s. 13.

A

Where a court makes a probation order under s. 3 (1) of the Criminal Justice Act, 1948, it has no power at the same time to impose a fine under s. 13.

[FOR THE CRIMINAL JUSTICE ACT, 1948, s. 3 and s. 13, see HALSBURY'S STATUTES, Second Edn., Continuation Vol. 1948, pp. 154, 166, and 168, respectively.]

B

APPEAL against sentence.

The appellants, John Henry Parry, George Julian Parry, and Dennis Spriggs, were convicted at Leicester City Sessions of breaking and entering and larceny and each was put on probation for two years and ordered to pay a fine of £25. The ground of the appeal was that the court had no power to make a probation order under the Criminal Justice Act, 1948, s. 3 (1), and at the same time to

C

impose a fine under s. 13.

G. H. Dixon for the appellants.

Stimson for the Crown.

LORD GODDARD, C.J., delivered the following judgment of the court.

D

The question arising in these cases, which are brought before us on a certificate by the recorder of Leicester, is whether, when making a probation order, the court can at the same time impose a fine. It is a point of some importance, because some courts of quarter sessions have been in doubt about it. Section 3 (1) of the Criminal Justice Act, 1948, provides:

E

"Where a court by or before which a person is convicted of an offence (not being an offence the sentence for which is fixed by law) is of opinion that having regard to the circumstances, including the nature of the offence and the character of the offender, it is expedient to do so, the court may, instead of sentencing him, make a probation order, that is to say, an order requiring him to be under the supervision of a probation officer for a period to be specified in the order of not less than one year nor more than three years."

F

It is then provided by s. 3 (3):

" . . . Provided that (without prejudice to the power of the court to make an order under s. 11 (2) of this Act) the payment of sums by way of damages for injury or compensation for loss shall not be included among the requirements of a probation order."

G

Section 3 (5) provides:

H

"Before making a probation order, the court shall explain to the offender in ordinary language the effect of the order (including any additional requirements proposed to be inserted therein under sub-s. (3) or sub-s. (4) of this section or under the next following section) and that if he fails to comply therewith or commits another offence he will be liable to be sentenced for the original offence . . ."

In other words, if a probation order is made and its terms are broken, the probationer can be brought back and sentenced by the court which has convicted him of the offence of which he had previously been convicted. It happens not infrequently that while a person is on probation he commits another offence. When he does so it is right, to emphasize that probation is not a formality,

that he should be brought back and sentenced for the offence for which he has been put on probation.

Section 11 (2) provides:

"A court, on making a probation order or an order for conditional discharge or on discharging an offender absolutely under this Part of this Act, may, without prejudice to its power of awarding costs against him, order the offender to pay such damages for injury or compensation for loss as the court thinks reasonable . . ."

Provision is made that the damages and compensation are not to exceed £100, and then, by sub-s. (3):

"An order for the payment of damages or compensation as aforesaid may be enforced in like manner as an order for the payment of costs by the offender . . ."

that is to say, as a civil debt and not in any way as the result of an offence carrying the sanction of imprisonment or other punishment administered corporeally. Damages or compensation are in no sense a fine. A fine can always be enforced by imprisonment, but damages or compensation cannot.

The matter which causes doubt is that s. 13 of the Act provides:

"Any court before which an offender is convicted on indictment of felony (not being a felony the sentence for which is fixed by law) shall have power to fine the offender in lieu of or in addition to dealing with him in any other manner in which the court has power to deal with him."

The history of that section and the reason for importing it into the Criminal Justice Act, 1948, is well known. There were certain felonies, principally those under the Larceny Act, 1916, in which a court of summary jurisdiction had power to fine. That was because it was considered desirable in the case of petty thefts that a court should be able to fine the offender and not send him to prison, but in cases which came before a court of assize or quarter sessions on indictment there was no power to fine until this Act of 1948, except in the case of manslaughter. The reason for that was that the offence of manslaughter varies enormously in seriousness according to the circumstances in which it is committed. Over and over again judges have had to deal at assizes with an offence which technically was a felony, where they would have been glad to have imposed a fine had there been power to do so. The court was often left in the position that it had either to send a person of hitherto good character to prison for a comparatively small offence or else bind him over, which was to inflict no punishment. That is the reason why Parliament by the Act of 1948 gave to courts trying cases on indictment the same powers as courts of summary jurisdiction formerly had in certain cases and now have in all cases of felony, *i.e.*, the power of imposing a fine instead of sending to prison.

In my view, it is impossible to read s. 13 as applying to the sections which precede it and deal with probation because they would be contradictory, and it is not necessary for the true construction of s. 13 to give it the contradictory effect of the earlier sections. Under those sections it is clear that the court has power to order the payment of sums of money, not by way of punishment, but by way of compensation. I emphasize "not by way of punishment" because, if it were by way of punishment, there would be provision for inflicting a sentence of imprisonment in default.

In the opinion of the court, it is plain, when the *fasciculus* of sections dealing with probation is considered, that the words in s. 13 "or in addition to dealing with him in any other manner in which the court has power to deal with him" cannot apply where a probation order is made. If the court makes a probation order, it has no power to fine. If it decides to fine, it cannot make a probation order. Consequently, this sentence cannot stand. As this court

has power in any case to pass a sentence which, in their opinion, ought to have been passed in substitution for a sentence which is defective or illegal, we shall set aside the probation order and leave the fine standing, with a penalty of three months in default of payment.

Sentence varied.

Solicitors: Registrar, Court of Criminal Appeal (for the appellant); L. J. McEvoy, town clerk, Leicester (for the Crown).

[Reported by H. McL. MORRISON, Esq., Barrister-at-Law.]

B

Re DUKE OF NORTHUMBERLAND (*deceased*). HALIFAX
v. NORTHUMBERLAND.

[CHANCERY DIVISION (Vaisey, J.), October 10, 11, November 23, 1950.]

C Settled Land—Repairs—Expenditure by tenant for life—Recoupment out of capital money—"Landlord"—Settled Land Act, 1925 (c. 18), s. 73 (1) (iv), s. 75 (2)—Agriculture Act, 1947 (c. 48), s. 22 (4)—Agricultural Holdings Act, 1948 (c. 63), s. 96 (1), *sched. III, para. 23*.

D By a codicil to his will, a testator, who died on May 14, 1918, created a settlement of certain real property consisting mainly of agricultural land and provided: "39. As regards any sale enfranchisement exchange reconveyance surrender partition mortgage charge grant reservation lease (for any term or purpose) or other disposition covenant (restrictive or otherwise) or contract or any purchase or other acquisition of property real or personal or investment or application of capital money or as regards
E any dealing or arrangement with respect to any part of the premises hereby settled or any easement right or privilege over or in respect of the same or of any share therein or any mines minerals or surface which is not hereby or by the Settled Land Acts otherwise authorised such disposition
F covenant contract acquisition investment application dealing or arrangement may be made or given effect to at any time and from time to time by the tenant for life either with the consent of the trustees or trustee in writing or under an order of the court. 40. In giving such consent as
G aforesaid the trustees or trustee shall consider whether or not the proposed disposition covenant contract acquisition investment application dealing or arrangement will be for the benefit of the premises hereby settled or of the tenant for life or his successors in title but shall not be liable to account in respect of any such consent given in good faith which shall
H be binding on all persons then or thereafter interested hereunder and the court may make the order if in its opinion an Act of Parliament might be obtained authorising the transaction were it one which could have been effected without obtaining an Act of Parliament if the premises had not been settled." In 1945 and the succeeding years the tenant for life expended substantial sums on repairs to farms, farm cottages, and market garden cottages, and also on woodmen's cottages, cottages occupied by workmen of the estate building department, and gamekeepers' cottages, and she now sought recoupment of part of the expenditure out of the capital moneys.

HELD: (i) on the true construction of cl. 39 and cl. 40, notwithstanding the disjunctive form of the words "for the benefit of the premises hereby settled or of the tenant for life or of his successors in title" the trustees must confine their consents to cases in which, proceeding with the greatest caution, they considered the matter beneficial to all parties, conducive to

the general interest of persons presently or prospectively entitled, and clearly fair, right, and reasonable in all the circumstances but in so far as the matters in respect of which recoupment was sought were not within the relevant statutory provisions, cl. 39 and cl. 40 could be invoked and consent given by the trustees on proper advice.

(ii) the word "landlord" in the Settled Land Act, 1925, s. 73 (1) (iv) had the meaning assigned to that term by the Agricultural Holdings Act, 1923, s. 57. A

(iii) by virtue of the provisions of the Settled Land Act, 1925, the Agriculture Act, 1947, and the Agricultural Holdings Act, 1948, and, in particular, s. 73 (1) (iv) of the Act of 1925, s. 22 (4) of the Act of 1947, and s. 96 (1) of the Act of 1948, the trustees were entitled to apply capital moneys of the settlement in payment (as for an improvement authorised by the Settled Land Act, 1925) of any money expended or to be expended and costs incurred or to be incurred by the tenant for life in or about the execution on or after Jan. 1, 1945, of such repairs as were specified in para. 23 of sched. III to the Act of 1948 in relation to agricultural land, whether or not the land were comprised in a contract of tenancy and whether or not within the definition of "agricultural land" in s. 1 of the Act of 1948. B
C

Re Borough Court Estate ([1932] 2 Ch. 39), applied.

(iv) the trustees were bound under s. 75 (2) of the Act of 1925 to comply with the directions of the tenant for life on being satisfied, on proper advice, that the application of the capital money was within the relevant provisions of that Act. D

[AS TO APPLICATION OF CAPITAL MONEY, see HALSBURY, Hailsham Edn., Vol. 29, pp. 704-714, paras. 985-991; and FOR CASES, see DIGEST, Vol. 40, pp. 748-753, Nos. 2778-2822.]

Case referred to:

(1) *Re Borough Court Estate*, [1932] 2 Ch. 39; 101 L.J.Ch. 316; 147 L.T. 476; Digest Supp. E

ADJOURNED SUMMONS for the determination of the following questions and the following relief: (i) whether by virtue of the Settled Land Act, 1925, the Agriculture Act, 1947, and the Agricultural Holdings Act, 1948, the trustees for the purposes of the Settled Land Act of a settlement created by a codicil to the will of the seventh Duke of Northumberland, deceased, were entitled to apply capital money of the said settlement in payment (as for an improvement authorised by the Act of 1925) of any money expended and costs incurred by the tenant for life of the said settlement in or about the execution on or after Mar. 1, 1948, of such repairs as were specified in para. 23 of sched. III to the Act of 1948 in relation to agricultural land which at the date of the execution of such repairs was comprised in a contract of tenancy not being a contract under which the said land was let to the tenant during his continuance in any office, appointment or employment held under the landlord; (ii) if the answer to question (i) were in the affirmative, whether the trustees were entitled to apply capital money in payment as aforesaid notwithstanding that the land was not comprised in a contract of tenancy, or was comprised in a contract of tenancy under which the land was let to the tenant during his continuance in an office, etc., held under the landlord; (iii) whether by virtue of the said Acts the trustees were entitled to apply capital money in payment (as aforesaid) of any money expended and costs incurred by the tenant for life in or about the execution on or after Jan. 1, 1926, and before Mar. 1, 1948, of any such repairs; (iv) if the answer to question (i), (ii), or (iii) were in the affirmative, whether the trustees were bound from time to time under s. 75 (2) of the Act of 1925 on the direction of the tenant for life to apply capital money in F
G
H

recouping to the tenant for life or paying any money expended or costs incurred by such tenant for life in or about the execution of such repairs as were referred to in questions (i), (ii), and (iii), or whether the trustees had a discretion as to such application. The trustees also raised by the summons a question of the construction of certain clauses in the said codicil which are set out in the headnote.

J. A. Brightman for the plaintiffs, the trustees for the purposes of the Settled Land Act, 1925, of the settlement constituted by the codicil to the testator's will.

E. I. Goulding for the first and second defendants, the tenant for life, and the tenant for life in remainder.

MacMaster for the tenant in tail in remainder.

Cur. adv. vult.

Nov. 23. **VAISEY, J.**, read the following judgment. The plaintiffs in this action are the present trustees for the purposes of the Settled Land Act, 1925, of the settlement created by the codicil to the will of the seventh Duke of Northumberland, who died on May 14, 1918. The will was dated Apr. 4, 1916, and the codicil Apr. 7, 1916, and such will and codicil were proved on June 18, 1918, by the eighth Duke of Northumberland. The eighth duke died on Aug. 23, 1930, and on his death his widow, who is the first defendant, became, and she still is, the tenant for life in possession under the said settlement. The second defendant, the tenth Duke of Northumberland, is tenant for life in remainder expectant on the death of the first defendant. His daughter, Lady Caroline Mary Percy, the third defendant, is tenant in tail in remainder expectant on the termination of the said two preceding estates for life.

The property which is the subject of the said settlement includes the Albury estate in the county of Surrey. It comprises about 3,500 acres and is for the most part agricultural land. The first defendant, the tenant for life, has informed the plaintiffs that considerable sums have been expended by her in repairs to and in and about the maintenance of the Albury estate in and since 1945 and that such sums have exceeded the net rents received from the estate during that period. Moreover, it would appear that a high rate of expenditure on such repairs is likely to continue for many years to come. The following figures are indicated as representing the amounts spent by the tenant for life on repairs to farms, farm cottages and market garden cottages, comprised in the estate: in 1945, £500; in 1946, £771; in 1947, £1,191; and in 1948, £3,104.

The following figures are stated to represent the amount spent by the tenant for life on repairs to woodmen's cottages, cottages occupied by estate building department's workmen, and gamekeepers' cottages: in 1945, £178; in 1946, £270; in 1947, £78; and in 1948, £499. The tenant for life is desirous of having recouped to her out of capital a part of the cost of repairs executed during the years in question and of the cost of repairs to be executed in the future. The plaintiffs desire to have their powers and obligations in this respect elucidated. Capital moneys of the settlement amount to some £250,000.

The questions raised involve a consideration of a number of interlocking sections of various Acts of Parliament. A separate question—a question of construction—arises under the codicil, the answer to which might to some extent render unnecessary any detailed consideration of the statutory provisions. I will take that question first. The relevant clauses of the codicil are as follows:

"39. As regards any sale enfranchisement exchange reconveyance surrender partition mortgage charge grant reservation lease (for any term or purpose) or other disposition covenant (restrictive or otherwise) or contract or any purchase or other acquisition of property real or personal or investment or application of capital money or as regards any dealing or arrangement with respect to any part of the premises hereby settled or any easement right or privilege over or in respect of the same or of any

share therein or any mines minerals or surface which is not hereby or by the Settled Lands Acts otherwise authorised such disposition covenant contract acquisition investment application dealing or arrangement may be made or given effect to at any time and from time to time by the tenant for life either with the consent of the trustees or trustee in writing or under an order of the court. 40. In giving such consent as aforesaid the trustees or trustee shall consider whether or not the proposed disposition covenant contract acquisition investment application dealing or arrangement will be for the benefit of the premises hereby settled or of the tenant for life or his successors in title but shall not be liable to account in respect of any such consent given in good faith which shall be binding on all persons then or thereafter interested hereunder and the court may make the order if in its opinion an Act of Parliament might be obtained authorising the transaction were it one which could have been effected without obtaining an Act of Parliament if the premises had not been settled."

It might well be suggested that cl. 39 is so wide and so vague as to be meaningless and ineffective. Literally, it would appear to give unlimited power to the tenant for life and the trustees to do exactly as they please with regard to (*inter alia*) the application of capital money, and to enable the trustees, if they thought fit, to hand over such capital money to the tenant for life unconditionally as being an application plainly for her benefit. On the whole, I do not think that the clauses can be held to be wholly inoperative, and, on the other hand, I think that the trustees must, notwithstanding the disjunctive form of the words "for the benefit of the premises hereby settled or of the tenant for life or of his successors in title," confine their consents to cases in which, on a broad view, they consider the matter beneficial to all parties and conducive to the general interest of the persons presently or prospectively entitled under the settlement.

I am asked specifically whether the provisions of those clauses could be utilised in relation to the desired recoupment if and so far as the matters in respect of which recoupment is desired are not strictly within the relevant statutory provisions, and, in my judgment, this question may be answered in the affirmative, with this qualification, that is to say, if the trustees under the advice of independent surveyors and having regard to every relevant consideration consider it to be the right thing to do. Among such relevant considerations, I would suggest: (a) the desirability or otherwise of retaining the estate unsold, (b) the pecuniary resources of the parties, and (c) their personal relationships, amicable or otherwise. I think, however, that the trustees should be advised to exercise those powers with the greatest caution and only to exercise them in cases in which they are quite clear that what is proposed is fair and right and reasonable in the circumstances.

[HIS LORDSHIP indicated the order which he would make in answer to question (v) of the summons and continued:] Turning to the relevant statutory provisions, I observe, first, that capital money is applicable under s. 73 (1) (iv) of the Settled Land Act, 1925:

"In payment as for an improvement authorised by this Act of any money expended and costs incurred by a landlord under or in pursuance of the Agricultural Holdings Act, 1923 . . . in or about the execution of any improvement comprised in Part I or Part II of sched. I to that Act."

The first question is as to the meaning of the word "landlord" in the subsection. Is it necessary that there should be a contract of tenancy of any kind? The answer to that question seems to me to be that where the word is used in close conjunction with a reference to the Agricultural Holdings Act, 1923, it bears the meaning which is assigned to it in that Act, in s. 57 of which it is defined as "any person for the time being entitled to receive the rents and profits of any land . . ." In *WOLSTENHOLME AND CHERRY*, 12th ed., p. 1098,

there is a note to the sub-section suggesting that the point is doubtful. I must, therefore, resolve it, and I do so in the sense indicated. I may observe that a similar definition is contained in the subsequent Act: see s. 94 of the Agricultural Holdings Act, 1948, which I will call the Act of 1948.

A It is to be noticed that the Settled Land Act, 1925, s. 75 (2), provides that capital money shall be invested or applied according to the direction of the tenant for life, and, in default thereof, according to the discretion of the trustees, and, in my judgment, that section is applicable here. That does not mean that the trustees can accept the direction of the tenant for life blindly or be absolved from the duty of ascertaining that the mode of application is within the provisions of the Act, a matter in which, in any case of doubt, they must have recourse to the professional advice of lawyers or surveyors.

B Section 96 (1) of the Act of 1948 provides, among other things, that references to Part I and Part II of sched. I to the Act of 1923 shall be construed as references to sched. III to the Act of 1948 and to Part II of that schedule respectively. Paragraph 23 of Part II of the last-mentioned schedule is in the following terms:

C “Repairs to fixed equipment, being equipment reasonably required for the proper farming of the holding, other than repairs which the tenant is under an obligation to carry out,”

and by s. 94 of the Act of 1948 “fixed equipment” is defined to include “any building or structure affixed to land and any works on, in, over or under land . . .” and

D “ . . . anything grown on land for a purpose other than use after severance from the land, consumption of the thing grown or of produce thereof, or amenity . . .”

The Act of 1948 came into force on July 30, 1948. It was a consolidating Act, and it consolidated not only the Act of 1923, but also Part III of the Agriculture Act, 1947, which (by virtue of the Agriculture Act, 1947 (Commencement) E (No. 1) Order, 1948 (S.I. 1948, No. 342)) came into force on Mar. 1, 1948. Section 22 (4) of and sched. III to the last-mentioned Act correspond with s. 96 (1) of and sched. III to the Act of 1948 respectively. By s. 42 (1) of the Agriculture Act, 1947, and s. 81 (1) of the Act of 1948, it is provided that where, under powers conferred by the Settled Land Act, 1925, capital money is applied in or about the execution of any improvement specified in sched. III to such F respective Acts, no provision shall be made for requiring the money or any part thereof to be replaced out of income, and, accordingly, any such improvement shall be deemed to be an improvement authorised by Part I of sched. III to the Settled Land Act, 1925. This is, in my judgment, a very inappropriate and inconvenient use of what may be called “referential legislation”. The Settled Land Act, 1925, deals with settled land and the mutual rights and G obligations of persons possessing particular estates and interests in such land. The Agricultural Holdings Act, 1923, Part III of the Agriculture Act, 1947, and the Act of 1948, all relate to agricultural holdings as defined in s. 1 of the Act of 1948, and particularly the mutual rights and obligations of landlords and tenants, and it would have been much easier to follow the meaning and purpose of the legislature if these very different subject-matters had been kept H separate and distinct.

However, applying as best I can the law as it seems to me to emerge from this welter of confused and confusing enactment, I will answer the question raised by the summons as follows. Under paras. (i), (ii), and (iii) of the summons, I will declare that under the enactments mentioned in para. (i) the plaintiffs, as trustees for the purposes of the Settled Land Act, 1925, of the settlement constituted by the codicil are entitled to apply capital moneys of the said settlement in payment (as for an improvement authorised by the Settled Land

Act, 1925) of any money expended or to be expended and costs incurred or to be incurred by the tenant for life under the said settlement in or about the execution on or after Jan. 1, 1945, on such repairs as are specified in para. 23 of sched. III to the Act of 1948 in relation to agricultural land, whether or not the same be comprised in a contract of tenancy and whether or not within the definition of "agricultural land" in s. 1 (1) of the Act of 1948.

I interpose the comment that the last-mentioned definition cannot, in my judgment, be applicable in the present connection. It reads thus:

"In this Act the expression 'agricultural holding' means the aggregate of the agricultural land comprised in a contract of tenancy, not being a contract under which the said land is let to the tenant during his continuance in any office, appointment or employment held under the landlord."

It is further to be observed that I have chosen Jan. 1, 1945, first because the evidence does not deal with any earlier period, and, secondly, because recoupment of expenditure made more than six years ago would seem to be inconsistent with the principles laid down in *Re Borough Court Estate* (1).

Under para. iv of the summons, I will declare that the trustees are bound to comply with the directions of the tenant for life on being satisfied that the application of the capital money was or will be within the relevant provisions of the Settled Land Act, 1925, and consistent with this judgment. Under para. v, I will make declarations in terms which I have already mentioned. Under para. vi, I will make a representation order under R.S.C., Ord. 16, r. 9. I will direct the costs of all parties of this application to be taxed as between solicitor and client and raised and paid out of the capital money.

Order accordingly.

Solicitors: *May, May & Deacon* (for all parties).

[*Reported by H. McL. MORRISON, Esq., Barrister-at-Law.*]

AMERICAN ECONOMIC LAUNDRY, LTD. v. LITTLE.

[COURT OF APPEAL (Somervell, Jenkins and Birkett, L.JJ.), November 22, 23, 1950.]

Rent Restriction—Death of tenant—"Member of tenant's family"—Daughter residing in house at time of statutory tenant's death—Unconditional order for possession made against tenant before death, but suspended—Death of statutory tenant before date for possession—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (c. 17), s. 12 (1) (g).

On Sept. 20, 1949, an unconditional order for possession of a dwelling-house to which the Rent Restrictions Acts applied was made against a statutory tenant. Execution of the order was suspended under the power contained in s. 5 (2) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, until Dec. 20, 1949, and thereafter, on an application by the tenant, until Jan. 20, 1950. The landlords did not proceed to eject the tenant immediately on the termination of the extended time on Jan. 20, and on Mar. 3, on a further application by the tenant, the time was extended to Apr. 3, 1950. On Mar. 8, 1950, the tenant died, and his daughter, the defendant, who had been residing with him for not less than six months immediately before his death, remained in possession, claiming that she was entitled to do so as a member of the tenant's family within s. 12 (1) (g) of the Act of 1920.

HELD: under s. 12 (1) (g) the defendant could succeed only to the limited interest in the tenancy which had been possessed by her father;

as an order for possession against him had been made to take effect on Apr. 3, 1950, there was no tenancy to which she could succeed; and, therefore, the landlords were entitled to possession.

Principle stated by SCOTT, L.J., in *Bolsover Colliery Co., Ltd. v. Abbott* ([1946] K.B. 12), *applied*.

[AS TO STATUTORY TENANTS, see HALSBURY, Hailsham Edn., Vol. 20, pp. 334, 335, paras. 400, 401, and 1950 Supplement; and FOR CASES, see DIGEST, Vol. 31, pp. 575, 576, Nos. 7226-7255, and Supplement.]

Cases referred to:

- (1) *Brown v. Draper*, [1944] 1 All E.R. 246; [1944] K.B. 309; 113 L.J.K.B. 196; 170 L.T. 144; 2nd Digest Supp.
- (2) *Keeves v. Dean*, *Nunn v. Pellegrini*, [1924] 1 K.B. 685; 93 L.J.K.B. 203; 130 L.T. 593; 31 Digest 576, 7254.
- (3) *Bolsover Colliery Co., Ltd. v. Abbott*, [1946] K.B. 8; 115 L.J.K.B. 5; 173 L.T. 172; 2nd Digest Supp.

APPEAL by the landlords from an order of His Honour JUDGE LEON, made at Clerkenwell County Court on July 17, 1950, whereby he refused to grant an order for possession on the ground that the defendant, the daughter of the deceased statutory tenant, was entitled to the protection of the Rent Restrictions Acts. The facts appear in the judgment of SOMERVELL, L.J.

N. MacDermot for the landlords.

The defendant appeared in person.

SOMERVELL, L.J.: This is an appeal by the landlords, the American Economic Laundry, Ltd., from a decision of His Honour JUDGE LEON which concerns the Rent Restrictions Acts. The defendant, Miss Little, is the daughter of the deceased tenant and she claims under s. 12 (1) (g) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, as amended by the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, s. 13, and the Increase of Rent and Mortgage Interest (Restrictions) Act, 1935, s. 1, the relevant words of which provide:

"... the expression 'tenant' includes the widow of a tenant ... who was residing with him at the time of his death, or, where a tenant ... leaves no widow or is a woman, such member of the tenant's family so residing as aforesaid as may be decided in default of agreement by the county court."

The defendant claims that those last words apply to her case. She was residing with her father and he was, she submits, a tenant within the meaning of that provision.

While the defendant's father was alive the landlords took proceedings against him and obtained a final order for possession on Sept. 20, 1949, but under the powers given by s. 5 (2) of the Act of 1920, as substituted by the Rent and Mortgage Interest Restrictions Act, 1933, s. 4, execution was suspended until Dec. 20, 1949. On Dec. 15, 1949, the defendant's father applied, as he was entitled to do under s. 5 (2), for an extension of the suspension of the order and that was granted until Jan. 20, 1950. From Jan. 20, 1950, until Mar. 3, the landlords, undoubtedly, could have executed the order, though they did not do so. On Mar. 3, the defendant's father being seriously ill, application was made on his behalf for an extension to Apr. 3, 1950. On Mar. 8 the defendant's father died. The defendant has remained in possession. The landlords took out a summons for possession and the defendant claimed that she was entitled to remain in possession by reason of the rights given in s. 12 (1) (g) of the Act of 1920 to the relatives of a deceased tenant. The point which now arises is whether a tenant against whom a final order has been made is a

"tenant" within s. 12 (1) (g)? That definition, like all the definitions in the Act, is to be read strictly except where the context otherwise requires.

The learned judge decided that the defendant was within the words "member of the tenant's family" and could claim to stay on in possession. The learned judge said, and I agree with him, that the point is not free from difficulty. Having stated the facts, he referred, first, to *Brown v. Draper* (1), and cited the following passage of LORD GREENE, M.R. ([1944] 1 All E.R. 248):

"... the only ways in which he [the tenant] can be deprived of the protection of the Acts are (a) by giving up possession, in which case no order for recovery of possession against him is required; or (b) by having an order for recovery of possession made against him . . ."

Those words, read literally, might be taken to indicate that the order for possession in itself deprived him of the protection of the Act. On the other hand, the learned county court judge referred to a statement of SCRUTTON, L.J., in *Keeves v. Dean*, *Nunn v. Pellegrini* (2), where the learned lord justice said ([1924] 1 K.B. 694):

"I take it that he [the tenant] has a right as against all the world to remain in possession until he is turned out by an order of the court . . ."

The difference between the literal meaning of those statements of the law becomes apparent in the present case. I agree with the learned judge in that I do not think LORD GREENE, M.R., had in mind the point which we have to consider here, *viz.*: What is the position of a statutory tenant (I am not begging the question by using the word "tenant," but it is useful to use it) between the time when the order for possession is made and the time when it falls to be executed having regard to a suspension under s. 5 (2)? I do not think that that point was in the mind of either the Master of the Rolls or of SCRUTTON, L.J., but it is right to say that the Master of the Rolls, in using the words he did, expressed something with which I respectfully agree, and which seems plain, namely, that an absolute order for possession made against a tenant fundamentally alters the position. The learned judge, having regard to those two statements which on the face of them point to different moments in a case where the order is not immediately executed, proceeded to consider the matter broadly on these lines. He posed to himself the question whether Mr. Little, after the order had been made and while it was suspended, was a statutory tenant protected by the Acts. He pointed out that there are, I think admittedly, many respects in which he was, at any rate, in the same position as a statutory tenant. The landlords, for instance, could not raise his rent. As was said in one case, he might be regarded as being there by licence of the court, but, no doubt, there are certain respects in which his position, *quoad* the person to whom he is paying mesne profits, is, during the interval, very much the same as it was before. I agree with what was said by JENKINS, L.J., in the course of the argument, that the position of someone against whom an order for possession has been made and suspended at common law or under s. 5 (2) of the Act of 1920 is *sui generis*. The problem which we have to solve is not assisted by considering in what respect his position is the same *quoad* the landlords as it was before the order was made. Obviously it is fundamentally different in the respect, that, whereas before he was entitled to the protection of the Acts until successful proceedings were taken, he is now in the position of proceedings having been taken and an order for possession having been made. All that he has is a right to apply for a postponement under s. 5 (2).

In my opinion, a tenant in that position, with an absolute order made against him, notwithstanding that it may be suspended, is not a tenant within the meaning of s. 12 (1) (g) of the Act of 1920. That, I think, is in accordance with a common-sense application of the section. It would be an illogical result if that section gave protection to a widow which the court had expressly taken

away from the husband whose tenancy she relies on, that tenancy having been brought to a suspended end by the order for possession. I am reinforced in that view by a case which deals with an analogous, though not identical, question, *viz.*, *Bolsover Colliery Co., Ltd. v. Abbott* (3). That was also concerned with s. 12 (1) (g) of the Act of 1920. The premises in question had been originally let to a tenant in the employment of the landlords who sought possession under the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, sched. I, para. (g), which provides that an order for possession can be made without proof of suitable alternative accommodation where

“the dwelling-house is reasonably required by the landlord for occupation as a residence for some person engaged in his wholtime employment . . . and . . . (i) the tenant was in the employment of the landlord or a former landlord, and the dwelling-house was let to him in consequence of that employment and he has ceased to be in that employment . . .”

While, therefore, the original tenant was alive, if he had ceased to be in the employment of the landlords, the other conditions being satisfied, the landlords would have had the right to invoke the provisions of the schedule and satisfy the county court judge that it would be reasonable to make an order for possession. The tenant had become a statutory tenant, and he continued in his employment until his death, when his son, who had been residing with him, claimed to continue in possession under the definition in s. 12 (1) (g). In 1945 the landlords required the house for the occupation of a person in their whole-time employment. The defendant declined to give up possession and the landlords' claim to recover possession was dismissed by the county court. The headnote illustrates the similarity between that case and the present one:

“*Held*, that the father's tenancy was subject to defeasance by the plaintiffs on his ceasing to be in their employment by virtue of the provisions of para. (g) (i) of the Rent and Mortgage Restrictions (Amendment) Act, 1933, that when the defendant succeeded to that tenancy, it remained subject to the same defeasance and therefore the plaintiffs having established that they required the house for occupation by a person in their whole-time employment, were entitled to an order for possession.”

The case raised questions of construction in deciding whether the word “tenant” in para. (g) of sched. I could be regarded as including a deceased tenant's widow or other relative claiming protection. This court held that he could not, and at the conclusion of his judgment SCOTT, L.J., used these words ([1946] K.B. 12):

“The right of the landlord and the liability of the tenant are co-extensive in that respect, and a tenancy carried on by the provisions of the Act as to the succession of a widow or other relation is the same tenancy with its advantages and disadvantages unaltered. I, therefore, thinks that the appeal should be allowed.”

That is of importance, although I do not think it is necessarily conclusive in the present case. It illustrates the principle which has led me to the conclusion that in the circumstances of this case the defendant had no rights which she could exercise under s. 12 (1) (g) of the Act of 1920.

Counsel for the landlords referred to the fact that under s. 5 (2) of the Act of 1920 orders for possession may take either of two forms. There may be, as here, an absolute order the execution of which is suspended, or there may be a conditional order, that is to say, the order for possession does not become operative so long as certain conditions are fulfilled—it may be payment of rent or abatement of a nuisance. The difference between those two kinds of orders is illustrated by the concluding words of s. 5 (2), where it is said in reference to an order made subject to conditions:

" . . . if such conditions are complied with, the court may, if it thinks fit, discharge . . . any such order . . . "

That cannot be done when an absolute order has been made. I am not deciding what the position would be in a case of this kind where a conditional order had been made against the deceased. It may be that the result would be the same; it may be that it would be different. There seems to me, at any rate, scope for argument, which would require serious consideration, that a different result would be arrived at, and, therefore, it is better to leave it to be decided if and when it arises. For those reasons I have come to the conclusion that this appeal must be allowed.

JENKINS, L.J.: I agree. The expression "statutory tenancy," as I understand it, is a compendious expression to describe the right of a tenant of protected premises to remain in possession of those premises, notwithstanding the determination of his contractual interest, until such time as he either voluntarily gives up possession or the court, on cause shown, makes an order against him to deliver up possession. In the latter alternative there will in most, if not all, cases be a period of time between the date when the order for possession is made and the date set by the court under s. 5 (2) of the Act of 1920 as the date on which the order is to be complied with.

In the present case Mr. Little died after the date of the order for recovery of possession against him, but before the expiration of the last of a series of extensions which had been made by way of postponement of the date on which the order was to be complied with. What was his position? It is said that, notwithstanding the order for possession, he was still a statutory tenant. To say that seems to me really to beg the question. It may well be that he could be described as a statutory tenant, but that description would not itself accurately define his precise position because he was a statutory tenant against whom had been made a final order, under which possession was to be delivered up on a fixed date. During the period intervening between the date of such an order and the date fixed for delivery of possession the statutory tenant has obviously certain rights and certain obligations. For instance, during that period he would have to pay the equivalent of the rent. That is not to say, however, that he is still a statutory tenant for all purposes, so as to be in the same position as if the order had never been made. He has nothing left but the limited interest granted to him by what may be described as the indulgence of the court pursuant to s. 5 (2). In effect, he has a period of grace.

That being the character of the statutory tenant's interest after the order for possession has been made, what effect, if any, can be given to the provisions of s. 12 (1) (g), under which, on the death of a statutory tenant, a member of the tenant's family residing on the premises becomes the statutory tenant? It was held by the learned judge that that provision still remained of full force and effect, that on the death of her father the defendant became the statutory tenant under a new statutory tenancy which was hers and nobody else's and would continue to be enjoyed by her in her own right until such time as some new ground for claiming possession arose and the landlords successfully applied for and obtained an order for possession. That would be a most surprising result, and, notwithstanding the reasons to the contrary stated by the learned judge, I agree with my Lord that on a consideration of the relevant provisions of the Act there is really no warrant for his conclusion. I agree that the right principle to be followed is the one stated in the *Bolsover* case (3), which shows that the member of the family who becomes a statutory tenant on the death of the original tenant—although in a sense claiming in his or her own right, *i.e.*, not claiming under the statutory tenant in the same way as an assignee or legatee of a contractual tenancy may be said to claim under the grantor or testator—nevertheless becomes a statutory tenant under the same tenancy by virtue of which the original statutory tenant was in possession. Thus, in

the present case, assuming in the defendant's favour that, notwithstanding the existence of the final order for possession, she could still become statutory tenant of the premises by virtue of s. 12 (1) (g) of the Act of 1920, it seems to me clear that the tenancy to which she would succeed could be no more than the limited interest remaining to run between the date of her father's death and the expiration of the date fixed for possession by the order. For these reasons, and those stated by my Lord, I agree that the appeal should be allowed.

BIRKETT, L.J.: I agree.

Appeal allowed.

Solicitors: *Foss, Bilbrough, Plaskitt & Co.* (for the plaintiffs).

[*Reported by C. N. BEATTIE, Esq., Barrister-at-Law.*]

B

C

JAWORSKI v. INSTITUTION OF POLISH ENGINEERS IN GREAT BRITAIN, LTD.

[COURT OF APPEAL (Somervell, Cohen and Denning, L.JJ.), October 30, 31 November 1, 27, 1950.]

Income Tax—Deduction of tax—Agreement to pay remuneration without deduction of tax—Validity—Income Tax Act, 1918 (c. 40), All Schedules Rules, r. 23 (2).

D

Under a service agreement, evidenced in writing, an employee of an association was entitled to receive his monthly salary "without any deductions and taxes, which will be borne by the association." The employers deducted income tax from his salary in accordance with the provisions of the Income Tax (Employments) Act, 1943, s. 1, under which all emoluments assessable to tax under sched. E to the Income Tax Act, 1918, are to be deducted by the person making the payment. On the ground that the deductions were contrary to the terms of his service agreement the employee brought an action to recover the amounts deducted.

E

HELD: on construction, the agreement was one to pay net remuneration at the stated figure together with such sum as was necessary to leave that figure available to the employee after the association had borne the taxes referable to him, and, accordingly, the agreement was valid.

F

Per curiam: "We find a difficulty in seeing how r. 23 (2) of the All Schedules Rules of the Income Tax Act, 1918, can be applicable except in cases when the deduction is permissive" and not mandatory.

Semble: salaries or other remuneration for services are not "annual payments" within r. 23 (2).

G

Decision of FINNEMORE, J. (ante, p. 51), reversed.

[AS TO AGREEMENTS FOR MAKING ANNUAL PAYMENTS WITHOUT DEDUCTION OF TAX, see HALSBURY, Hailsham Edn., Vol. 17, p. 258, para. 526; and FOR CASES, see DIGEST, Vol. 28, pp. 64-73, Nos. 329-391.]

FOR THE INCOME TAX ACT, 1918, All Schedules Rules, r. 23, see HALSBURY'S STATUTES, Second Edn., Vol. 12, p. 192.]

H

Cases referred to:

- (1) *Blount v. Blount*, [1916] 1 K.B. 230; 85 L.J.K.B. 230; 114 L.T. 176; 28 Digest 68, 356.
- (2) *North British Ry. Co. v. Scott*, [1923] A.C. 37; 92 L.J.P.C. 16; 128 L.T. 394; 8 Tax Cas. 332; 28 Digest 88, 514.
- (3) *Booth v. Booth*, [1922] 1 K.B. 66; 91 L.J.K.B. 127; 126 L.T. 342; 28 Digest 69, 365.

- (4) *South American Stores (Gath & Chaves), Ltd. v. Inland Revenue Comrs.*, (1926), 12 Tax Cas. 905; Digest Supp.
- (5) *Whiteside v. Whiteside*, [1949] 2 All E.R. 913; [1950] Ch. 65; 2nd Digest Supp.
- (6) *Re Pettit*, [1922] 2 Ch. 765; 91 L.J.Ch. 732; 127 L.T. 491; 39 Digest 167, 587.

APPEAL by the plaintiff from a decision of FINNEMORE, J., dated May 5, 1950, and reported p. 51, *ante*, whereby he held that an agreement by the defendants to pay to the plaintiff a salary in full without allowing any deductions for income tax was void under r. 23 (2) of the All Schedules Rules under the Income Tax Act, 1918. The facts appear in the judgment of the court delivered by SOMERVELL, L.J.

A. F. M. Berkeley for the plaintiff.

Sir Roland Burrows, K.C., and *Stogdon* for the defendants.

Cur. adv. vult.

Nov. 27. **SOMERVELL, L.J.**, read the following judgment of the court. This is an appeal from a decision of FINNEMORE, J., who decided in favour of the defendants. The facts which are fully stated by the learned judge can be shortly summarised. In January, 1943, the plaintiff, a Polish subject, entered the service of the defendants. The defendants were at that time an official body under the Polish government in London, recognised by His Majesty's government. The agreement of service was made orally at an interview conducted in Polish on Jan. 4, 1943, and confirmed by a letter of Jan. 8, written by the plaintiff, of which we have a translation. It is agreed that the translation is an accurate record of what was agreed. It reads as follows:

"Dear Colleague, With reference to our conversation regarding proposed work in the office of the association I beg to inform you that I agree with the proposal made to me, namely: My remuneration will amount (during the initial period, which I treat as a trial period) to £20 net per month, payable in advance, later increased to £25 net per month, without any deductions and taxes, which will be borne by the association. I dare say that I do not deem the remuneration of £25 to be a final one and I hope that after finding out my usefulness by the association, my remuneration will not be lower than salaries of other employees at the association's office. Business hours were communicated to me as follows: From 9.30 to 13 and from 14.30 to 17 hours. Questions regarding holiday and notice of employment are based on the provisions relating to Polish civil servants. Trusting that my work will be useful for the benefit of the association."

At that time the employees of the defendants were treated as having immunity in respect of income tax. The amount of £20 as stated in the letter was later raised to £36. By May, 1946, the plaintiff, with other employees of the defendants, had become liable to British income tax. Nothing turns on the fact that the defendants have been incorporated under the Companies Act.

It was not disputed that the emoluments of the plaintiff fell within the Income Tax (Employments) Act, 1943, which, with the regulations made thereunder, established the system known as "P.A.Y.E." Under s. 1 (1) of that Act it is provided that on the making of any payment of any emoluments covered by the Act, income tax shall, subject to, and in accordance with, regulations to be made, be deducted by the person making the payment. In the year in question the defendants proceeded to make the appropriate deductions on the basis that the plaintiff's emoluments were £36 a month. The plaintiff claims that, on the true construction of his agreement, he is entitled to emoluments which will, after the proper deduction has been made, leave a sum of £36. The claim is for tax sums deducted from £36 in the year 1946-47 which have regard to the allowances to which the plaintiff is entitled.

An intention that an employee or annuitant should get a certain sum irrespective of variations in income tax is common. Such an intention would seem to appear on the face of this document. The difficulties arise from certain provisions of the Income Tax Acts, and their application to words which on the face of them appear to show such an intention, but have been held not to effect it. The principle by which tax is deducted at the source is applicable to a number of payments. The most familiar examples are to be found in r. 19 and r. 21 of the All Schedules Rules in sched. I to the Income Tax Act, 1918. Leaving out words which do not matter, r. 19 provides:

"(1) Where any yearly interest of money, annuity, or any other annual payment . . . is payable wholly out of profits or gains brought into charge to tax, no assessment shall be made upon the person entitled to such interest, annuity, or annual payment, but the whole of these profits or gains shall be assessed and charged with tax on the person liable to the interest, annuity, or annual payment . . . and the person liable to make such payment . . . shall be entitled, on making such payment, to deduct . . . a sum representing . . . the tax thereon . . ."

Rule 21 provides:

"(1) Upon payment of any interest of money, annuity, or other annual payment charged with tax under sched. D . . . not payable, or not wholly payable, out of profits or gains brought into charge, the person by or through whom any such payment is made shall deduct thereout a sum representing the amount of the tax thereon . . ."

It will be noticed in r. 19 the words are permissive and in r. 21 mandatory. Rule 23 provides as follows:

"(1) A person who refuses to allow a deduction of tax authorised by this Act to be made out of any payment, shall forfeit the sum of £50.

(2) Every agreement for payment of interest, rent, or other annual payment in full without allowing any such deduction shall be void."

There was argument below and before us whether r. 23 (2) applied to deductions "authorised" from salaries or emoluments for services. Are they or are they not "annual payments" within the rule? We find a difficulty in seeing how r. 23 (2) can be applicable except in cases when the deduction is permissive: see *Blount v. Blount* (1) ([1916] 1 K.B. 234). If this is right, no assistance can be got from *North British Ry. Co. v. Scott* (2), which dealt with a "right to deduct" given to railway companies. In the present area, if a man's wages are £5 and the employer agrees not to deduct income tax, the agreement would be a direct contravention of s. 1 of the Income Tax (Employments) Act, 1943, and there would seem no need to resort to r. 23 (2).

It has been clearly established that, if appropriate words are used, a payer can so provide that the payee gets year by year a fixed sum. The payer covenants to pay a sum which after deduction of tax leaves the sum that it is desired should be available to the payee: *Booth v. Booth* (3). This is now familiar law, but the words used must point to a gross sum. In *South American Stores (Gath & Chaves), Ltd. v. Inland Revenue Comrs.* (4), the appellant company issued debentures, the prospectus stating that the interest would be 5½ per cent. free of English income tax. ROWLATT, J., held that this could not be read as a covenant to pay such a sum as will leave the net sum at the disposal of the recipient. In *Blount v. Blount* (1) the covenant was to pay £62 10s. free of income tax. SCRUTTON, J., was unable to construe this as a covenant to pay a sum which after deduction of tax left £62 10s. and held that it was void under s. 103 of the Income Tax Act, 1842, the predecessor of r. 23 (2). In *Whiteside v. Whiteside* (5), SIR RAYMOND EVERSHED, M.R., stated as beyond doubt that a promise to pay a sum of money free of income

tax contravened the provisions of the income tax law. He clearly had not in mind contracts of service.

In the light of these and other decisions we approach the construction of the words used. The grammar is not, perhaps, quite clear. Is "without" to be understood before taxes, etc., or is it to be read as providing for "£20 and taxes"? However this may be, the words which, in our opinion, point to a gross sum are the later words "which will be borne by the association." We think one is entitled to have regard to the fact that this is not an instrument drawn by lawyers. We think it means—taking the £20 in the original agreement—"My remuneration is to be £20 plus whatever sum is necessary to leave that available to me after you have borne the taxes." As under the law the tax is suffered by deduction, it means such a sum as will after deduction leave £20.

At one time we thought it was being suggested by counsel for the plaintiff that the agreement meant such sum as after deduction at the standard rate left £20. We did not in the end understand him so to contend. This might have involved incorporating the principle of *Re Pettit* (6), which we would have been loath to do. An employer would be very unlikely to contract on the basis that his employees would have to repay to him sums which they had recovered from the Revenue because they were not liable to pay the standard rate on the whole or perhaps any part of their emoluments. The taxes are, in our opinion, the taxes referable to the plaintiff. An example of how this can be worked out is given in *SIMON'S INCOME TAX*, Vol. 3, pp. 39 and 40.

We have found it unnecessary to decide the question whether r. 23 (2) applies to salaries or remuneration for employment under sched. E. As, however, the point was argued before us, and the learned judge proceeded on the basis that it did apply, we will make some observations on it. That its predecessor applied to sched. E is expressly provided by s. 103 of the Income Tax Act, 1842, and the Income Tax Act, 1918, was a consolidation Act. The words are:

" . . . and if any person shall refuse to allow any deduction authorised to be made by this Act out of any rent or other annual payment mentioned in r. 9 and r. 10 of sched. IV (A) or out of any annuity or annual payment mentioned in sched. (C) or sched. (E), or in the next preceding clause, save such annual interest as aforesaid, every such person shall forfeit the sum of fifty pounds; and all contracts, covenants, and agreements made or entered into, or to be made or entered into, for payment of any interest, rent, or other annual payment aforesaid, in full, without allowing such deduction as aforesaid, shall be utterly void."

Schedule E covers annuities and pensions as well as stipends and profits of public office. The former are annual payments, but the latter may not be. Under the Finance Act, 1922, s. 18 (1), other offices, employments and pensions previously assessable under sched. D were transferred to sched. E. So far as the latter are concerned, it has never, so far as we know, been suggested in any reported case that they were annual payments within the rules applicable to sched. D; it would be, at any rate, an unexpected result if they became annual payments by the transfer. Assuming that they do, for r. 23 (2) to be applicable, it would have to be shown that the deduction was authorised. If we are right in thinking that there is no room for r. 23 (2) where the deduction is mandatory, the only permissive deduction under sched. E, as the matter stood before the P.A.Y.E. scheme was in respect of railway companies. Under r. 7 the railway company was assessed in respect of their employees, and it was provided that they might deduct the tax from the emoluments. This was the provision which came before the House of Lords in *North British Ry. Co. v. Scott* (2). It was not necessary for the decision to decide whether r. 23 (2) applied. The fact that there was a reference to the company's contractual liability not to deduct and no one suggested that such a contractual liability

was void under r. 23 (2) supports the view that profits of employment under sched. E are not annual payments within the rule. Reliance was placed on references in s. 26 (1) of the Finance Act, 1941, and para. 24 of the Income Tax (Employments) Regulations, 1944 (S.R. & O., 1944, No. 251), as amended. For reasons which it is unnecessary to elaborate we doubt if much assistance can be got from either. They are certainly not purporting to render valid anything previously invalid. Their wording, though it would not conclude the issue if it ever arises, is, we think, more consistent with the view that r. 23 (2) has no application in this area than the other view.

The learned judge came, as we have said, to a different conclusion on the construction of this agreement. He prefaced his consideration by saying that the agreement could not be construed as an agreement for a gross sum unless this was done in quite plain terms. We are not sure that one should need plainer words for one construction rather than the other. We would have thought it was the other way. The parties clearly intended the plaintiff to get more than £20 subject, by deduction or otherwise, to the full tax. One must not, of course, re-write the contract, but, if two constructions are possible, we would favour one which gives effect to the intention of the parties. The learned judge went on to hold that r. 23 (2) was applicable. We have given our reasons for thinking that this does not arise, but, as the learned judge decided it was applicable, we thought it right to express our doubts on this point. For these reasons we think this appeal succeeds.

Appeal allowed with costs.

Solicitors: *H. H. Wells & Sons* (for the plaintiff); *Gaunt, Foster & Hill* (for the defendants).

[*Reported by C. N. BEATTIE, Esq., Barrister-at-Law.*]

Affirmed in part and Reversed in part.
C.A. [1951] 1 All E.R. 971.

Re SANDBACH (deceased).

[CHANCERY DIVISION (Vaisey, J.), October 12, November 23, 1950.]

Settled Land—Improvement rentcharge—“Redemption”—Tithe annuity—“Discharge”—Payment by tenant for life of periodical instalments under rentcharge, representing capital and interest, and of annuities—Right to recoupment, in respect of such part of payments as represented capital, out of capital moneys subject to settlement—Settled Land Act, 1925 (c. 18), s. 73 (1) (xiii), (xvi).

Loans made by the Lands Improvement Co. in respect of an estate settled by the will of the testator were charged on the settled property by orders of the Board or Minister of Agriculture and Fisheries, and the instalments in respect thereof, consisting of capital and interest, were paid by the tenant for life, whose life estate commenced on June 25, 1928. Of the instalments so paid, the sum of £1,742 2s. 6d. represented capital. Tithe annuities charged on the estate in consideration of the redemption of tithe rentcharges under orders made under the Tithe Act, 1918, s. 4 (2), were also paid by the tenant for life, and of the sums so paid £824 18s. was attributable to capital. The tenant for life claimed that she was entitled to be repaid these sums of £1,742 2s. 6d. and £824 18s. out of capital moneys subject to the settlement as, under the Settled Land Act, 1925, s. 73 (1) (xiii), and s. 73 (1) (xvi), respectively, they were payable out of capital.

HELD: (i) on the true construction of s. 73 (1) (xiii), “redemption” referred to a compounding of future payments, and a rentcharge was not

redeemed, within the meaning of the paragraph, by the payment of periodical sums as they became due, and, therefore, the tenant for life was not entitled to be recouped out of capital moneys subject to the settlement in respect of so much of the instalments paid by her as represented capital.

(ii) an annuity was discharged, within the meaning of s. 73 (1) (xvi), only by being commuted for a lump sum, and not by being paid as it fell due, and, therefore, the tenant for life was not entitled to be recouped in respect of so much of the tithe annuities paid by her as was attributable to capital.

[FOR THE SETTLED LAND ACT, 1925, s. 73 (1) (xiii) and s. 73 (1) (xvi), see HALSBURY'S STATUTES, Vol. 17, pp. 909, 910.]

Cases referred to:

- (1) *Re Knatchbull's Settled Estate*, (1885), 29 Ch.D. 588; 54 L.J.Ch. 1168; 53 L.T. 284; 30 Digest 281, 65.
- (2) *Re Sudeley's (Lord) Settled Estates*, (1887), 37 Ch.D. 123; 57 L.J.Ch. 182; 58 L.T. 7; 30 Digest 293, 199.
- (3) *Re Egmont's (Lord) Settled Estates*, (1890), 45 Ch.D. 395; 59 L.J.Ch. 768; 63 L.T. 608; 30 Digest 294, 205.
- (4) *Re Howard's Settled Estates*, [1892] 2 Ch. 233; 61 L.J.Ch. 311; 67 L.T. 156; 30 Digest 281, 66.
- (5) *Re Dalison's Settled Estates*, [1892] 3 Ch. 522; 61 L.J.Ch. 712; 30 Digest 293, 198.

ADJOURNED SUMMONS by the tenant for life of an estate settled by the will of the testator, Colonel Samuel Sandbach, applying for recoupment out of the capital moneys subject to the settlement (a) of so much of the instalments paid by her in respect of improvement rentcharges as represented capital, and (b) of so much of the sums paid by her in respect of tithe annuities as was attributable to capital. The application to the court was made under the Settled Land Act, 1925, s. 93 and s. 113, and it was contended by the tenant for life that, under s. 73 (1) (xiii) and s. 73 (1) (xvi), respectively, the sums were payable out of the capital moneys subject to the settlement, and, therefore, she having paid them, she was entitled to be recouped out of capital. The facts appear in the judgment.

Jopling for the tenant for life.

F. B. Marsh for the tenant in tail male.

V. M. C. Pennington for the trustees.

Cur. adv. vult.

Nov. 23. **VAISEY, J.**, read the following judgment. The testator, Colonel Samuel Sandbach, made his will on Apr. 12, 1923, and died on Mar. 24, 1928. The effect of the will, so far as relevant, was to create a life tenancy in an estate in Wales in favour of his niece, the applicant in these proceedings, with remainder to her son, the infant respondent, as tenant in tail male. The trustees of the settlement for the purposes of the Settled Land Act, 1925, are also respondents to the summons.

The applicant's life estate commenced on June 25, 1928, on the termination of a preceding life estate. Subsequently to that date, the applicant has paid, or there has been paid on her behalf, or deducted from her income as tenant for life, all the instalments consisting of capital and interest in respect of certain loans made by the Lands Improvement Co. to the testator or to herself and charged on the settled property by orders of the Board or Minister of Agriculture and Fisheries. The total amount of so much of the instalments so paid as represents capital is £1,742 2s. 6d. There have also been similarly paid or deducted certain tithe annuities charged on the estate in consideration of the redemption of tithe rentcharges under orders made under the Tithe Act, 1918,

s. 4 (2). Of the sums so paid or deducted, the sum of £824 18s. is attributable to capital. The applicant now asks that these sums of £1,742 2s. 6d. and £824 18s. may be recouped to her out of capital moneys subject to the settlement.

As regards the former sum, her case appears to rest on the Settled Land Act, 1925, s. 73 (1) (xiii), and as regards the latter sum on s. 73 (1) (xvi) of the same Act. Section 73 (1) sets out the modes in which capital money arising under the Act is to be invested or applied. With regard to the first point, the words in s. 73 (1) (xiii) are:

“In redemption of an improvement rentcharge, that is to say, a rentcharge (temporary or permanent) created, whether before or after the commencement of this Act, in pursuance of any Act of Parliament, with the object of paying off any money advanced for defraying the expenses of an improvement of any kind authorised by Part I of sched. III to this Act.”

It was in consequence of the decision in *Re Knatchbull's Settled Estate* (1) that the Settled Land Acts (Amendment) Act, 1887, was passed, and the words in s. 73 (1) (xiii) of the Act of 1925 are said to replace s. 1 of the Act of 1887, though the wording is by no means the same. In my judgment, the difference is vital. While s. 1 of the Act of 1887 refers to money expended in redeeming or “otherwise providing for the payment” of the rentcharge, s. 73 (1) (xiii) of the present Act refers to redemption only, and the decisions in *Re Lord Sudeley's Settled Estates* (2), *Re Lord Egmont's Settled Estates* (3), *Re Howard's Settled Estates* (4), and *Re Dalison's Settled Estates* (5), have, in my judgment, no present application. I think that a rentcharge is not “redeemed” within the meaning of the relevant words, by the payment of the periodical sums as they become due, though it is, of course, thereby “otherwise provided for.” “Redemption” in the context refers, I think, to a compounding of future payments, and I think that, as regards the £1,742 2s. 6d., the application fails.

With regard to the second point, the words in s. 73 (1) (xvi) of the Act of 1925 are:

“In the purchase of an annuity charged under s. 4 of the Tithe Act, 1918, on the settled land or any part thereof, or in the discharge of such part of any such annuity as does not represent interest.”

The question is whether an annuity is discharged, within the meaning of that word, by being paid as it falls due or only by being commuted for a lump sum, as is suggested in WOLSTENHOLME AND CHERRY'S CONVEYANCING STATUTES, 12th ed., p. 1103, in the note to s. 73 (1) (xvi). I think, on the whole, that the latter is the correct view, and that this application also fails as regards the £824 18s. I will, however, allow the costs of all parties to this application to be taxed and raised and paid out of capital moneys.

Order accordingly.

Solicitors: *Gregory, Rowcliffe & Co.* (for all parties).

[*Reported by H. McL. MORRISON, ESQ., Barrister-at-Law.*]

BIRCH AND ANOTHER *v.* TREASURY SOLICITOR.

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Asquith and Jenkins, L.JJ.), November 10, 13, 14, 27, 1950.]

Gift—Donatio mortis causa—Bank balances—Deposit accounts—Delivery—Animus donandi—Sufficiency of deposit books as indicia of title.

The deceased was an elderly widow with no blood relations, her best friends being her deceased husband's nephew, F.B., and his wife, G.B., to whom she had given a house jointly in 1940. On Feb. 22, 1948, she met with a serious accident and was taken to hospital where she was visited by F.B. and G.B., sometimes separately and sometimes together. On Mar. 4 she asked G.B., who had visited her alone, to go to her house and find her bank books. She told G.B. to keep the books and "if anything happens to me I want you and F. to have the money at the banks." The books in question were deposit account books of (a) the Post Office Savings Bank, (b) the London Trustee Savings Bank, (c) Barclays Bank, Ltd., (d) Westminster Bank, Ltd., and (e) Midland Bank, Ltd. On Mar. 11 G.B. again visited the deceased, and, on being asked if she had found the books, she replied: "Yes." At a later date, the deceased told G.B. that she would like her to pay an outstanding bill and left it to G.B. to arrange how it should be paid. G.B. arranged for the manager of a branch of the Midland Bank to come to the hospital on the morning of Mar. 25 and the deceased put her mark to a document instructing the bank to pay the bill out of her deposit account with it. On the evening of Mar. 25 F.B. and G.B. were asked to visit the deceased at once as she had had a relapse. The deceased told them that she knew that she was on the danger list and asked F.B. whether he had her bank books. He replied: "Yes, we have got them—well, as a matter of fact, G. has got them." The deceased said: "Don't forget, if anything happens to me, I want you to have the money in the banks," and before they left she repeated that she wanted them both to have that money. On Mar. 29 she died. F.B. and G.B. claimed that she had made a valid *donatio mortis causa* to them of the sums standing to her credit with the banks (with the exception of the sum in the account with the Midland Bank).

HELD: (i) on the facts, it was clear that the deceased treated F.B. and G.B. as one entity and that they regarded themselves in that light, and, even if the original delivery of the bank books was to G.B. alone, the events of the evening of Mar. 25 impressed it with a new character so that it became a delivery to both, and, therefore, there was a sufficient delivery to them to support a good *donatio mortis causa*.

Cain v. Moon ([1896] 2 Q.B. 283), *applied*.

(ii) as she did not reserve in advance the right to deal with the bank balances, the deceased parted with dominion over the balances when she parted with possession of the bank books, and the precatory formula used by her when asking G.B. to see that the outstanding bill was paid was consistent with her having parted with dominion. At most, this request and the events of the morning of Mar. 25 might amount to a partial revocation, an effective *donatio* of the rest being made or re-affirmed that evening.

Reddel v. Dobree (1839) (10 Sim. 244), *distinguished*.

(iii) where the subject-matter of an alleged *donatio mortis causa* consisted of a chose in action, incapable itself of physical delivery, the real test of the validity of the gift was whether the instrument, of which there had been a physical delivery, was the essential *indicia* or evidence of title, possession or production of which entitled the possessor to the money or property purported to be given, and it was not essential that every term

of the contract out of which the chose in action arose should be stated in the document of title; therefore, the gift of the balance standing to the credit of the deceased in the Post Office Savings Bank account was a good *donatio*, and so, too, was the gift of the balance with the London Trustee Savings Bank, although the book in that case did not contain a statement of the rate of interest allowed; in respect of the balances standing to the credit of the deceased in her deposit accounts with the joint stock banks (Barclays Bank, Ltd. and Westminster Bank, Ltd.), the condition stated in each of the deposit books, that production thereof was essential on any withdrawal from the account, should, on the evidence, be taken to have remained operative, even though the strict contractual practice might not always have been followed by the banks in their dealings with other customers; so the deposit books were the essential *indicia* of title and delivery of the books amounted to a transfer of the bank balances (it being immaterial that these books, also, contained no statement of the rate of interest payable); and, therefore, there was a valid *donatio mortis causa* to F.B. and G.B. by the deceased of her deposits with the Post Office Savings Bank, the London Trustee Savings Bank, Barclays Bank, Ltd. and Westminster Bank, Ltd.

Re Dillon (1890) (44 Ch.D. 76), *explained and applied*.

Moore v. Darton (1851) (4 De G. & Sm. 517), *explained*.

Delgoffe v. Fader ([1939] 3 All E.R. 682), *distinguished*.

[AS TO DONATIONES MORTIS CAUSA, see HALSBURY, Hailsham Edn., Vol. 15, pp. 742-748, paras. 1283-1290; and FOR CASES, see DIGEST, Vol. 25, pp. 541-554, Nos. 286-390.]

Cases referred to:

- (1) *Cain v. Moon*, [1896] 2 Q.B. 283; 65 L.J.Q.B. 587; 74 L.T. 728; 25 Digest 541, 286.
- (2) *Hills v. Hills*, (1841), 8 M. & W. 401; 10 L.J.Ex. 440; 151 E.R. 1095; 25 Digest 542, 294.
- (3) *Blount v. Burrow*, (1792), 4 Bro. C.C. 72; 1 Ves. 546; 29 E.R. 784; 25 Digest 542, 293.
- (4) *Reddel v. Dobree*, (1839), 10 Sim. 244; 59 E.R. 607; 25 Digest 554, 382.
- (5) *Re Weston*, [1902] 1 Ch. 680; 71 L.J.Ch. 343; 86 L.T. 551; 25 Digest 544, 302.
- (6) *Re Dillon*, (1890), 44 Ch.D. 76; 59 L.J.Ch. 420; 62 L.T. 614; 25 Digest 543, 298.
- (7) *Delgoffe v. Fader*, [1939] 3 All E.R. 682; [1939] Ch. 922; 161 L.T. 166; Digest Supp.
- (8) *Ward v. Turner*, (1752), 1 Dick. 170; 2 Ves. Sen. 431; 21 E.R. 234; 28 E.R. 275; 25 Digest 552, 372.
- (9) *Re Beaumont*, [1902] 1 Ch. 889; 71 L.J.Ch. 478; 86 L.T. 410; 25 Digest 542, 292.
- (10) *Moore v. Darton*, (1851), 4 De G. & Sm. 517; 20 L.J.Ch. 626; 18 L.T.O.S. 24; 64 E.R. 938; 25 Digest 541, 288.
- (11) *Duffield v. Elwes*, (1827), 1 Bli. N.S. 497; 4 E.R. 959; *sub nom. Duffield v. Hicks*, 1 Dow. & Cl. 1; 25 Digest 549, 351.

APPEAL by the plaintiffs from an order of ROXBURGH, J., dated July 14, 1950, in an action against the Treasury Solicitor as administrator *ad colligenda bona* of the estate of the deceased, Elisabeth Lucy Birch. The plaintiffs claimed a declaration that the deceased made a valid *donatio mortis causa* to them of sums of money standing to the credit of her account at her death in (a) a Post Office savings bank, (b) the London Trustee Savings Bank, and (c) deposit accounts with Barclays Bank, Ltd., Westminster Bank, Ltd., and Midland Bank, Ltd., respectively. ROXBURGH, J., held that there was no valid *donatio*

mortis causa to the plaintiffs, and he further held that only the sum standing to the deceased's credit in the Post Office savings bank was capable of being the subject-matter of a valid *donatio*. On appeal, the plaintiffs abandoned their claim to the sum standing to the deceased's credit with the Midland Bank, Ltd. The facts appear in the judgment of the court delivered by SIR RAYMOND EVERSLED, M.R.

Hawser and Briegel for the plaintiffs.

Denys B. Buckley for the Treasury Solicitor.

Cur. adv. vult.

Nov. 27. **SIR RAYMOND EVERSLED, M.R.**, read the following judgment of the court. The question raised on this appeal is whether on the evidence there was a valid *donatio mortis causa* of certain bank accounts to the two plaintiffs, who are husband and wife. The learned trial judge has held that there was not. To answer this question involves answering at least three subordinate questions: (i) Was there a sufficient "delivery" to the two plaintiffs of the subject-matter of the alleged gift to support a *donatio*? (ii) Was there the requisite *animus donandi*, having regard especially to acts done after the delivery, which are said to amount to the assertion and exercise of continued dominion by the alleged donor over the subject-matter of the alleged gift? (iii) Assuming that there was a sufficient delivery and the requisite *animus*, then, seeing that the subject-matter of the gift is a number of bank balances (choses in action incapable themselves of physical delivery) and that documents relating to them were delivered, were these documents such *indicia* of title as are necessary to constitute a valid *donatio mortis causa* of choses in action? The defendant, the Treasury Solicitor, in his capacity of administrator *ad colligenda bona* of the estate of the deceased, says that a negative answer should be given to all three questions save as to part of the third, and that there was, accordingly, no valid *donatio*.

The material facts may be summarised as follows. The deceased, a frail elderly lady, who by extreme frugality had accumulated substantial savings—the bank balances involved in this case amount to about £8,000—suffered a serious accident on Feb. 22, 1948, and was taken to St. Mary's Hospital, Paddington. She had no blood relations, but her best friends were Frank Birch, a nephew of her late husband, and his wife, Gladys. They are the first and second plaintiffs respectively in this case. They together, or one or other of them separately, visited her in hospital on various occasions between the accident and her death, which occurred on Mar. 29. As to who was present at which visit there are some discrepancies between the pleadings and the evidence, the importance of which we think the learned judge has over-estimated. The most important, at first sight, is that, while para. 3 of the statement of claim appears to say that both plaintiffs were present at a visit to the deceased which can be identified as having occurred on Mar. 4, 1948, both plaintiffs are quite positive that the first plaintiff, Frank Birch, was not present on that day. Actually, as the learned judge himself acknowledged, para. 3 is ambiguous and Frank Birch's evidence is consistent with one of its possible meanings. Apart from this, counsel for the plaintiffs stated that he had from the first been instructed that Frank Birch was not present at the interview on Mar. 4, and counsel for the defendant accepted his assurance. It is quite true that, where the court is dependent wholly on the evidence of interested parties, it must test such evidence somewhat rigorously, but the learned judge, after seeing and hearing the witnesses examined and cross-examined, came to the conclusion that, though the recollection of Frank Birch was deficient, both plaintiffs were completely honest.

The evidence as to the material visits and what passed at each is not very long, but, as the exact words used are important, some of it must be quoted verbatim. The second plaintiff, Gladys Birch, seems to have gone every

Thursday, Thursday being visiting day. Frank Birch, when he went, went on Sundays, except that he was a party on the final visit of Mar. 25, which was a Thursday. The crucial visits were those of Mar. 4 and 25. We will consider the evidence, in relation to these visits, first of Gladys Birch. Gladys said (in her evidence in chief) that on Mar. 4 she visited the deceased unaccompanied by Frank and the deceased said to her:

- A "Would I [Gladys] go to Bickerton Road [deceased's house] and . . . I would find a black handbag with her bank books in, adding: 'I want you to take them home and keep them, and if anything happens to me I want you and Frank to have the money at the banks'."

Gladys replied: "Nothing is going to happen to you," but the deceased disagreed, saying: "No . . . I think I am finished." On the next Thursday

- B (Mar. 11) Gladys went again, was asked if she had found the books, and said: "Yes." In cross-examination Gladys said she was quite certain that she and Frank were "to have the money in the banks." On the evening of Mar. 25 Frank and Gladys were told that the deceased had had a relapse and were asked to visit her at once. They thought it tactful to pretend that it was a casual visit, but the deceased was not deceived and said: "I know I have been 'slated'" (i.e., put on the danger list). She then "stared at Frank Birch for a long time" and said: "You have got my bank books, Frank?" He said:

"Oh yes, we have got them—well, as a matter of fact, Gladys has got them."

- D Later, the deceased said:

"Now don't forget, if anything happens to me, I want you to have the money in the banks."

Then later, according to Gladys:

- E ". . . before I left her I made her comfortable and said: 'Goodbye,' and she said: 'Now don't forget, I want you to have that money'."

In cross-examination Gladys re-affirmed this account of this interview. Frank Birch's evidence is shorter. He said that he and Gladys saw the deceased together on Feb. 22, immediately after the accident. He was not present on Mar. 4. The next time he "came into the picture" was on the evening of Mar. 25, the final interview, of which in his evidence in chief his account tallies

- F exactly with that of Gladys, except that the final remark of the deceased, according to him, was: "I want you both" or "I want you and Glad to have that money," and not I want "you"—a term ambiguous as to number—to have it. In cross-examination he was pressed with discrepancies between the pleadings and his and Gladys' evidence, but was quite positive as to what happened on Mar. 25. On this occasion (he said) the deceased definitely said, not "I want you both to have the books," but "I want you both to have the money."

- G This evidence establishes beyond question that certain prerequisites of a valid *donatio mortis causa* were fulfilled. The gift, if otherwise valid, was made in contemplation of death, and was to take effect conditionally on death occurring and in that event only. This, however, leaves outstanding the three issues indicated above.

- H (i) The first issue is whether on this evidence there was a sufficient delivery to the two alleged donees. Physically, delivery on Mar. 4 was into the hands of Gladys Birch alone, and it is objected that, where there are two donees, it must be to both. It is, however, clear that A. may take delivery as agent for B., and, presumably, where a joint gift is intended, A. may take delivery for himself and as agent for B. Is it, however, a proper inference from the evidence in this case that the delivery to Gladys on Mar. 4 was, or became, actually or constructively, a delivery to both? The defendant says "No." The only

delivery (says the defendant) was to Gladys, and this was a delivery to her as agent only for the deliveror, the deceased—no doubt, with a direction to deal with the object delivered, and to deal with it in a way which, no doubt, if the direction were carried out, would benefit Frank as well. That, however, does not make it a delivery to Frank as well as to Gladys. There is no evidence, so the argument runs, that on Mar. 4 Gladys had authority to take delivery on behalf of Frank, and nothing the deceased did could create such an authority. A

On this issue, the following circumstances are relevant. (a) Some years earlier, in 1940, the deceased had given and conveyed a house to the two jointly. (b) In law the delivery need not be contemporaneous with the gift. It can precede it: see *Cain v. Moon* (1). (c) The delivery may acquire a new quality as the result of events subsequent to its physical occurrence. Thus, a delivery made in the first instance *alio intuitu*, e.g., for safe custody only, may acquire from subsequent events the complexion of a delivery sufficient to support a *donatio mortis causa*: see *Cain v. Moon* (1). The relevant supervening events in this case are those of the evening of Mar. 25, when the final tripartite interview occurred. The material passages in the evidence have been quoted. It is transparently clear from this evidence that the deceased treated the two plaintiffs (as she had previously, when giving them a house) as interchangeable, or as a single entity—"one flesh." It is equally plain that the plaintiffs regarded themselves in that light. The deceased, well knowing that Gladys was the person who had actually taken delivery of the bank books on Mar. 4, gazes fixedly, not at Gladys, but at Frank, and asks not her, but him whether he has the bank books. He says: B C

"Yes, we have got them—well, as a matter of fact, Glad has got them." D

Such language either means nothing or it means that these two amount in the eyes of the speaker to the same thing, and Gladys stands by, acquiescing without protest in this tacit identification. What passed at that interview would seem to impress on a delivery, which may originally have been a delivery into the hands of Gladys only, a new character (and we know that a delivery can acquire a new character as the result of supervening events)—the character of a delivery to both. None of the parties at this interview drew any distinction between husband and wife, any more than they drew any distinction between bank books and the balances represented thereby. E

Even if the matter had been otherwise—if counsel for the defendant had been right in contending that the delivery on Mar. 4 was and remained a delivery to Gladys as agent for the deliveror only, with directions to deal with the thing delivered in a certain way—yet it has been decided that in certain events delivery to X. subject to a trust in favour of Y. may be valid. In *Hills v. Hills* (2) it was held that there could be a valid *donatio mortis causa* though coupled with a trust. In that case ROLFE, B., said (8 M. & W. 404): F

"... I cannot see how the annexation of a trust to the gift can make any difference. If it be lawful so to give the property out and out to the party for his own use, I cannot see that it makes any difference that with it he is to pay for a particular thing. If a man on his death-bed gives another £1,000, is it any addition to the evils attending this mode of bestowing property that he attaches a condition to it—as, for instance, that he stipulates that his brother shall receive an outfit to India? The case of *Blount v. Burrow* (3) is expressly in point, and disposes of the question; and I have no doubt that other cases to the same effect might be found." G H

So here, a delivery of the bank books to Gladys on Mar. 4, with a direction in the event of the deceased's death to withdraw the balances and hand half to Frank, might well be a valid *donatio*, and produce the practical result for which the plaintiffs contend. It is, however, not necessary to decide this point. For

these reasons we think that there was a delivery sufficient to comply with the requirements of a *donatio*.

(ii) The second outstanding question is: Assuming the other conditions of a valid *donatio* to be satisfied, is the present disposition vitiated on the ground that the deceased, though she parted with possession, did not part with dominion over the subject-matter of the gift? For this she must do, or there is no *donatio*. The argument that the deceased retained dominion is founded on an incident which occurred on the morning of Mar. 25—before the final interview between the parties that evening. The deceased owed a builder, called Mason, a sum of £98 15s. 10d., and was anxious that this debt should be paid. Gladys Birch saw her on Mar. 11 and “later on” found this bill. She mentioned this to the deceased “subsequently” (no date can be identified, but it was before Mar. 25). Gladys Birch said in her evidence:

“I took her the bill and she said: ‘I would like you to pay this because I promised to pay him quickly and he did the work. Would you go and draw some money?’ I said: ‘Well, where shall I draw the money?’ She said: ‘Oh, I leave that entirely to you. You have my books. You can draw it where you like.’”

Thereupon Gladys Birch saw Mr. Andrews, the manager of a branch of the Midland Bank, Ltd., a day or two before Mar. 25. According to Andrews, Gladys Birch explained the situation and told him that the deceased wanted arrangements made to pay this account. It was agreed that she and Andrews should go round to the deceased at the hospital on the morning of Mar. 25 and that they should get the deceased to give the bank an order to pay this sum to the builders. On Mar. 25 the deceased put her mark on a document in the presence of Andrews and Gladys Birch. This document, which is addressed to the Upper Holloway branch of the Midland Bank, Ltd., reads:

“Please pay Mr. E. Mason . . . £98 15s. 10d. . . . to the debit of my deposit account with you.”

It is witnessed by Andrews and Gladys Birch. This is the transaction relied on as showing that the deceased had not parted with dominion over these balances. In support of this contention counsel for the defendant cited *Reddel v. Dobree* (4). In that case A., in declining health, delivered to B. a locked cash box, telling her to go at his death to his son for the key and that the box contained money for herself, but that he should want it every three months while he lived. He called for it twice before he died (no doubt, drawing from it) and re-delivered it on each occasion to B. It was held by SIR LANCELOT SHADWELL, V.-C., that A. had retained dominion by reserving in advance the right to deal with it between its delivery and his death, and keeping control of the key through his son as his agent. In the present case there was no such antecedent reservation. The precatory formula used by the deceased before the final interview, “I would like you to pay this,” is consistent with her having parted with dominion. At most, this request and the events of the morning of Mar. 25 might amount to a partial revocation, an effective *donatio* of the rest being either made or re-affirmed in the interview later that day. We are of opinion, accordingly, that this point, too, fails.

(iii) If we are right in concluding that the evidence supports in other respects a valid *donatio mortis causa*, there remains the more difficult question whether any and, if so, which of the sums of money specified in para. 6 of the statement of claim are, from their nature and in the light of the evidence given on the defendant’s behalf, capable of being the subject-matter of a *donatio*. On this point the learned judge was of opinion that the sum of £3,328 9s. 6d., standing to the deceased’s credit in the Post Office Savings Bank was so capable. In this respect he followed the decision of BYRNE, J., in *Re Weston* (5). The decision of BYRNE, J. (in which he followed and applied the decision of the Court of

Appeal in *Re Dillon* (6)) has now stood unchallenged for close on half a century and counsel for the defendant has addressed to us no argument against its soundness. It, therefore, follows that no question arises as to this sum of money, though it may be necessary to refer to the facts relevant and peculiar to a Post Office Savings Bank deposit in discussing the problem as it affects the other deposits in this case. On the other hand, counsel for the plaintiffs has abandoned any claim to the sum of £357 12s. 6d. to the deceased's credit with the Midland Bank, Ltd., and this item, therefore, disappears from the case. There remain, accordingly, the three sums to the credit of the deceased, *viz.*, (a) £55 with the London Trustee Savings Bank, (b) £646 11s. 2d. with Barclays Bank, Ltd. and (c) £1,353 1s. 8d. with Westminster Bank, Ltd. In considering these three cases the learned judge applied the test stated by LUXMOORE, L.J., sitting as an additional judge of the Chancery Division, in *Delgoffe v. Fader* (7). That learned judge said ([1939] 3 All E.R. 685):

"The test of whether the delivery of the document constitutes a good *donatio mortis causa* of a chose in action depends on the answer to the question whether the document expresses the terms on which the subject-matter of the chose in action is held by the donor, or the terms under which the chose in action came into existence."

Counsel for the defendant in this court has relied on this statement, and has contended, accordingly, that in the case of a chose in action actual delivery of the document constituting the evidence or *indicia* of title must fulfil one, if not both, of the following conditions, *viz.*, (a) that production and delivery of the document must be essential to the recovery of the chose in action, and (b) that it must contain all, or all the essential, terms of the contract out of which the chose in action arises. In the present case the documents in question are, of course, the relevant bank deposit books. For reasons which we shall have to consider presently, it is claimed by counsel for the defendant that in no one of the three cases (save, perhaps, for the London Trustee Savings Bank, as regards the first condition) were the conditions satisfied. It is said by counsel for the defendant that, so far as concerns the first condition, the evidence called by him proved that, whatever might have been the strict contractual terms, the practice of the joint stock banks has not been to require production of the deposit book as a condition of any withdrawal, and, as far as concerns the second condition, not all the terms of the relevant contracts are to be found stated, or even referred to, in any of the books.

We have examined numerous authorities relating to this difficult subject-matter, but, although it seems clearly established that there may be a valid *donatio mortis causa* of property other than such only as is capable of manual delivery, it must be confessed that there was, at any rate before *Delgoffe v. Fader* (7), no clear or precise statement of the limiting conditions applicable in such cases. The English law in regard to *donationes mortis causa* must be taken largely to rest on the well-known judgment of LORD HARDWICKE, L.C., in *Ward v. Turner* (8). As appears from LORD HARDWICKE's judgment, the English law relating to *donationes mortis causa* (derived, at least in part, from the civil law) is in many respects anomalous. It was, indeed, questioned at one time whether the old decisions supporting *donationes mortis causa* were consistent with the Wills Act, 1837, on the ground that they are in a sense testamentary in that full effect is not given to them until the donor's death. Being at that date incomplete, the gifts are then (unlike other gifts or trusts) rendered perfect and complete by the law. In *Re Beaumont* (9) BUCKLEY, J., said ([1902] 1 Ch. 892):

"A *donatio mortis causa* is a singular form of gift. It may be said to be of an amphibious nature, being a gift which is neither entirely *inter vivos* nor testamentary. It is an act *inter vivos* by which the donee is to

have the absolute title to the subject of the gift not at once but if the donor dies. If the donor dies the title becomes absolute not under but as against his executor. In order to make the gift valid it must be made so as to take complete effect on the donor's death."

Because of these peculiar characteristics the courts will examine any case of alleged *donatio mortis causa* and reject it if in truth what is alleged as a *donatio* is an attempt to make a nuncupative will, or a will in other respects not complying with the forms required by the Wills Acts. Such, as I read it, was *Reddel v. Dobree* (4), where the donor stipulated that the box delivered to the claimant should be returned to him (the donor) every three months, thereby preserving to the donor an effective dominion over the contents which he could change from time to time. For the same reasons it is of the essence of a valid *donatio* that there should be *traditio*, *i.e.*, delivery in fact of the thing given to the donee. As LORD HARDWICKE, L.C., observed (2 Ves. Sen. 442) in *Ward v. Turner* (8), mere symbolic delivery will not suffice. It might, therefore, be supposed that there could be a valid *donatio* only of such subject-matters as were capable of actual manual delivery. This, however, is clearly not the law. Thus (as LORD HARDWICKE, L.C., himself noted (*ibid.*, 443)), where the thing given is of a bulky nature, the handing to the donee of the key of the box or place where the thing is kept will be sufficient and is not to be regarded as merely symbolic. LORD HARDWICKE, L.C., summed the matter up by stating (*ibid.*, 444) that it is impossible to make a *donatio mortis causa* "without a transfer, or something amounting to that."

The question then is: Where actual transfer does not or cannot take place, what will "amount to that"? As a matter of principle, delivery of the *indicia* of title (*viz.*, the document or thing the possession or production of which entitles the possessor to the money or property purported to be given), as distinct from mere evidence of title, should satisfy LORD HARDWICKE'S condition. On this ground, in our judgment, the validity of a *donatio* of money standing to the donor's credit in a Post Office Savings Bank deposit, or a mortgage debt, should be sustained, and it appears to us irrelevant in such cases whether all the terms of the contract out of which a chose in action arises are stated in the document of title. It is true that in *Re Weston* (5) BYRNE, J., founded himself on the view that the document, *i.e.*, the deposit book, "expresses the terms on which [the money] is held, and shows what the contract between the parties is," and the learned judge cited *Moore v. Darton* (10) and *Re Dillon* (6). He said ([1902] 1 Ch. 685):

"An examination of the savings bank book in the present case appears to me to show a fulfilment of the test; and although every rule regulating the contract is not set out in the book itself, all the essential rules are."

The learned judge, however, went on to state (*ibid.*) that the deposit book was not a mere receipt, but that:

"It must, as stated on the face of it, be produced whenever any money is deposited or withdrawn . . ."

In *Moore v. Darton* (10) the question was whether there had been a valid *donatio* to the debtor of a debt of £500. The thing handed over was in the form of a receipt, which was signed by the debtor and was as follows:

"Received Oct. 22, 1843, of Miss Darton £500, to bear interest at four per cent. per annum, but not to be withdrawn at less than six months' notice."

In regard to that document SIR JAMES KNIGHT BRUCE, V.-C., said (4 De G. & Sm. 520):

"The document here has been called a receipt, and is a receipt in a sense, but it is not a receipt in the ordinary acceptation of that term . . ."

The debt was a debt carrying interest. A mere debt of £500 would have arisen from a loan, without any writing. But it would not have been a debt carrying interest, without a contract to that effect beyond the advance. That particular contract, I agree, might have been entered into without writing; but, as it was created by writing, proof of the writing, if possible, was essential to recovery upon the contract. This writing was therefore in a sense essential to the proof of the contract; and it is this writing which was in substance delivered *mortis causa* to the person owing the money. In my opinion it is consistent with what was said by LORD HARDWICKE, LORD ROSSLYN and LORD ELDON, with the civil law and our own, to hold, as I do, that this was a sufficient delivery to constitute a *donatio mortis causa*, which, in my judgment, it was intended to be."

This passage from the judgment of SIR JAMES KNIGHT BRUCE, V.-C., seems to me to show that the *ratio decidendi* was that, since, in the case before him, the contract of loan was recorded in writing, proof and production of the writing was essential to the recovery of the debt—in other words, that the document was the essential *indicia* of title, and delivery of it "amounted to transfer" of the debt. It is, no doubt, true that all the material terms of the contract were stated in the writing, but it was because of that fact that the document was the essential evidence of the contract. In our judgment, it is the latter circumstance, and not the incidental fact that all the terms of the contract were recorded in the writing, which satisfied the test of a valid *donatio*.

In *Re Dillon* (6), which appears to be the only case in this court relevant to the present question, the problem arose in regard to a banker's deposit note. The deposit note stated all the terms of the contract save the rate of interest then presently payable, but it contained on the back of it a form of cheque. As appears from the argument, the real question which was raised was whether, because of the indorsed cheque form, the result was that the document, on the face of it a deposit note, was, in truth, no more than a cheque payable to bearer. If it were, there would be little doubt that it could not be the subject of a valid *donatio*. As BUCKLEY, J., stated ([1902] 1 Ch. 894) in *Re Beaumont* (9):

" . . . in order that the gift may be valid, it must I think be shown that the donor handed over either property, or the *indicia* of title to property, which belonged to him. His own cheque is not property; it is only a revocable order such that if the banker acts on it the donee will have the money to which it relates."

The decision of the Court of Appeal in *Re Dillon* (6) was, however, that the presence of the cheque form did not convert what would otherwise have been a deposit note, the *indicia* of title to the sum deposited, into a mere bearer cheque. COTTON, L.J., said (44 Ch.D. 81) that, in the absence of evidence why banks put a memorandum of this kind on their deposit notes, he came to the conclusion that:

" . . . in order to preserve convenient evidence when the money is withdrawn, they put the form of cheque on the note, so that when filled up and signed it may be preserved as a receipt, and not that they make it a part of the bargain that they will not pay unless this cheque is signed and produced . . . I cannot think that the requiring this cheque to be signed puts the account on any footing different from that of an ordinary deposit account, so as to prevent the fund from being given away as a *donatio mortis causa*."

Later in his judgment (*ibid.*, 82) he used the language on which counsel for the defendant has mainly founded his argument:

A "The case of *Duffield v. Elwes* (11) shows that there may be a good *donatio mortis causa* of an instrument which does not pass by delivery, and that the executors of the donor are trustees for the donee for the purpose of giving effect to the gift. The case of *Moore v. Darton* (10) is very instructive as to the class of instruments which are subjects of *donatio mortis causa*. There a document was executed when a deposit of money was made. The mere fact of the deposit would create a debt; but the document, besides acknowledging the receipt of the money, expressed the terms on which it was held, and showed what the contract between the parties was. It was held that the delivery of that document was a good *donatio mortis causa* of the money deposited, and so, in my opinion, was the delivery of the deposit note in the present case."

B In our judgment, and having regard to the circumstances of the case, COTTON, L.J., cannot be taken as laying down that, in a case of alleged *donatio* of a chose in action such as a sum of money on deposit with a bank, the deposit note or book must contain all, or all the material, terms of the contract. Neither LINDLEY, L.J., nor LOPES, L.J., gave any support, in their judgments, for that proposition. Both those learned judges confined themselves to disposing of the argument based on the indorsed form of cheque, and, having disposed of that argument, treated the deposit note as having been established by authority as a good subject-matter of a *donatio mortis causa*. In our judgment, accordingly, BYRNE, J., in *Re Weston* (5) and LUXMOORE, L.J., in *Delgoffe v. Fader* (7) went further than was necessary in stating that a record of all the essential terms of the contract in the document handed over was a condition D or test of the validity of the *donatio mortis causa*. For reasons which we have attempted to give, we think that the real test is whether the instrument handed over is the essential *indicia* or evidence of title, possession or production of which entitles the possessor to the money or property purported to be given, so that delivery of the instrument "amounts to a transfer." We must not, however, be taken to be casting any doubt on the correctness of the decision E in *Delgoffe v. Fader* (7), for, as LUXMOORE, L.J., observed ([1939] 3 All E.R. 687), on the evidence before him, the deposit book there in question

" . . . was in no way essential to be produced if the depositor had required to withdraw her money . . . [The donor] had no current account, but she in fact operated her deposit account by making deposits and drawing cheques upon it, just as she would have operated a current account."

F We turn, accordingly, to the facts relating to the three deposits. Having regard to the view which we have expressed, it is unnecessary to consider whether in each case all the terms of the contract between depositor and bank are stated in the respective books, or whether the books record all the conditions on which the deposits were made, but we must not be taken to be expressing G the view that a negative answer ought to be given to these questions. In the case of the London Trustee Savings Bank it is true that there is no statement of the rate of interest allowed. For that, it is necessary to look at the elaborate book of rules duly certified in accordance with the Trustee Savings Bank Act, 1863. On the face of the book, however, appears a reference to the Act of 1863 and we are not satisfied that, on any view, a statement of the H rate of interest would be necessary. As we have already pointed out, the rate current at the date of deposit was not stated in the note in *Re Dillon* (6). It is not clear that even in the case of the Post Office account every term of the contract appears from the deposit book. There is a page headed "Information," which contains statements as to withdrawals and rate of interest, but also the statement that "further information is contained in a booklet obtainable at post offices, etc." For similar reasons we do not think that the absence in the Barclays bank book of any statement of the rate of interest could, on any view,

be material, for in the case of joint stock banks it must, we should have thought, be taken to be clearly implied that the rate was the rate of interest allowed by these banks from time to time on deposits. The case of Westminster Bank is more difficult, for in that case the book contains no reference to interest at all. One view would be that in that case no interest was, in fact, payable and none was credited in the book until the end of the account, but it is at least doubtful if this was the true contractual position. It is, however, unnecessary to pursue the matter further.

What, then, is the evidence in this case as to the necessity for production of the books on any withdrawal—for this, in the view which we take, is the essential matter? In each case, on the face of the deposit book, such production was, beyond doubt, made a term or condition of the deposit, but, as we have said, counsel for the defendant has contended that, whatever the strict contractual terms, as a matter of practice—at least in the case of the two joint stock banks—such production was not required, and it is, perhaps, a matter of common knowledge (as was found to be the fact in *Delgoffe v. Fader* (7)) that a so-called deposit account may, by arrangement between banker and customer, be operated much as a current account so that the deposit book is no more than an ordinary bank pass book. What is the evidence here? In the case of the London Trustee Savings Bank counsel for the defendant did not, and could not, press the point far, as the local actuary, Mr. Skeets, said:

“Really, we always insist on the production of the pass book except in exceptional circumstances where hardship may be caused—for instance with a lost pass book.”

The requirements of the two joint stock banks, Barclays Bank, Ltd. and Westminster Bank, Ltd., are, no doubt, less stringent, but, in our opinion, the evidence in the present case cannot be said to go anything like so far as that in *Delgoffe v. Fader* (7). The evidence is, in our view, fairly summarised in two questions and answers, appearing in the cross-examinations of the respective witnesses from those banks:

(i) “Q.— . . . the bank is kind enough to its depositors on occasions to say ‘We will not trouble about it’ [*i.e.*, the rule that production is required to obtain any payment]? A.—To stretch a point in their favour.”

(ii) “Q.— . . . the rule is that the book must be produced . . . but . . . the bank is a little easy about the rule and is prepared to relax it from time to time? A.—I think that is a very fair way of saying it.”

In the result, counsel for the defendant failed, in our judgment, to prove any such general practice as would lead to the conclusion that the contractual term as to production of the book in either case had become a dead letter, and certainly there was no evidence of any particular arrangement with the deceased. We think, accordingly, that in the case of both banks the condition stated on the face of the deposit books must be taken to have remained operative, *i.e.*, that the book was and is the essential *indicia* of title and that delivery of the book “amounted to transfer” of the chose in action. The result is that, in our judgment, the plaintiffs are entitled to succeed as to the deposits in all three cases, the London Trustee Savings Bank, Barclays Bank and Westminster Bank. We think the result satisfactory, for it avoids, as it seems to us desirable to avoid, fine distinctions between moneys on deposit with the Post Office Savings Bank, on the one hand, and with trustee savings banks and joint stock banks, on the other, where in the latter cases the deposit account is a true deposit account as distinct from an ordinary current account.

Appeal allowed with party and party costs here and in the court below.
Solicitors: *Manches & Co.* (for the plaintiffs); *Treasury Solicitor.*

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

WETHERALL & CO., LTD. v. STONE AND OTHERS.

[COURT OF APPEAL (Somervell, Jenkins and Birkett, L.J.J.), November 21, 1950.]

Landlord and Tenant—New lease—Joint landlords—Premises required for occupation by two of three landlords—Two landlords sons of third landlord—Reasonableness—Landlord and Tenant Act, 1927 (c. 36), s. 5 (2), s. 5 (3) (b) (i).

By s. 5 (2) of the Landlord and Tenant Act, 1927, the court may order the grant of a new tenancy of business premises on the application of a tenant who alleges that compensation for loss of goodwill would be inadequate if the court "... considers that the grant of a new tenancy is in all the circumstances reasonable ...". By s. 5 (3), the grant of a new lease is not to be deemed reasonable "(b) if the landlord proves—(i) that the premises are required for occupation by himself, or, where the landlord is an individual, for occupation by a son or daughter of his over eighteen years of age." The tenant applied for the grant of a new lease of premises of which there were three joint landlords—a mother and her two sons, both of whom were aged over eighteen. The landlords, in resisting the application, relied on s. 5 (3) (b) (i), alleging that they required the premises for occupation by a firm in which the two sons were partners.

HELD: (i) s. 5 (3) (b) (i) did not afford the landlords any defence to the tenant's application as that provision did not apply where premises were required for occupation by only two out of three landlords, nor did the fact that a son of the third landlord required the premises for his occupation bring the landlords within the provision.

McIntyre v. Hardcastle ([1948] 1 All E.R. 696), *applied*.

(ii) nevertheless, the fact that some of the landlords required to occupy the premises and that those landlords were the sons of the third landlord, were circumstances which the court should take into account in considering under s. 5 (2) whether it was reasonable to grant a new lease, and, on these facts, a new lease should not be granted.

[AS TO TENANT'S RIGHT TO A NEW LEASE, see HALSBURY, Hailsham Edn., Vol. 20, pp. 297-299, para. 340; and FOR CASES, see Digest Supp., and 2nd Digest Supp.]

Cases referred to:

(1) *McIntyre v. Hardcastle*, [1948] 1 All E.R. 696; [1948] 2 K.B. 82; [1948] L.J.R. 1249; 2nd Digest Supp.

(2) *Clift v. Taylor*, [1948] 2 All E.R. 113; [1948] 2 K.B. 394; [1948] L.J.R. 1822; 2nd Digest Supp.

APPEAL by the landlords from an order of His Honour JUDGE WALMSLEY, sitting at Salford County Court, dated July 4, 1950, whereby he granted the tenants a new lease under s. 5 of the Landlord and Tenant Act, 1927. The facts are set out in the judgment of SOMERVELL, L.J.

Hawser for the landlords.

Mais for the tenant.

SOMERVELL, L.J.: The tenant claimed a new lease under s. 5 of the Landlord and Tenant Act, 1927. The landlords, Mrs. Stone and two of her sons, resisted the application, among other grounds, on the ground, under s. 5 (3) (b) (i), that they required the premises for their own occupation. The judge granted a new lease and the landlords appeal.

The point arising here is a narrow one. There was a report from the referee who found that there was adherent goodwill. Section 5 (1) of the Act provides that the tenant must show that he would be entitled to compensation under s. 4 in respect of the loss of goodwill and requires him to serve notice on the landlord requiring a new lease. Sub-section (2) provides:

"Where such a notice is so served, the tribunal, on application being made for the purpose either by the landlord or by the tenant not less than nine months before the termination of the tenancy, or, where the tenancy is terminated by notice, within two months after the service of the notice, may, if it considers that the grant of a new tenancy is in all the circumstances reasonable, order the grant of a new tenancy for such period (being a term of years absolute) not exceeding fourteen years and on such terms as the tribunal may determine to be proper, but if the tribunal is precluded on any of the grounds mentioned in para. (b) of the following sub-section from making such an order the tribunal may award such compensation as is provided under the last foregoing section."

Sub-section (3) (b), with which we are concerned, provides:

"If the landlord proves—(i) that the premises are required for occupation by himself, or, where the landlord is an individual, for occupation by a son or daughter of his over eighteen years of age . . ."

the grant of a new lease shall not be deemed to be reasonable.

It appears that the two "son-landlords," if I may so express it, had a business in which their mother, the third landlord, was not a partner, and the learned judge construed s. 35 (b) (i) as inapplicable where there was more than one landlord if occupation was required by less than the total number of landlords or by the son of one landlord only. Counsel for the landlords submitted that that is wrong. He referred us to a case decided under the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, sched. I, para. (h)—*McIntyre v. Hardcastle* (1)—in which this court construed somewhat similar words in the same sense as that given by the judge in the present case to the words of s. 5 (3) (b) (i). Schedule I to the Act of 1933 provides:

"A court shall, for the purposes of s. 3 of this Act, have power to make or give an order or judgment for the recovery of possession of any dwelling-house to which the principal Acts apply or for the ejection of a tenant therefrom without proof of suitable alternative accommodation (where the court considers it reasonable so to do) if . . . (h) the dwelling-house is reasonably required by the landlord . . . for occupation as a residence for—(i) himself; or (ii) any son or daughter of his over eighteen years of age; or (iii) his father or mother."

In *McIntyre v. Hardcastle* (1) this court held that where there were two or more joint beneficial owners possession of a dwelling-house could be obtained under para. (h) only if the house were required for occupation as a residence for both or all of them. Counsel for the landlords submitted that the Acts of 1927 and 1933 have different purposes, and that that is so is clear. He relied on the definition in the Landlord and Tenant Act, 1927, s. 25 (1), of "landlord" as being

"any person who under a lease is, as between himself and the tenant or other lessee, for the time being entitled to the rents and profits of the demised premises payable under the lease"

and also on the principle that where there are joint lessors either lessor can sue or give a receipt for the entire rent.

I do not, however, think that the words of s. 5 (3) (b) (i) of the Act of 1927 can be given any different construction from that given to the somewhat similar words in the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, in *McIntyre v. Hardcastle* (1). I do not think the definition of "landlord" affects the matter. Substituting the plural for the singular, as is permitted under the Interpretation Act, 1889, unless the context otherwise requires, does not, I think, lead to the conclusion to which counsel for the landlords submits we should come, namely, that we should read the words in question as applying to a case

where the landlords prove that the premises are required for occupation by one or more, but not all, of them. On that question of construction I think the judge was right.

- A But that does not dispose of the matter. Under s. 5 (2) of the Act of 1927 the court still has to consider whether the grant of a new tenancy is, in all the circumstances, reasonable. It may well be that that point was not stressed as an alternative point to the extent to which it should have been before the learned judge. We must first consider whether the fact that the landlords require the premises for one or more of them, but not all of them, is to be taken into account in considering whether it is reasonable to grant a new tenancy. It seems to me that it clearly is. In *McIntyre v. Hardcastle* (1) TUCKER, L.J., suggested ([1948] 1 All E.R. 699) that, in using the words that were being construed there, the legislature had not really present to its mind the problems which arose if there was more than one landlord. That may be so, and it may also apply to the words which we have to construe. But on any basis I think that the fact that some, but not all, of the landlords require the premises for their own occupation must be a circumstance which is relevant to be considered when deciding whether it is reasonable to grant a new tenancy. The court is told to consider all the circumstances. We have thought whether we ought to send the case back to the judge, but we wish to avoid unnecessary expense and we have come to the conclusion that we can, and should, deal with the matter here. I have come to the conclusion that, having regard to the fact that two out of three of the landlords require these premises to carry on their business, it would be unreasonable to grant a new tenancy to the tenant, long as he has been there. In *Clift v. Taylor* (2) SCOTT, L.J., pointed out ([1948] 2 All E.R. 116) that these provisions cut down the common law right of a landlord to grant a new lease to a new lessee on the conclusion of a tenancy, and this also must be borne in mind in considering whether it is reasonable to grant a new lease. For these reasons, I think the appeal should be allowed.

- E JENKINS, L.J.: I agree. *McIntyre v. Hardcastle* (1) dealt with a different Act, but the words there construed are sufficiently similar to the words here in question to make it wrong, in my view, for us to place a different construction on the words here, even if otherwise we might be disposed to do so. I also agree that, on the true construction of s. 5 of the Landlord and Tenant Act, 1927, the four cases set out in sub-s. (3) (b) in which it is not to be deemed to be reasonable to grant a new lease are not exhaustive. There is still the overriding requirement of sub-s. (2) that the tribunal must be satisfied that the grant of a new tenancy is, in all the circumstances, reasonable. I agree with my Lord that it appears from the judgment of the judge that he had not that overriding consideration in mind. Having applied himself to the objection under sub-s. (3) (b) (i) and decided that adversely to the landlords, he felt that nothing remained but to make the order granting a new lease whether he thought that was a reasonable thing to do or not.

- G I also agree that it is proper for us, having come to the conclusion that the judge did not address himself to the general question of reasonableness, to entertain that question ourselves and come to a decision upon it. Once it is appreciated that the general question of reasonableness is open, it can hardly be doubted that it would not be reasonable to grant a new lease in the circumstances of this case. H If all three landlords had wanted the premises for their own occupation, the case would have been outside the Act of 1927 by the express provision of sub-para (b) (i) of sub-s. (3). If the mother had been the only landlord, she could have claimed possession of the premises for occupation by the two sons. The surprising position arises, therefore, that while sub-s. (3) (b) (i) does not apply to the case, each of the three individuals collectively constituting "the landlords" requires possession for a purpose recognised by the Act. Each of the two sons requires the premises for occupation by himself; the mother requires the premises for occupation by

the two sons. Yet that case cannot be brought within sub-s. (3) (b) (i) because, as a matter of strict construction, the precise terms of that provision are not satisfied. It seems to me that is the very kind of situation with which the overriding provision as to reasonableness was intended to deal. It is, if one may use the expression, *ejusdem generis* with the case dealt with in sub-para. (i) of sub-s. (3) (b). It is within the spirit, though not within the letter, of that provision. Accordingly, in my judgment, this is a case in which, although the grant of a new lease is not prohibited, it would not, in all the circumstances of the case, be reasonable to grant it. Accordingly, I agree that the appeal succeeds. A

BIRKETT, L.J.: I agree with the two judgments which have been delivered and with the reasons which have been given for them. It is plain that before the judge the landlords relied very strongly on s. 5 (3) (b) of the Landlord and Tenant Act, 1927. The judge held that their submission failed on the ground that they had not proved that they all required the premises for their occupation, although it appeared that two out of the three did. My Lord has indicated the view of the court on that question of construction. The second point which was raised by counsel for the landlords seems to be a point of very considerable substance. He said that, even if the judge were right in his construction of para. (b) (i), nevertheless that was not decisive. Counsel for the landlords submitted that, even if that point was decided against the landlords it was, nevertheless, incumbent on the judge to consider the words in sub-s. (2) of s. 5: B C

"... if the court considers that the grant of a new tenancy is in all the circumstances reasonable, order the grant of a new tenancy..."

I should have thought that when considering all the circumstances and the question of reasonableness the fact that two out of three of the landlords are proved to have required the premises for their own occupation was a very strong factor for consideration. I agree that this appeal should be allowed. D

Appeal allowed, without costs.

Solicitors: *Manches & Co.*, agents for *David Blank, Alexander & Co.*, Manchester (for the landlords); *Haslewood, Hare & Co.*, agents for *Turner, Andrews & Co.*, Manchester (for the tenants). E

[Reported by C. N. BEATTIE, ESQ., Barrister-at-Law.]

BURGESS v. COX.

[CHANCERY DIVISION (Harman, J.), November 9, 10, 14, 15, 28, 1950.]

Sale of Land—Contract—Memorandum or note—Deficiency in memorandum supplied by second document—No reference in second document to memorandum—Omission of material term in alleged memorandum—Concession by plaintiff of term in favour of defendant to render contract enforceable—Law of Property Act, 1925 (c. 20), s. 40 (1). G

On June 28, 1949, the defendant and N. discussed with the vendor the purchase from the latter of a holiday camp for £10,500. Everything on the site was to be included in the sale except certain furniture in a permanent dwelling-house ("The Laurels") on the site, some articles in a bungalow, and some electrical appliances and other articles belonging to the Ministry of Works. Although the camp was not being sold as a going concern, it was agreed that the consumable stock at the date of completion and also such deposits made by intending guests as were then outstanding should be included in the sale. N., as the defendant's agent, gave the vendor his cheque for £500, and wrote out the following document: H

" (Completion at an early date). Sale of Beach Approach Holiday Camp. Complete freehold. Exceptions of personal furniture in 'The Laurels' and of Mr. Burgess' (senior) bungalow (East Lodge) including stock on day of completion. Agreed sum £10,500." The vendor signed the document, but no document was signed by the defendant or N. On July 1, 1949, the defendant wrote to the vendor: " Dear Mr. Burgess, re Disposal of Beach Approach Holiday Camp. With reference to our visit to you on Tuesday last, I am very pleased we were able to mutually agree terms for the purchase of Beach Approach Holiday Camp, and shall look forward to taking over from you at an early date. I . . . believe that a really prompt completion date, as we both desire, is almost certain . . . I hope we did not bother you too much on Tuesday, but having reached agreement on this matter, I think final completion will most certainly be within the time you desired." The defendant was unable to raise the necessary money, and, subsequently, the plaintiff (the vendor's executrix, the vendor having died in the meantime) sold elsewhere for £8,000. The plaintiff claimed damages for breach of contract, and the defendant pleaded (*inter alia*) the Law of Property Act, 1925, s. 40 (1).

HELD: (i) although there was no reference in the letter of July 1, 1949, to the document drawn on June 28, 1949, it was proper to look at the earlier document as recording the transaction referred to in the later, and, as it was clear on the face of the two documents that the same transaction was referred to, the defendant's signature to the letter of July 1, 1949, could be incorporated into the document of June 28, 1949,

Sheers v. Thimbleby & Son (1897) (76 L.T. 709), *applied*.

Long v. Millar (1879) (4 C.P.D. 450); *Oliver v. Hunting* (1890) (44 Ch.D. 205); and *Stokes v. Whicher* ([1920] 1 Ch. 411), *considered*.

(ii) but the omission of any reference in the two documents to the deposits which were to be included in the sale was an omission of a material term of the agreement and rendered the documents insufficient to satisfy the requirements of s. 40 (1), and it was not open to the plaintiff to concede the term in favour of the defendant so as to render the contract enforceable.

North v. Loomes ([1919] 1 Ch. 378), *distinguished*.

[AS TO MEMORANDUM IN WRITING, see HALSBURY, Hailsham Edn., Vol. 29, pp. 240-248, paras. 323-329; and FOR CASES, see DIGEST, Vol. 40, pp. 26-34, Nos. 111-190.]

F Cases referred to:

(1) *Winn v. Bull*, (1877), 7 Ch.D. 29; 47 L.J.Ch. 139; 42 J.P. 230; 12 Digest 86, 511.

(2) *Cave v. Hastings*, (1881), 7 Q.B.D. 125; 50 L.J.Q.B. 575; 45 L.T. 348; 46 J.P. 56; 12 Digest 142, 961.

(3) *Ridgway v. Wharton*, (1857), 6 H.L. Cas. 238; 27 L.J.Ch. 46; 29 L.T.O.S. 390; 10 E.R. 1287; 12 Digest 137, 924.

(4) *Long v. Millar*, (1879), 4 C.P.D. 450; 48 L.J.Q.B. 596; 41 L.T. 306; 43 J.P. 797; 12 Digest 141, 956.

(5) *Stokes v. Whicher*, [1920] 1 Ch. 411; 89 L.J.Ch. 198; 123 L.T. 23; 12 Digest 143, 967.

(6) *Oliver v. Hunting*, (1890), 44 Ch.D. 205; 59 L.J.Ch. 255; 62 L.T. 108; 12 Digest 160, 1156.

(7) *Sheers v. Thimbleby & Son*, (1897), 76 L.T. 709; 12 Digest 140, 943.

(8) *North v. Loomes*, [1919] 1 Ch. 378; 88 L.J.Ch. 217; 120 L.T. 533; 12 Digest 156, 1109.

ACTION for damages for breach of a contract to purchase a holiday camp and equipment, or, alternatively, for rescission of the agreement and forfeiture of a deposit of £500. The defendant counterclaimed for the return of the deposit.

On June 28, 1949, the defendant with a Mr. Nicholas (his brother-in-law) and their respective wives visited the camp as intending purchasers. There was to be included in the sale the chalets, a dwelling-house called "The Laurels," stock, and furniture (except certain furniture in "The Laurels" and in a bungalow occupied by a relative of the vendor), certain electrical appliances and other articles on the site belonging to the Ministry of Works being excepted. After inspecting the property and after some discussion, the vendor offered to take £10,500, which was to include whatever consumable stocks there should be when the business was taken over and also such of the deposits made by intending guests as were then outstanding. The vendor was ill and was willing to sell at that price only on condition that completion should be prompt. Mr. Nicholas said that they would accept the offer, and, as the defendant's agent, gave the vendor his cheque for £500 to hold as a deposit. Mr. Nicholas suggested that something should be written to show what had been agreed, and he himself wrote: "Sale of Beach Approach Holiday Camp. Complete freehold. Exceptions of personal furniture in 'The Laurels' and of Mr. Burgess' (senior) bungalow (East Lodge) including stock on day of completion. Agreed sum £10,500." On the vendor's objecting that the document did not provide for completion by July 28, 1949, Mr. Nicholas wrote at the head of the document: "(Completion at an early date)." The vendor then signed the document, and handed it to Mr. Nicholas. The defendant made a copy for the vendor to keep. No document was signed by the defendant or Mr. Nicholas. On June 30, 1949, the vendor's solicitors wrote to the defendant stating that they were preparing a draft contract. On July 1, 1949, the defendant wrote to the vendor:

"Dear Mr. Burgess, re Disposal of Beach Approach Holiday Camp. With reference to our visit to you on Tuesday last, I am very pleased we were able to mutually agree terms for the purchase of Beach Approach Holiday Camp, and shall look forward to taking over from you at an early date. I have already taken energetic action in connection with this matter and have every reason to believe that a really prompt completion date, as we both desire, is almost certain. I am arranging part of the necessary capital through my bank and it may be that the bank will instruct their representative in Great Yarmouth to inspect the site and report to them . . . I hope we did not bother you too much on Tuesday, but having reached agreement on this matter, I think final completion will most certainly be within the time you desired."

The terms of the draft contract were eventually approved and signed by the vendor, but, although its terms were agreed by the defendant, he did not sign the counterpart as he found that he was unable to raise the money. On July 23, 1949, the defendant's solicitors wrote to the vendor's solicitors that

" . . . the survey of the property had not come up to his or the bank's expectations, and, consequently, the bank will not give as large an advance as he needs. We very much regret therefore that he will be unable to go on with his purchase . . . With regard to the deposit of £500, paid by our client's brother-in-law to [the vendor], we suggest that this is repaid direct to the gentleman concerned as he has not instructed us in this matter. We hope your client will be able to effect a sale satisfactorily elsewhere."

On Sept. 22, 1949, the vendor died. On Oct. 22, 1949, the solicitors to the vendor's executrix wrote acknowledging a letter from the defendant's solicitors (in which claim had been made to the return of the deposit) and stating that the executrix was prepared to carry out the contract, but in view of the correspondence she was endeavouring to find another purchaser. On Dec. 28, 1949,

the executrix granted an option to another purchaser at the price of £8,000, and that option was exercised.

McMullen for the plaintiff, the executrix.

S. Pascoe Hayward, K.C., and Plowman for the defendant.

Cur. adv. vult.

Nov. 28. **HARMAN, J.**, read a judgment in which he stated the facts, A found that a valid oral contract had been concluded between the vendor and the defendant, and continued: The next defence set up is that there is no note or memorandum of the contract signed by or on behalf of the party to be charged, viz., the defendant, sufficient to satisfy the Law of Property Act, 1925, s. 40 (1). It is surprising at this date to find a new point arising out of B this section, which, together with its predecessor, the Statute of Frauds, 1677, s. 4, has been under judicial fire for over two centuries. It is well known that the terms of the memorandum need not all be contained in one document, but may be spread over many. Now here the document which contains (if any does contain) the terms of the bargain is signed only by the vendor, who is C not the party to be charged. The plaintiff (the executrix of the vendor), however, alleges that this defect is cured by the letter of July 1, 1949, signed by the defendant and to which I have already referred, and it was pleaded that this contained a reference to Mr. Nicholas' note of the agreement reached on June 28, 1949, the earlier document, sufficient to satisfy the statute. There is no direct reference in one document to the other, but it is now settled that this is not essential and that references in a later document to an agreement may be explained by D parol evidence, and if that evidence leads to another document containing the terms, or the rest of the terms, the memorandum is complete: see, for instance, *Cave v. Hastings* (2).

It has, however, been decided that, if the reference in the later writing be, not to a written agreement, but only to terms agreed by parol, there is no enforceable contract: see *Ridgway v. Wharton* (3). It is on this point that E the defendant relies. It is said on his behalf that when parol evidence is led to explain the references in the letter of July 1 to the words "mutually agreed terms" and "reached agreement on this matter," that evidence leads only to the conclusion of the oral agreement during the course of June 28 which I have described. It is said to be no part of this agreement that its terms were, in fact, recorded in Mr. Nicholas's note and that for this purpose I may not F look at that note, which does not purport of itself to be of a contractual nature. In this connection I have been referred to *Long v. Millar* (4). The plaintiff urges that that case justifies me in laying the two documents side by side and observing the connection between them. It is said that, if this be done, no oral evidence is necessary because that connection springs to the eye and G convinces the reader that the two refer to the same transaction. If this be legitimate, I agree with that submission. This way of finding a memorandum was urged on RUSSELL, J., in the well-known argument of Mr. Clauson in *Stokes v. Whicher* (5). As to that, the learned judge makes the following observations ([1920] 1 Ch. 419):

"Mr. Clauson has put his case on a higher platform and said that, even H if you do not get any reference, either inferential or otherwise, in the second, the defective, document to the first, the authorities go to show that if, placing the two documents side by side, there is, upon an inspection of them, such a physical state of affairs that it is obvious that they were produced at the same time and that they originally, to that extent, formed a single document, you can take them and read them together, even though one document does not by inference or in terms contain a reference to the other. There is some colour for that proposition in *Oliver v. Hunting* (6) before KEKEWICH, J., and more still in the later case before

the Court of Appeal of *Sheers v. Thimbleby & Son* (7). However that may be, I do not propose to decide this case upon that broad ground, because I have come to the conclusion that, upon this document as it stands, I can find in it a sufficient reference to another document which contains the necessary terms."

I am here asked to do what RUSSELL, J., declined to do. On the whole, I do not think that *Long v. Millar* (4) goes so far, nor, in my judgment, does *Oliver v. Hunting* (6). In that case the missing element was the name of the property to be purchased, and KEKEWICH, J., found it in the receipt for the deposit, but the document to which that receipt pointed was, in fact, a written contract, or so the learned judge held. Moreover, he only professed to be following *Long v. Millar* (4) and *Cave v. Hastings* (2), both of which adhere to the rule of connecting documents by parol evidence where the one leads to the other, and that method does not carry the plaintiff home in this case.

More to the point is *Sheers v. Thimbleby & Son* (7). That was a decision of the Court of Appeal and LOPES, L.J., gave the leading judgment, which was a reserved judgment. The memorandum there consisted of two documents the later of which did not refer to the earlier, nor was parol evidence led to show that a reference in one of them led to the other. The learned lord justice says (76 L.T. 711):

"The one letter states: 'I hereby guarantee the safety of the investments, Burton's and Balderson's,' and the other acknowledges the receipt of the £710 invested by the plaintiff Sergeant with Burton and Balderson as follows: 'received from you the sum £710, as under: A mortgage on an estate at Toynton St. Peter, the property of Mr. James Burton, £360; a mortgage on an estate at Fiskney, the property of Mr. Balderson, £350.' I cannot myself doubt that these two documents on their face show that they are connected together without the aid of parol evidence. It might have been said in *Long v. Millar* (4) that the receipt signed by the defendant for the £31 as a deposit on the purchase of three plots at Hammersmith might refer to a different purchase to that referred to in the agreement to purchase; but this argument this court would not entertain, and, I think, quite rightly. So here it would, in my judgment, be sheer affectation to say that, without the aid of parol evidence, it cannot be predicated whether Burton's and Balderson's investments, in the letter of Sept. 15 referred to Burton's and Balderson's mortgages in that of Sept. 16, for, in my opinion, they clearly do, and formed part of, one and the same transaction. It does not seem to me that, the two documents having been written, one on one day and the other on the next, causes them to be such separate and distinct documents that the one cannot be connected with the other without the aid of parol evidence, for, in my judgment, it is not so."

If that judgment is right it justifies the process to which I am invited here. Now it seems to me that it is a very artificial doctrine which allows me to receive evidence as to the nature of the agreement referred to in the letter of July 1, 1949, but declines to allow me to look at the document recording that transaction when I find that, if I place the two documents side by side, I need no parol evidence at all to satisfy myself that the two refer to the one transaction. Thus Mr. Nicholas's memorandum speaks of "Sale of Beach Approach Holiday Camp" and "Agreed sum £10,500," while the letter is headed "Disposal of Beach Approach Holiday Camp" and asserts "we were able to mutually agree terms for the purchase of Beach Approach Holiday Camp." As the lord justice said in the last case cited, it would be sheer affectation to pretend that it is not obvious that the two documents refer to the same transaction. I think, therefore, I can go this far—that I am entitled

to incorporate the defendant's signature on the letter of July 1 with Mr. Nicholas's note and thus get a memorandum complete in this respect.

There remains, however, another obstacle in the plaintiff's way. It is said that the two documents, if read together, still do not record all the terms of the contract, and are, therefore, no sufficient memorandum of it. The omitted terms are said to be, first, the exception of the electrical appliances and the property of the Office of Works already mentioned, and, secondly, the inclusion of the deposits. As to the first of these, I am of opinion that the contract was to sell all the vendor's interest in the camp and its equipment. He was careful to point out that these articles were excluded, and the defendant agreed that he did not suppose he was negotiating for them. They were, therefore, not included in the agreement and need not be mentioned in the memorandum. The deposits are another matter. They belonged to the vendor and were thrown in to sweeten the bargain, and, no doubt, were part of the inducement to the defendant to accept the extra £500 in the price. It was argued for the plaintiff that the deposits would pass under the contract without mention, and this might be so if the sale had been a sale of the business as a going concern with its assets and liabilities, but, as I have already held, that was not the bargain, and, in my judgment, the deposits required to be mentioned no less than the stock if they were to pass.

Lastly, it was argued that this was a term wholly for the defendant's benefit which the plaintiff may concede and so avoid the mischief of the statute, and *North v. Loomes* (8) was cited as supporting that view. That case is some authority for the proposition that a plaintiff may waive such a term and enforce the contract, but it does not extend to the converse case. It may be right that a defendant should not be allowed to avoid his bargain when the plaintiff is not insisting on a term detrimental to him, but that is not the same thing as to say that a plaintiff may enforce a bargain not set out in the memorandum by giving something to the defendant. I find in *WILLIAMS ON VENDOR AND PURCHASER*, 4th ed., p. 5, this statement:

"It appears, however, that if a stipulation, which is to the detriment or for the benefit of one of the parties exclusively, is omitted from the memorandum, that party may submit to perform it or waive the benefit of it (as the case may require), and may with such submission or waiver specifically enforce the contract as stated in the memorandum."

This statement does not appear in the second edition, and I do not think it finds support in the cases cited. I prefer the note in *FRY ON SPECIFIC PERFORMANCE*, 6th ed., p. 243, which is in these terms:

"It would seem, however, that where a stipulation of no great importance and solely benefiting the plaintiff is omitted from the memorandum, the defendant will not, in an action for specific performance, in which the stipulation is not asserted against him, be allowed to set up that the memorandum is insufficient by reason of such omission to satisfy the statute, if the plaintiff chooses to waive his stipulation."

In other words, if you are going to leave the term out altogether, it may be the plaintiff can enforce it. But here there is no intention of either party to leave it out, and the court is being asked to assert a term which is not in the memorandum at all, and, in my judgment, the principle in *FRY* does not extend to this. I hold, therefore, that the memorandum is deficient in this respect.

Two more questions were argued. First, that the plaintiff by re-selling the property had rescinded the contract, and, therefore, could not obtain damages for its breach, and, secondly, the measure of damages. As to the first, I hold that the defendant, by his solicitors' letter of July 23, which I have read, repudiated the contract. It was thus open to the plaintiff to accept this

repudiation and sue in damages, and this, in my judgment, she did by her solicitors' letter of Oct. 22, 1949, which I have read. This is an unhappily worded document. It treats the contract as still on foot, but by threatening to re-sell it conditionally accepts the defendant's repudiation. It was open to him at that time to recant and to perform the bargain, but he did not do so, and, in my judgment, the plaintiff was not bound to give further warning, but was at liberty after a reasonable interval to treat the contract as at an end as she did by granting an option to a third party and issuing the writ. As to damages, it was agreed that the date at which they must be calculated was that of the defendant's breach or shortly thereafter, that is to say, in July or August, 1949. The plaintiff's counsel conceded that the evidence of value at that time did not show a diminution of more than £500 from the contract price. As the plaintiff is entitled to retain the deposit she could get no more. If, therefore, I had held the memorandum sufficient I should have awarded the plaintiff £500 and held that it was satisfied by the deposit already in her hands.

Action and counterclaim dismissed without costs.

Solicitors: *Bartlett & Gregory*, agents for *Lucas & Wyllys*, Great Yarmouth (for the plaintiff); *W. J. Fraser & Son* (for the defendant).

[*Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.*]

WIGLEY v. WIGLEY.

[COURT OF APPEAL (Singleton and Birkett, L.JJ.), November 3, 6, 1950.]

Legal Aid—Security for costs—Right of assisted person to order—Matrimonial cause—Amount of order—Wife's case conducted by salaried solicitor—Wife poor person when application first made—Legal Aid (General) Regulations, 1950 (S.I. 1950, No. 1359), reg. 5 (10).

There is nothing in the Legal Aid and Advice Act, 1949, which prevents an assisted person obtaining an order for security for costs. Regulation 5 (10) of the Legal Aid (General) Regulations, 1950, which relates to matrimonial causes, provides that where a wife is an assisted person and the maximum contribution payable by her is not more than £10 and it appears to the local committee that her husband cannot provide such security as would make up their joint contribution to £10, the wife's case is to be conducted by a salaried solicitor of the Law Society, but that regulation has not the effect of requiring that, if later the wife is given an order for security for costs, the amount should be limited to £10. In such circumstances it is open to the registrar to follow the general, accepted principles with regard to applications for security for costs and he is not bound by any earlier decision of a local committee.

[FOR THE LEGAL AID AND ADVICE ACT, 1949, s. 1 (7) and s. 12 (2) (b) (ii), see HALSBURY'S STATUTES, Second Edn., Vol. 18, p. 534 and p. 548, respectively.]

APPEAL by the wife from a decision of COLLINGWOOD, J., dated Oct. 5, 1950, refusing an application by her for an extension of time in which to appeal to the judge in chambers against an order of the registrar of the Southampton District Registry, dated July 26, 1950, refusing to make an order for security for costs in her favour in a suit in which her husband had petitioned for divorce on the ground of her adultery.

D. Henderson for the wife.

Broderick for the husband.

SINGLETON, L.J. : This is an appeal by the wife who is respondent in a matrimonial suit. On July 9, 1949, her husband petitioned for a divorce on the ground that she had committed adultery. On Nov. 24, 1949, an answer was filed by the wife in which she denied that she had committed adultery, and she cross-petitioned for a divorce on the ground of her husband's cruelty. The co-respondent named in the husband's petition entered an appearance, but did not file an answer. Between the date of the petition and the date of the answer the wife obtained a certificate under which she was entitled to defend the petition as a poor person, and she was a poor person on Oct. 2, 1950, when the Legal Aid and Advice Act, 1949, came into operation. From that date she is to be regarded as an assisted person under that Act.

On July 12, 1950, the case was set down for hearing. The solicitor assigned to the wife was a London solicitor, but interlocutory matters were dealt with in the Southampton district registry. On July 26 an application was made to the registrar at Southampton for security for the wife's costs by solicitors at Southampton. That application was refused. Counsel for the wife told the court that the registrar was informed that the husband had already paid £91 to former solicitors of the wife in respect of the costs or as security for the costs, and it was said that it was on that assumption that the registrar refused to make an order. Counsel said that the £91 was, in fact, paid to the wife in respect of quite different matters. The husband and wife had held assets jointly which had been sold for £182. That sum was divided equally, and in December, 1949, the wife received £91. The order made by the registrar was as follows: "Upon hearing the solicitors for the petitioner and the respondent and the respondent having received £91 from the petitioner on Dec. 2, 1949, it is ordered that there be no order for security for costs herein." On Aug. 16, 1950, the wife's solicitors applied *ex parte* to the registrar and pointed out to him that there was some misunderstanding regarding the £91. The registrar said the wife had the right of appeal to the judge in chambers, but the time for an appeal had then expired. On Sept. 1 the wife's solicitors in London, having received the file from Southampton, issued a summons for extension of time in which to appeal to the judge from the order of the registrar. On Oct. 5 the summons was heard before COLLINGWOOD, J., who held that the appeal was out of time and declined to extend the time. He did not go into the merits of the case otherwise than to consider whether he ought to extend the time or not, but he gave leave to appeal. In my view, the learned judge ought to have extended the time. There had been no waste of time on the part of the wife's solicitors. They had put the facts as they knew them before the registrar at Southampton in the first instance. They had caused their Southampton agent to go before the registrar again when the facts were established, and they had adopted the advice of the registrar in seeking leave to appeal although time had expired. In those circumstances I think that the time ought to have been extended so that the appeal could have been heard on its merits by COLLINGWOOD, J. As it is, we have had to consider this case without the advantage of knowing what view the learned judge took on the various sections of the new Act and the regulations made thereunder. It is always an advantage to this court to have the view of one of experience in the practice of the Divorce Court when it is considering a matter arising therefrom.

By r. 74 (3) of the Matrimonial Causes Rules, 1947:

"Where an application for security has been made under this rule, the registrar or taxing officer shall ascertain what is a sufficient sum of money to cover the costs of the wife, and if, after taking all the circumstances into account, including the means of the husband and the wife, he considers that the husband should provide security for all or some of the wife's costs, he may order the husband to pay the sum so ascertained, or some portion of it, into court or to give security therefor within such

time as he may fix, and may direct a stay of the proceedings until such order is complied with."

That rule stated what had been the practice in divorce for many years. That practice continued unaffected, except perhaps as to amount, when the poor person's procedure was established. Even if one party, or both parties, had been admitted as a poor person, or persons, an order could be made for security for the wife's costs. This present wife was admitted as a poor person, and her application for security for costs was made when she was a poor person. If she had continued under the Poor Persons' Rules the practice would have been the same as it had been for many years, but it is said that by the coming into operation of the Legal Aid and Advice Act, 1949, the whole position is changed.

Counsel for the husband put forward three main submissions to this court. The first raised the question whether a wife who is an assisted person under the Legal Aid and Advice Act, 1949, in respect of whom the maximum contribution payable is not more than £10 is entitled to an order for security against her husband. The second submission was that, assuming that she could obtain an order for security, the order must be limited to the sum of £10 mentioned in reg. 5 (10) of the Legal Aid (General) Regulations, 1950, or, alternatively, that she ought not to be given a greater sum by way of security than she would have obtained if she had remained a poor person. The third submission was that in any event there ought to be no order in this case having regard to all the facts.

We have considered a good many sections of the Act and the regulations made under it, but I find nothing in the Act or in the regulations which forces me to say that the long-standing practice under which an order for security for the wife's costs has been made has been altered. Section 12 of the Act, which gives the Lord Chancellor power to make regulations, seems to point to the fact that the power to order security for costs remains. Section 12 (2) provides:

"Without prejudice to the foregoing sub-section or any other provision of this Act authorising the making of regulations, regulations may . . . (b) regulate the procedure of any court or tribunal in relation to legal aid, and in particular make provision . . . (ii) as to the cases in which and extent to which a person receiving legal aid may be required to give security for costs, and the manner in which it may be given . . ."

Therefore, it seems to me that the first submission in opposition to this appeal fails.

The second submission is based on reg. 5 (10) of the Legal Aid (General) Regulations, 1950, which provides:

"Where an application relates to a matrimonial cause and the maximum contribution payable by the applicant is not more than £10, the local committee shall inform the applicant that if he accepts the terms upon which they are prepared to issue a certificate they will arrange for the case to be conducted, in accordance with s. 6 (7) of the Act, by a solicitor employed by the Law Society for a salary to act in connection with matrimonial causes: Provided that this paragraph shall not apply where the applicant is a wife and it appears to the local committee that the husband might reasonably be expected, if ordered to do so, to provide such security for her costs as would, with her contribution, if any, amount to more than £10."

That regulation, read with the proviso, presupposes a case in which the wife cannot provide £10 and the local committee comes to the conclusion that the husband cannot pay enough to render a joint contribution of £10 possible. In those circumstances there is the provision for a salaried solicitor employed

by the Law Society to act for the wife. It is submitted that when that has been done no portion of the solicitor's costs can be recovered. Counsel for the wife argued that there are other costs and disbursements, and, consequently, there is no reason why there should not be an order for security for costs generally to cover those matters. Counsel for the husband replied that the proviso to reg. 5 (10) presupposes that together the two parties cannot provide more than £10, and, therefore, there ought not to be any greater security for costs ordered than the sum of £10. I do not think that reg. 5 (10) has the effect of imposing a requirement that, if a wife is given security for her costs, they shall be limited to £10. The proviso is:

"Provided that this paragraph shall not apply where the applicant is a wife and it appears to the local committee that the husband might reasonably be expected, if ordered to do so, to provide such security for her costs as would, with her contribution, if any, amount to more than £10."

The local committee is assumed to have considered that question and to have come to a decision, but they may not have had full information before them. If thereafter there is a summons before the registrar to ask for security of the wife's costs it is, I think, open to the registrar to consider all the facts, and, if it appears to him within the general principles, adopted and applied for so long, right to make an order for more than £10, it is open to him to do so. He is not bound by the limits arrived at by the local committee on such information as was before them when they considered the question at an earlier stage. I think it is probably right and just that when an appeal of this kind comes before the court in respect of an application which was made when the wife was a poor person, it would in general be right to limit the amount of her order to that which she would have obtained as a poor person.

[HIS LORDSHIP examined the evidence in support of the third submission for the husband, found that the registrar had considered all the circumstances, and said it was impossible to hold that the registrar was wrong in refusing to make an order for security. Accordingly, the appeal was dismissed.]

BIRKETT, L.J.: I agree. There is no doubt that the wife, who was a poor person, by the provisions of the Legal Aid and Advice Act, 1949, became an assisted person: see s. 17 (3); so the case comes before us with the wife an assisted person and the husband not. In those circumstances counsel for the wife said: "I am entitled to come to this court to appeal against the judgment of COLLINGWOOD, J., on two matters. I appeal first of all on the ground that he was wrong in not extending the time." My Lord has already said that, in our view, the time ought to have been extended. Counsel for the wife also said: "I submit (a) that I am entitled to an order for security for costs, and (b) that I am not limited in any way in making that application by anything that appears either in the regulations or in the Legal Aid and Advice Act, 1949." The position of the wife was that her maximum contribution under the Act did not exceed £10. Her case was a matrimonial cause, and it was conducted by a solicitor employed by the Law Society in its Divorce Department. That meant that the fees were on a low scale which was specially fixed, but it is plain that where the assisted person is a wife and it appears that the husband might reasonably be expected and ordered to provide security for her costs in such an amount that with that sum her contribution would be more than £10, it would not be a case for the solicitor in the Law Society's Divorce Department, but would be one for the ordinary panel of solicitors assigned to all assisted persons. Counsel for the wife thereupon argued: "I am not bound, in my application for security, merely because I am in that position, to be limited to security to the amount of £10, but the discretion is in the court to deal with all the circumstances and to make the amount as they think fit." On the other hand, counsel for the husband said: "After the coming

into force of the Legal Aid and Advice Act, 1949, the whole basis of this matter changed," and he submitted that the theory on which the order for security for costs had formerly been made now no longer had any application. He argued that in some detail, and then said: "If I am wrong about that and it is open to an assisted person to get an order for security for costs, having regard to the special position of this wife (what I would call the under £10 position) security for costs against the husband must necessarily be limited to that amount, or, alternatively, such an amount as would have been payable under the Poor Persons' Rules if there had been no change." The rule is set out at p. 281 of RAYDEN ON DIVORCE, 5th ed.:

"A wife suing as a 'poor person' or whose husband is so suing, can obtain an order for security for the out-of-pocket costs of the hearing . . ."

Counsel's third point was that, having regard to all the circumstances, no order should be made.

I do not think that counsel's first point will bear examination. It is expressly provided by s. 1 (7) of the Legal Aid and Advice Act, 1949:

"Save as expressly provided by this Part of this Act or by regulations made thereunder—(a) the fact that the services of counsel or a solicitor are given by way of legal aid shall not affect the relationship between or rights of counsel, solicitor and client or any privilege arising out of such relationship; and (b) the rights conferred by this Part of this Act on a person receiving legal aid shall not affect the rights or liabilities of other parties to the proceedings or the principles on which the discretion of any court or tribunal is normally exercised."

As my Lord has pointed out, s. 12 (2) (b) (ii) gives the Lord Chancellor power to make regulations as to the cases in which, and the extent to which, a person receiving legal aid may be required to give security for costs and the manner in which it may be given. I am of opinion that the new Act has done nothing to prevent an assisted person coming to the court at the proper time on appropriate occasions to ask for security for costs. I, therefore, agree with the view which my Lord has already expressed that the right of the present wife to come to ask for security for costs is not affected by the Act.

As to how that sum is to be assessed, I also agree with what my Lord has said. I think that the committee, when originally dealing with this matter and coming to the conclusion that a contribution should be asked only from the wife, must have considered that the husband himself was not able to make much of a contribution. Otherwise the case might have been dealt with differently. I cannot think that any registrar or any court called on to assess the amount for security is in any way rigidly confined because of that particular provision. Neither do I think that the sum under the Legal Aid and Advice Act, 1949, is to be assessed merely as though the Poor Persons' Rules still existed. When a poor person becomes an assisted person under the Act of 1949 she must be dealt with under the provisions and regulations of that Act.

[HIS LORDSHIP considered the evidence and the submission that no order should be made on the merits, found that the payment of £91 to the wife was a material circumstance to which the registrar had given effect and concluded:] In all the circumstances I think that we cannot disturb the order made by the registrar and I agree that this appeal should be dismissed.

Appeal dismissed.

Solicitors: *Goodman, Brown & Warren*, agents for *E. Parry Jones*, the Law Society, Divorce Department (for the wife); *Wills Chandler, Burrows & Beach*, Basingstone (for the husband).

[Reported by J. D. PENNINGTON, ESQ., Barrister-at-Law.]

SHACKLETON v. GREENHALGH.

[COURT OF APPEAL (Somervell, Jenkins and Birkett, L.J.J.), November 24, 1950.]

A

Rent Restriction—Sub-tenancy—Exclusive use of part of house—Kitchen and other essential parts of house shared with tenant—Surrender of tenancy by tenant—Landlord's right to possession against sub-tenant—Landlord and Tenant (Rent Control) Act, 1949 (c. 40), s. 9.

B

A tenant of a dwelling-house to which the Rent Restrictions Acts applied sub-let a part of the house unfurnished, the sub-tenant having the use of the kitchen and other essential parts of the premises in common with the tenant. The tenant vacated the part occupied by her, and the landlord claimed possession of the other part from the sub-tenant.

C

HELD: section 9 of the Landlord and Tenant (Rent Control) Act, 1949, was intended to protect the tenant against the landlord where the tenant had created a sub-tenancy under which certain parts of the premises were shared, but it was not intended to protect the sub-tenant under such a sub-tenancy against the landlord where the tenancy between the tenant and the landlord had been terminated, and, therefore, the landlord was entitled to possession.

[FOR THE LANDLORD AND TENANT (RENT CONTROL) ACT, 1949, s. 7, s. 9, see HALSBURY'S STATUTES, Second Edn., Vol. 13, pp. 1102, 1106, respectively.]

D

Cases referred to:

E

- (1) *Neale v. Del Soto*, [1945] 1 All E.R. 191; [1945] K.B. 144; 114 L.J.K.B. 138; 172 L.T. 65; 2nd Digest Supp.
- (2) *Banks v. Cope Brown*, [1948] 2 All E.R. 76; [1948] 2 K.B. 287; [1948] L.J.R. 1370; 112 J.P. 338; 2nd Digest Supp.
- (3) *Turner v. Baker*, [1949] 1 All E.R. 560; [1949] 1 K.B. 605; *reversd. sub nom. Baker v. Turner*, [1950] 1 All E.R. 834; [1950] A.C. 401; 2nd Digest Supp.
- (4) *Kenyon v. Walker, Stevenson v. Kenyon*, [1946] 2 All E.R. 595; 2nd Digest Supp.
- (5) *Barrell v. Fordree*, [1932] A.C. 676; 101 L.J.K.B. 529; 147 L.T. 206; 96 J.P. 278; *affg.*, [1931] 2 K.B. 257; 100 L.J.K.B. 515; 145 L.T. 219; 95 J.P. 141; Digest Supp.

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APPEAL by the landlord from a judgment of His Honour JUDGE HARRISON, sitting at Southport County Court, dated July 25, 1950, whereby he refused the landlord an order for possession of part of a dwelling-house on the ground that the sub-tenant of that part was a protected tenant under the Rent Restrictions Acts, 1920 to 1939, by virtue of the Landlord and Tenant (Rent Control) Act, 1949, s. 9.

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The sub-tenancy gave the sub-tenant the right to the sole occupation of certain rooms and the right to share other rooms, including the kitchen, with the tenant. After the tenant had vacated possession the landlord sought an order for possession against the sub-tenant on the ground that the sub-tenancy was not protected by the Rent Restrictions Acts, 1920 to 1939. The county court judge refused to make an order for possession and the landlord appealed. The facts appear in the judgment of SOMERVELL, L.J.

J. M. Davies for the landlord.

P. H. R. Bristow for the sub-tenant.

SOMERVELL, L.J.: This is an appeal by the landlord against a decision of the county court judge refusing to make an order for possession. There is

no dispute on the facts about any relevant matter. The landlord let the premises in question to a Mrs. Wilde. He served a notice to quit on her in 1948, and at about the same time she agreed with the sub-tenant, Mr. Greenhalgh, that he should have exclusive occupation of some rooms, but that essential parts of the premises, including the kitchen, should be shared. The sharing between Mrs. Wilde and the sub-tenant and his wife went on until Feb. 16, 1950, when Mrs. Wilde herself ceased to occupy the premises. The landlord then sought possession from the sub-tenant who claimed that he was entitled to stay on.

Before referring to the Landlord and Tenant (Rent Control) Act, 1949, it is useful to consider the position on the authorities as it was before that date with regard to this question of sharing. In *Neale v. Del Soto* (1), the tenant was let two unfurnished rooms with the use jointly with the landlord of the garage, kitchen, bathroom, lavatory, coal-house, and conservatory. It was held that that amounted to a sharing of the house although each party had exclusive use of some rooms and that the letting was not a letting of a separate dwelling-house within the meaning of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920. Therefore, in such circumstances, as between the tenant and his landlord, the protection of the Acts could not be claimed by the tenant. That principle was extended in *Banks v. Cope Brown* (2), to a case where the landlord was not one of the sharers, but had let the premises to two or more tenants, each tenant having some rooms of which he had exclusive possession, and sharing other essential rooms with the other tenant. In *Turner v. Baker* (3) this court decided that a tenant who had sub-let a furnished bed-sitting room with the use of the kitchen in common with herself lost the protection of the Acts so that the landlord was entitled to possession. That decision was reversed by the House of Lords who held that, even if the sub-tenant had no separate dwelling-house, the house was still let to the tenant as a separate dwelling, and, therefore, the landlord was not entitled to possession of the whole house. Previously, in *Kenyon v. Walker, Stevenson v. Kenyon* (4) it had been decided that a sub-tenant who had a sharing tenancy was not protected. There is one other case which I do not think really comes into the present argument, but I will refer to it. In *Barrell v. Fordree* (5), a tenant had created furnished sub-tenancies of two separate parts of the house, retaining a third part for herself. The House of Lords decided that, although the tenant was entitled to claim protection in respect of the rooms which she occupied, the landlord was entitled to possession of those which had been sub-let furnished.

That was the state of the law when the Landlord and Tenant (Rent Control) Act, 1949, was passed. Section 7 of that Act deals with the position as between tenant and immediate landlord, and provides:

“Where under any contract—(a) a tenant has the exclusive occupation of any accommodation, (b) the terms on which he holds the accommodation include the use of other accommodation in common with his landlord or with his landlord and other persons, and (c) by reason only of the circumstances mentioned in para. (b) of this section, the accommodation referred to in para. (a) thereof is not a dwelling-house to which the [Rent Restrictions] Acts apply, the [Furnished Houses (Rent Control) Act, 1946], shall apply to the contract notwithstanding that the rent does not include payment for the use of furniture or for services.”

The Furnished Houses (Rent Control) Act, 1946, set up tribunals to deal with furnished lettings which are not controlled under the Rent Restrictions Acts, but are to some extent controlled under the Act of 1946. An application can be made for a reduction of rent, and the tribunal has power to protect a tenant if, after reference to a tribunal, the landlord gives him notice to quit. It is to be noticed that the legislature did not give the sharing tenant the protection

of the Rent Restrictions Acts. It gave him the lesser protection of the Furnished Houses (Rent Control) Act, 1946. It seems to me plain that that was the position of the sub-tenant during the period of Mrs. Wilde's tenancy, and, in my opinion, it would need very plain words to lead to the conclusion that the position of the sub-tenant was improved as the result of the tenant from whom he derived his interest giving up her interest altogether. That would seem to me an illogical result.

A Section 9 of the Act of 1949 is the one on which counsel for the sub-tenant relies and I will read the relevant parts of it:

B “Where the tenant of any premises, being a house or part of a house, has sub-let a part, but not the whole, of the premises, then as against his landlord or any superior landlord (but without prejudice to the rights against and liabilities to each other of the tenant and any person claiming under him, or of any two such persons) no part of the premises shall be treated as not being a dwelling-house to which the [Rent Restrictions] Acts apply by reason only—(a) that the terms on which any person claiming under the tenant holds any part of the premises include the use of accommodation in common with other persons . . .”

C There follows a reference to a furnished letting. That section, in my view, is dealing with the position as between a landlord and a tenant who has himself made a sharing sub-tenancy or has sub-let part of the premises furnished. It is saying that, as between the landlord and the tenant, no part of the premises is to be treated as not being a dwelling-house to which the Rent Acts apply.

D All are concerned with in the present case is to consider whether s. 9 contains any such express words as would produce the result about which it is necessary for the sub-tenant to satisfy us, namely, that the sub-tenant, who would not have had the protection of the Rent Restrictions Acts if Mrs. Wilde had remained, now has it. I can find no such express words in this section. Indeed, the words “without prejudice . . .” seem to me expressly to point in a contrary direction. As questions may arise under this section I do not propose to set out exactly what seem to me to be its precise limits. For the reasons I have given I think this appeal must be allowed.

JENKINS, L.J. : I agree. The sections are not entirely easy to follow, but, in my judgment, on the facts of this case it is plain that the appeal should succeed. Section 7 of the Act of 1949 relates to the decision in *Neale v. Del*

F *Soto* (1) where part of a dwelling-house was let, the tenant sharing other essential parts of the house with the landlord. In such a case s. 7 does not say that the Rent Restrictions Acts shall apply notwithstanding the sharing arrangement; it recognises that, owing to the sharing arrangement, as between landlord and tenant the accommodation is not a dwelling-house to which those Acts apply. That being placed on record, the section provides that the Furnished
G Houses (Rent Control) Act, 1946, shall apply to the contract. If the sub-tenant's submission in the present case were accepted, the curious result would be that after s. 7 has recognised that the sharing by the tenant with the landlord of essential rooms in the house prevents the premises from being a dwelling-house to which the Rent Restrictions Acts apply, nevertheless s. 9 provides that in this type of case those Acts are to apply. That would be a result so surprising
H that it would require clear words to produce it.

So far as s. 9 is concerned, I agree with SOMERVELL, L.J., that it is primarily intended to protect the tenant and his sub-tenant as against the tenant's landlord where there have been sub-lettings, which, considered by themselves, would not have been protected sub-lettings, that is to say, the tenant is given a reasonably free hand to deal with the premises as he thinks fit and he does not jeopardise his position or forfeit his rights under the Act merely because he lets some part of the premises furnished or under a sharing agreement.

In my judgment, however, it by no means follows, where the tenant quits, leaving a sub-tenant in possession of part of the premises with a right to share some other part, that that sub-tenant is still protected as against the former tenant's landlord. I agree with SOMERVELL, L.J., that there is nothing in the section which constrains the court to place that meaning on it, and I agree that it cannot be intended in a case like the present, after the tenant has vacated the premises and given up the tenancy and the tenant's landlord has stepped into the tenant's shoes as the immediate landlord of the sub-tenant, to put the sub-tenant in a better position as against the landlord than he was in under his contract with the tenant. The county court judge said: "In my view, if the whole purpose of the Landlord and Tenant (Rent Control) Act, 1949, was to protect the head tenant and not to protect the sub-tenant as against the landlord, then the distinctions between s. 7 and s. 9 of that Act become entirely ridiculous." With respect to the judge I do not agree. An obvious distinction is drawn in s. 9 between the position as between the tenant and the landlord and the position as between the tenant and the sub-tenant. The protection is in the former relationship and not in the latter. By the words in parenthesis in s. 9:

"... but without prejudice to the rights against and liabilities to each other of the tenant and any person claiming under him, or of any two such persons..."

those rights are expressly saved. For the reasons given by SOMERVELL, L.J., and such additional reasons as I have given, I agree that the appeal should be allowed.

BIRKETT, L.J.: I agree.

Appeal allowed with costs.

Solicitors: *Peacock & Goddard*, agents for *Mawdsley & Hadfield*, Southport (for the landlord); *Pritchard, Englefield & Co.*, agents for *Hodge & Halsall*, Southport (for the sub-tenant).

[*Reported by C. N. BEATTIE, Esq., Barrister-at-Law.*]

firmly and Obse-
NING, L.J., at p. 1236,
H.L. [1951] 2 All E.R. 839.

MAGOR AND ST. MELLONS RURAL DISTRICT COUNCIL v. NEWPORT CORPORATION.

[COURT OF APPEAL (Somervell, Cohen and Denning, L.JJ.), November 3, 27, 1950.]

Local Government—Alteration of areas—Extension of county borough boundaries to include parts of rural districts—Loss to rural district ratepayers—Abolition of rural district councils affected and districts amalgamated—Right of new rural district council to financial adjustment with county borough—"Property" of former rural district councils—Local Government Act, 1933 (c. 51), sched. V, r. 1 (a).

By the Newport Extension Act, 1934, s. 4, the boundary of the county borough of Newport was extended so as to include part of the area of the rural district of Magor and part of the area of the rural district of St. Mellons. The Act came into force on Apr. 1, 1935. By the Local Govern-

A ment Act, 1933, s. 151 and s. 152 (which are applied by s. 58 of the Act of 1934 where financial adjustments are necessary under the latter Act), provision is made for the adjustment of property, income, etc., between public bodies affected by any alteration in areas. Section 151 (1) enables public bodies so affected to settle any such adjustments by agreement. Section 152 (1) (b) provides that provision should (on an adjustment under s. 151) be made for payment to a local authority of such sum as might seem equitable in accordance with the rules contained in sched. V to the Act of 1933 in respect of any increase of burden which, as a consequence of any alteration of boundaries, would properly be thrown on the ratepayers of the area of that local authority in meeting the cost incurred by that local authority in the discharge of any of its functions. Rule 1 of sched. V provides that in determining the sum to be paid: "Regard shall be had to—(a) the difference between the burden on the ratepayers which will properly be incurred by the local authority in meeting the cost of executing any of their functions and the burden on the ratepayers which would properly have been incurred by the local authority in meeting such cost had no alteration of boundaries or other change taken place; (b) the length of time during which the increase of burden may be expected to continue." Before the Act of 1934 came into force the Minister of Health made the County of Monmouth Review Order, 1935, which came into force on the same day as, but immediately after, the Act of 1934. The Order abolished the rural district of Magor and the rural district of St. Mellons and formed a new rural district of Magor and St. Mellons, which included all the areas forming the two former rural districts except such parts thereof as were transferred to the borough of Newport by the Act of 1934 or to the areas of other authorities by the Order. Under art. 53 of the Order all property and liabilities of the dissolved district councils of Magor and St. Mellons were transferred to and vested in the new rural district council. "Property" in art. 53 bore the same meaning as in the Local Government Act, 1888, which, in s. 100, defines it as including all property, real and personal, and all estates, interests, easements and rights, whether equitable or legal, in, to, and out of property real and personal including things in action. The new rural district council of Magor and St. Mellons made a claim to the Newport Corporation for financial adjustment under the Act of 1934. It was accepted that, but for the Order of 1935, the separate rural district councils for Magor and St. Mellons would each have been entitled to an adjustment under s. 151 of the Act of 1933.

HELD: (i) the right to financial adjustment was "property" within the meaning of s. 100 of the Act of 1888, and, therefore, that right passed from the two former rural district councils to the new rural district council of Magor and St. Mellons by virtue of the Order of 1935, but

G (ii) (DENNING, L.J., *dissentiente*) the new rural district council could claim only as assignee of the two former councils; the increase of burden on the two former councils endured only for a moment, since the Order of 1935 dissolved them immediately after the alteration of boundaries occurred; and, therefore, the payment to which the two former councils became entitled was nil and the amount of the claim of the new council was also nil.

H *Godstone Rural District Council v. Croydon Corpn.* (1932) (102 L.J.K.B. 34), *applied*.

Oxford City Council v. Oxfordshire County Council ([1938] 4 All E.R. 721), *considered*.

[AS TO FINANCIAL ADJUSTMENT ON ALTERATION OF AREAS, see HALSBURY, *Hailsham Edn.*, Vol. 21, pp. 248-253, paras. 450-452; and FOR CASES, see DIGEST, Vol. 33, pp. 24-28, Nos. 109-132.]

Cases referred to:

- (1) *Godstone Rural District Council v. Croydon Corpn.*, (1932), 102 L.J.K.B. 34; 148 L.T. 87; 96 J.P. 363; Digest Supp.
- (2) *Dawson v. Great Northern & City Ry. Co.*, [1905] 1 K.B. 260; 74 L.J.K.B. 190; 92 L.T. 137; 69 J.P. 29; 1 Digest 79, 636.
- (3) *Oxford City Council v. Oxfordshire County Council*, [1938] 4 All E.R. 721; [1939] A.C. 48; 108 L.J.K.B. 136; 160 L.T. 161; 103 J.P. 79; *revsg.*, [1938] 1 All E.R. 801; [1938] 2 K.B. 415; 107 L.J.K.B. 724; 159 L.T. 73; 102 J.P. 219; Digest Supp.
- (4) *Seaford Court Estates, Ltd. v. Asher*, [1949] 2 All E.R. 155; [1949] 2 K.B. 481; 2nd Digest Supp.
- (5) *Newport Borough Council v. Monmouthshire County Council*, [1947] 1 All E.R. 900; [1947] A.C. 520; [1947] L.J.R. 913; 177 L.T. 77; 111 J.P. 402; 2nd Digest Supp.

APPEAL by the rural district council of Magor and St. Mellons and CROSS-APPEAL by Newport Corporation from an order of PARKER, J., dated Oct. 5, 1950, made on a Case stated by an arbitrator under the Arbitration Act, 1934, s. 9. PARKER, J., held that the rural district council (as the successor to two rural district councils which had been abolished) was entitled to any right against Newport Corporation to which the two former councils had been entitled, but that, in the circumstances, the rights of those councils in respect of a transfer of burden consequent on an alteration in boundaries had been of no money value*.

Simes, K.C., and *C. E. Scholefield* for the Rural District Council of Magor and St. Mellons.

H. B. Williams, K.C., and *Stewart Brown* for Newport Corporation.

Cur. adv. vult.

Nov. 27. The following judgments were read.

COHEN, L.J.: This is an appeal from a judgment given on Oct. 5, 1950, by PARKER, J., on a consultative Case stated by Mr. MICHAEL ROWE who was acting as arbitrator in a dispute between the rural district council of Magor and St. Mellons (hereinafter called the new rural district council) and the mayor, aldermen and burgesses of the county borough of Newport (hereinafter called the borough council). This dispute arose out of an alteration of boundaries which had been made in manner following.

By the Newport Extension Act, 1934, s. 4, the boundary of the county borough of Newport was enlarged so as to include part of the area of the rural district of Magor and part of the area of the rural district of St. Mellons. The parts so added to the borough of Newport were in the said Act and are hereinafter referred to as "the added areas." The Act of 1934 came into force on Apr. 1, 1935 (in the Act of 1934 and hereinafter referred to as "the appointed day"). Section 58 of the Act of 1934 provided that where in consequence of the Act of 1934 any adjustment of any property, income, debts, liabilities or expenses or of any financial relations might be required, an adjustment should be made between the councils or other authorities affected under and in accordance with s. 151 and s. 152 of the Local Government Act, 1933 (hereinafter referred to as the Act of 1933) as if the Act of 1934 were an Order made under Part VI of the Act of 1933.

Section 151 of the Act of 1933 enables any public bodies affected by any alteration of areas or authorities made by an Order under Part VI of the Act of 1933 to settle any requisite adjustments of property, income, etc., by agreement. The section further provides that in default of agreement as to any matter requiring adjustment, such adjustment shall be referred to arbitration. Section 152 (1) (b) provides that on an adjustment under s. 151 provision should,

* See Local Government Act, 1948, s. 11—Ed.

unless otherwise agreed, be made for the payment to a local authority of such sum as might seem equitable in accordance with the rules contained in sched. V to the Act of 1933 in respect of any increase of burden which, as a consequence of any alteration of boundaries or other change in relation to which the adjustment takes place, would properly be thrown on the ratepayers of the area of that local authority in meeting the cost incurred by that local authority in the discharge of any of their functions. Schedule V to the Act of 1933 laid down certain rules for determining the sum to be paid in respect of increase of burden on ratepayers. Rule 1, omitting the proviso which does not affect the question before us, reads as follows:

- A “Regard shall be had to—(a) the difference between the burden on the ratepayers which will properly be incurred by the local authority in meeting the cost of executing any of their functions and the burden on the ratepayers which would properly have been incurred by the local authority in meeting such cost had no alteration of boundaries or other change taken place; (b) the length of time during which the increase of burden may be expected to continue.”
- B
- C Rule 2 fixes a maximum which the sum payable in respect of the increase of burden is not to exceed.

Had the matter stopped at the Act of 1934 there can be no doubt but that the rural district of Magor and the rural district of St. Mellons would each have been entitled to an adjustment under s. 151 and that on that adjustment provision would have had to be made for the payment to each such rural district of an equitable sum under s. 152. But before the appointed day the Minister of Health, in exercise of the powers given to him by the Local Government Act, 1929, s. 46, made the County of Monmouth Review Order, 1935 (hereinafter referred to as “the Order”), which came into operation on the appointed day but immediately after the Act of 1934. The Order abolished the rural district of Magor and the rural district of St. Mellons and formed a new rural district to be known as the rural district of Magor and St. Mellons (hereinafter referred to as the new rural district). The new rural district included all the areas forming part (a) of the former rural district of Magor and (b) of the former rural district of St. Mellons except such parts thereof as were by the Act of 1934 transferred to the borough of Newport or were by the Order transferred to the areas of other authorities. Under art. 53 of the Order all property and liabilities of the dissolved district council of Magor and the dissolved district council of St. Mellons were transferred to and vested in or attached to the new rural district council, subject to a proviso which does not affect the point we have to decide. “Property” in art. 53 bears the same meaning as in the Local Government Act, 1888, which in s. 100 defines it as including all property, real and personal, and all estates, interests, easements, and rights, whether equitable or legal, in, to, and out of property real and personal, including things in action.

In July, 1942, the new rural district council delivered to the borough council a detailed claim to a financial adjustment under the Act of 1934 and the applied provisions of the Act of 1933. The parties were unable to agree as to the validity of the claim, and on Nov. 17, 1948, referred their dispute to the arbitration of Mr. ROWE. The parties asked the arbitrator to state a Case for the opinion of the court under the Arbitration Act, 1934, s. 9. On May 18, 1949, the arbitrator complied with this request, stating the questions for the opinion of the court as follows:

- H “(i) Whether the rural council as successor of the former rural district councils or otherwise is entitled to claim as against the borough council a financial adjustment under s. 58 (1) of the Act of 1934 and the applied

provisions of the Act of 1933 in respect of the alteration of boundaries effected by the Act of 1934. (ii) If the first question is answered affirmatively, whether a claim for any increase of burden within the meaning of s. 152 of the Act of 1933 can lawfully be made by the rural council. (iii) If the first and second questions are answered affirmatively whether, for the purpose of determining in this case the sum to be paid in respect of the increase of burden in accordance with the rules in sched. V to the Act of 1933, (a) the expression in para. 1 (a) of the schedule, 'the burden on the ratepayers which will properly be incurred by the local authority in meeting the cost of executing any of their functions,' means the burden on the ratepayers which will properly be incurred by the rural council after the appointed day, or the burden on the ratepayers which would properly have been incurred by the councils of the two former rural districts if the Order had not been made, and (b) whether the expression in para. 1 (a) of the schedule 'the burden on the ratepayers which would properly have been incurred by the local authority in meeting such cost had no alteration of boundaries or other change taken place' means the estimated burden on the ratepayers which would have been incurred by an authority whose area consisted of the two former rural districts including the added areas, or the separately computed burdens on the ratepayers of each of the former rural districts which would have been incurred by each of the two former rural district councils had the Act of 1934 not been passed; or if none of the meanings attributed to those expressions in para. (a) and para. (b) hereof is correct, what is the true meaning of those expressions for the purpose of this case."

On Oct. 5, 1950, PARKER, J., answered the first question in the affirmative, but the second question in the negative. Accordingly, he did not find it necessary to deal with the third question. From this decision both parties appealed.

It will be convenient, first, to deal with the cross-appeal against the answer to the first question. The correctness of this answer depends on whether or not the right to a financial adjustment is "property" which passed to the new rural district council by virtue of art. 53 of the Order. The argument for the borough council is conveniently stated by the learned judge when rejecting it:

"The respondents, on the other hand, contend that such a right is not 'property' within the meaning of that article and that such a right did not, accordingly, vest in the claimant. It seems to me that any right to a financial adjustment in respect of physical property transferred to the respondents, e.g., council houses, administrative offices, etc., would clearly be a 'thing in action,' and, therefore, property which would vest in the claimant. Indeed, I think that, despite their contention in para. 15 (2) of the Case, the respondents would not dispute this, but they contend that, in so far as concerns the right to claim a financial adjustment in respect of increase of burden, that is a mere right to ask an arbitrator to say what is equitable within certain limits: *per* SCRUTTON, L.J., in *Godstone Rural District Council v. Croydon Corporation* (1) (102 L.J.K.B. 38); and, further that the words 'including things in action' in the definition of 'property' in s. 100 of the Act of 1888 must be read restrictively with the preceding words 'all estates, interests, easements and rights, whether equitable or legal, in, to, and out of property real and personal.' As regards this latter contention, all I need say is that I see no need to read the words in that restrictive sense. As regards the former contention, it seems to me that, once it is accepted that a right to a financial adjustment in some respects is property, that must include a right to claim an adjustment in respect

of increase in burden. Section 152 (1) of the Act of 1933 stipulates that on an adjustment, provision *shall*, unless otherwise agreed, be made for a payment in respect of increase in burden."

A I agree so entirely with the reasoning and conclusion of the learned judge that I do not desire to add any further reasons of my own for concurring in his answer to question (i). He also referred to the decision in *Dawson v. Great Northern & City Ry. Co.* (2). The point decided in that case was a different one from that with which we are concerned, but I agree with him that there is a similarity between the two cases and that the payment under a financial adjustment may be regarded as in the nature of the price payable for the transfer of the added areas.

B I turn to the second question. As the learned judge pointed out, if his answer to the first question is correct, the new rural district could theoretically claim any adjustment in respect of increase in financial burden to which the old councils would have been entitled, but the learned judge answered the second question in the negative because he considered himself bound by the decision in *Godstone Rural District Council v. Croydon Corpn.* (1) to hold that he must have regard only to the increase in burden during the period of the continued existence of the old councils after the transfer of the added areas to the borough council. That period was but a moment of time, and, therefore, said PARKER, J., the sum ascertained in accordance with the rules laid down in sched. V must be nil. Counsel for the rural district council submitted that the *Godstone* case (1) did not necessarily lead to the learned judge's conclusion in the present case. In the *Godstone* case (1) the claimant was the authority, D part of whose areas had been transferred to the borough of Croydon. Before the matter came before the arbitrator the liability in respect of roads had been transferred by the Local Government Act, 1929, from rural district councils to county councils, and this court held that, having regard to r. 1 (b) of sched. V, the claimant could not recover in respect of the liability for road repair for any period after it had ceased to be responsible for the upkeep of roads. E SCRUTTON, L.J., however, expressly reserved the question whether the county council to whom the liability for road repair had been transferred might have a claim.

The question so reserved arose for decision in *Oxford City Council v. Oxfordshire County Council* (3), where their lordships reversed the decision of the F Court of Appeal, expressing their approval of the *ratio decidendi* of the dissenting judge, BENNETT, J.: see ([1938] 1 All E.R. 812). In the *Oxford* case (3), alterations of the boundaries as between the county of Oxford and the city of Oxford had been effected by the Oxford Extension Act, 1928, which came into operation on Apr. 1, 1929. On Apr. 1, 1930 (before claims for financial adjustment consequent on the Oxford Extension Act, 1928, had been disposed of) the G Local Government Act, 1929, came into force which transferred to the county council (a) from rural district councils, responsibility for the maintenance of district roads (by s. 30 (1)), and (b) from boards of guardians, responsibility for public assistance (by s. 1). Claims were then made against the city both by the county of Oxford and by certain district councils. The nature of and history of the claims is conveniently stated by LORD RUSSELL OF KILLOWEN in the House of Lords as follows ([1938] 4 All E.R. 723):

H "Claims for financial adjustment were made upon the appellants by the two rural district councils in respect of the estimated increases of annual burden on the ratepayers of their respective areas in regard to the maintenance of highways. These were settled on the basis that, owing to the provisions of the Local Government Act, 1929, the burden (and therefore the increase) could have existed for one year only a sum of £1,925 being paid to Headington and a sum of £650 being paid to Wood-

stock. Claims for financial adjustment were also made by the respondents against the appellants, who agreed to pay and paid a sum of £195,000 in full settlement of all the respondents' financial claims arising out of alteration of areas, other than such claims (if any) as the respondents might be entitled to make for increase of burden as from Apr. 1, 1930, in respect of the maintenance of the roads transferred to them from the two district councils by the Local Government Act, 1929, and in respect of the administration of public assistance. Subsequently the respondents sent in two alternative claims against the appellants in respect of each of these matters. The appellants refused to admit any of the four claims, and Sir LYNDEN MACASSEY was appointed by the parties to arbitrate between them. By agreement he stated a consultative Case for the decision of the court. In para. 2 of the Special Case he states the four claims, the two alternative claims in respect of increase of burden on county ratepayers in meeting the cost of road maintenance being set out under heads (A) and (B) respectively, and the two alternative claims in respect of increase of burden on county ratepayers in meeting the cost of public assistance being set out under heads (C) and (D) respectively."

Heads (A) and (B) were as follows:

"(A) The difference (if any) between the burden on the ratepayers of the county which would properly be incurred by the county council in meeting the cost of executing their powers and duties in respect of roads transferred to them by the Local Government Act, 1929, and the burden on the ratepayers which would properly have been incurred by the county council in meeting such cost had the alteration of boundaries made by the Oxford Extension Act, 1928, not taken place; (B) Or, alternatively, the increase of burden, if any, which would have been thrown upon the ratepayers lately in the rural districts of Headington and Woodstock after Apr. 1, 1930, by reason of the said extension and for which the rural district councils would have obtained compensation if their functions as highway authorities had not been transferred to the county council under the Act of 1929."

In the Court of Appeal, GREER, L.J., and MACKINNON, L.J., answered the question in favour of the county council, GREER, L.J., on the basis of heads (A) and (C), and MACKINNON, L.J., on the basis of an approximation to heads (B) and (D); see *per* LORD RUSSELL OF KILLOWEN (*ibid.*, 724); but BENNETT, J., whose judgment was approved in the House of Lords, was in favour of the city council. His *ratio decidendi* on the question of public assistance is as follows ([1938] 1 All E.R. 816):

"The claim made by the claimants in respect of public assistance is formulated in s. 17 (B) of para. 1 of the Special Case and is in no way related to the claim the Woodstock board of guardians had or might have had against the Headington board of guardians. It is not a claim on behalf or in right of the ratepayers in the Woodstock union or on behalf or in right of the Woodstock board of guardians. It is a claim on behalf of the ratepayers throughout the administrative county of Oxford in relief of the burden upon them in respect of the cost of public assistance not in the old Woodstock union but throughout the administrative county of Oxford. It is a claim for an adjustment not in respect of an increase to a burden resting on Apr. 1, 1930, on the county ratepayers but in respect of a new burden placed upon such ratepayers for the first time on Apr. 1, 1930, by the Local Government Act, 1929. The crux of the matter is whether the language of s. 1 of the Local Government (Adjustments) Act, 1913, can be fitted to the facts out of which the present claim arises. The

language of that section seems to me to envisage, first, a local authority exercising powers and duties in some given area, secondly, a change of boundaries effecting a transfer of a profitable part of the district of that local authority to another, and, lastly, as a consequence, an increased rate being levied upon the ratepayers in the reduced area of that local authority to enable it to exercise the same powers and duties in the reduced area. The language does not fit the case where after a change of boundaries has become an accomplished fact Parliament for the first time lays upon a local authority a new duty and upon the ratepayers of that authority a new burden to enable the local authority to discharge the new duty. Such a burden is not an increase to an existing burden as a consequence of change of boundaries. So to hold would, as it seems to me, enable adjustments to be made at any time if Parliament established a new public service, for example, hospitals for the sick, and laid the duty of performing it upon county councils and county boroughs and the burden of paying the cost of it upon the ratepayers of those authorities. For these reasons, I would myself answer question (C) in para. 2 of the special case in the negative. The same process of reasoning would lead me to answer question (A) of the same paragraph in the same sense."

It will be observed that the Woodstock Board of Guardians and the Headington Board of Guardians corresponded to the Magor Rural District Council and the St. Mellons Rural District Council in the present case. BENNETT, J., deals with the road portion of the claim, saying (*ibid.*, 817):

"By virtue of the provisions of the Local Government Act, 1929, on Apr. 1, 1930, the said rural district councils and all other rural district councils in the administrative county of Oxford ceased to be road authorities and the roads which theretofore had been maintained by rural district councils became maintainable by the claimants. Just as in the case of their claim in respect of public assistance, so in the case of their claim in respect of road maintenance, the claimants' claim formulated in s. 17 of para. 1 of the Special Case has no relation to the claims of the Headington rural district council or the Woodstock rural district council, nor to any increase in burden upon their respective ratepayers."

The effect of his judgment is conveniently summarised by LORD RUSSELL OF KILLOWEN in the House of Lords where he says ([1938] 4 All E.R. 725):

"I agree with [BENNETT, J.,] that the words of the section do not apply to a case (such as the present) where, subsequently to an accomplished change of boundaries, a new duty is laid upon a local authority, and a new burden is laid on the ratepayers of that authority to enable the local authority to discharge the new duty. In such a case there is no increase of an existing (or indeed any) burden as a consequence of an alteration of boundaries."

Counsel for the rural district council pointed out that in the *Oxford* case (3) the courts had not to consider the question whether the county council could claim as successor in title of the rural district council and boards of guardians. No argument on these lines appears to have been addressed to the court. Indeed, I doubt whether the facts would have permitted it, for, although the Act of 1929 contained a provision (s. 117) that road property and liabilities of a rural district council should be transferred to and vest in the county council, I do not think that section can have covered a claim in respect of increase of burden since the rural district councils remained in existence and had claims enforceable in their own right and for their own benefit in respect of the period before Apr. 1, 1930. Counsel for the

borough council suggested that the question was raised by the form of heads (B) and (D) of the question before the court, and that BENNETT, J., dealt with it at the end of his judgment where he said ([1938] 1 All E.R. 817):

"The alternative questions propounded in para. II. (B) and (D) seem to me to be based upon the idea of subrogating the claimants to the rights the Headington and Woodstock rural district councils might have had against the respondents, and to the right the Woodstock guardians might have had against the Headington guardians if the Local Government Act, 1929, had not been passed."

I do not think, however, we can safely proceed on the basis that there is a decision binding us since the question does not appear to have been argued. Subrogation is something different from assignment and the language of the statute then under consideration did not, I think, afford a solid foundation for an argument based on assignment.

Treating the point as still open, I turn to the arguments that were addressed to us. Counsel for the borough council relied on a passage in LORD RUSSELL OF KILLOWEN's speech in the *Oxford* case (3), where he said ([1938] 4 All E.R. 725):

"I would only add that in my opinion s. 1 (1) (b) of the Act of 1913 postulates by its language the existence of two burdens (a smaller burden and a larger burden) each of which is thrown on the ratepayers of the area of one and the same authority in meeting the cost incurred by that authority in executing any of its powers and duties, the burden becoming larger as a consequence of an alteration of the authority's boundaries; that is to say it postulates an authority imposing a burden on the ratepayers of its unreduced area, and the same authority subsequently imposing a larger burden on the ratepayers of its reduced area."

In the present case, he said, that postulate cannot exist since the authority which imposed the smaller burden had ceased to exist before the question of imposing a larger burden arose. Counsel for the rural district council, however, says that this is not conclusive because LORD RUSSELL OF KILLOWEN's attention was not directed to the question of an assignee of the rights of the original authority. It would defeat, said counsel, the clear purpose of the Act if the authority taking over the beneficial area were not to remain liable despite an amalgamation of areas. The clear purpose of the Act was the benefit or relief of ratepayers by counteracting the increase of rates that might otherwise be imposed on them.

I do not, however, think this argument can avail the new rural district council. It can only claim as assignee of the old councils, for if it sought to claim in its own right the answer would be that the burden was imposed not by the Act of 1934, but by the Order, just as in the *Oxford* case (3) the burden in respect of roads was imposed, not by the Oxford Extension Act, 1928, but by the Local Government Act, 1929. If it claims as assignee, it cannot have greater rights than the dissolved rural district councils through whom it claims. The claim of the dissolved rural district councils would have had to be valued by an arbitrator in accordance with s. 152 and sched. V to the Act of 1933. The arbitrator would have had to have regard to the facts known at the time of the arbitration, and, in the result, the award would have necessarily been nil in view of the decision in the *Godstone* case (1). I think, therefore, that, although the decision in the *Godstone* case (1) is not directly in point, the learned judge was right when he held that it was implicit in that decision that the second question must be answered in the negative. For these reasons, I would dismiss the appeal.

DENNING, L.J.: The Special Case sets out the various statutory provisions which the arbitrator had to interpret. They have been drafted, as legal documents often are, more with a view to accuracy than to intelligibility, and the unfortunate result is that the arbitrator has to ask the court what they mean. The learned judge has given one answer. The Court of Appeal has veered between one answer and another and is eventually divided in opinion.

A We all have to do the best we can to make sense of these provisions.

I confess that I find it difficult to deal with these questions of interpretation in the abstract. I like to see their practical application, and for that reason I propose to set out hypothetical sets of facts which, I suppose, are probably the true facts although they are not stated in the Case. Newport, Monmouthshire, is a very progressive borough. By 1935 it had expanded beyond its

B original boundaries into the adjoining rural districts. This had proved very helpful to the original ratepayers of those rural districts, because the new residents brought more money in to the rates than it cost the rural district councils to look after them. The new rich grounds, in effect, helped pay for the old poor grounds in the rural districts. But the time came in 1934 when the borough of Newport obtained an Act of Parliament extending its boundaries

C so as to take these rich grounds into the borough and out of the rural districts. This meant, of course, that, if nothing was done about it, the rates in the rural districts would have to go up, because they would be left with the poor grounds and with no help from the rich grounds which they had lost. To remedy this hardship on the ratepayers in the rural districts, Parliament expressly enacted that the borough of Newport should pay compensation to the rural district

D councils. The amount was to be agreed between them, or if not agreed was to be decided by an arbitrator. Parliament laid down rules to guide him. He was to have regard to the increase in rates which would fall on the ratepayers of the rural districts because they had lost the rich grounds and to the length of time their rates would have to be increased on that account.

That is all intelligible enough. The new boundaries were to take effect on

E Apr. 1, 1935, and, if the matter had been left where Parliament left it, the arbitrator would probably have solved all his difficulties and awarded the appropriate compensation without consulting the court about it, but the trouble has arisen because in 1935 the Minister of Health made an Order on the top of the Act of 1934. He made an Order combining two of the rural districts, shorn as each was of its rich grounds, and made them one district,

F and he said that this combination was to take place also on Apr. 1, 1935, but immediately after they had lost their rich grounds to the borough. No one would suppose that this innocent combination would take away from the ratepayers of the rural districts the right to compensation which Parliament had given them, but the judge has held that it has. If he is right, it means that the rural ratepayers have to bear all the increased burden themselves,

G without any help from the borough, and the borough gets off scot free by reason of a ministerial Order with which it had no concern.

I cannot think that the judge is right about this. The Minister's Order expressly provided that the property of the two rural district councils should be transferred to and vest in the combined council. The right of the two councils to compensation was clearly "property" which vested in the combined

H council, and the judge so held, but he thought that the right was worth nothing because the two councils only lived for a moment of time after they had been shorn of their rich grounds. Much as I respect his opinions, I cannot agree with him about this. The effect of the Minister's Order was, if I may use a metaphor, not the death of the two councils, but their marriage. The burdens which each set of ratepayers had previously borne separately became a combined burden to be borne by them all together. So, also, the rights to which the two councils would have been entitled for each set of ratepayers separately

became a combined right to which the combined council was entitled for them all together. This was so obviously the intention of the Minister's Order that I have no patience with an ultra-legalistic interpretation which would deprive them of their rights altogether. I would repeat what I said in *Seaford Court Estates, Ltd. v. Asher* (4). We do not sit here to pull the language of Parliament and of Ministers to pieces and make nonsense of it. That is an easy thing to do, and it is a thing to which lawyers are too often prone. We sit here to find out the intention of Parliament and of Ministers and carry it out, and we do this better by filling in the gaps and making sense of the enactment than by opening it up to destructive analysis.

It may be said that these heroics are out of place, and I agree they are, because I think that Parliament has really made its intention plain enough. The Act which conferred the title to compensation conferred it on each of the district councils, not in its own right, but in right of its ratepayers: see s. 152 (1) (b) of the Act of 1933. The district council was the hand to receive the compensation, but it only received it so that it might give relief to the ratepayers for the increased burden which the change of boundaries cast on them. The amalgamation changed the legal identity of the two district councils, but it did not change the ratepayers at all, nor did it relieve them of their burdens: and there is no reason whatever why the amalgamated council should not claim the compensation due to the ratepayers. This enables me to show what I believe is the fallacy in the judgment of the learned judge. These are the steps in his argument. (i) Each district council only remained in existence for a moment of time after it was shorn of its rich grounds. (ii) Therefore, its increased burdens were to all intents and purposes nil. (iii) Therefore, it is entitled to nothing. (iv) The amalgamated council only takes over the property of the two district councils. (v) Therefore, as each of them was entitled to nothing, the amalgamated council is entitled to nothing. The fallacy in the whole of that argument is at the second step. It assumes that each district council was entitled in its own right in respect of its own increased burdens. On that basis it would, of course, be entitled to nothing because it did not live long enough to bear any increased burden itself. The answer is, however, that it was never entitled in its own right at all. It was only entitled in right of its ratepayers in respect of *their* increased burdens, and their increased burdens did not last only for a moment of time. They lasted for years. Parliament expressly said that the arbitrator was to have regard to the length of time during which the increase of *burden on the ratepayers* might be expected to continue: see r. 1 (a) and (b) of sched. V to the Act of 1933; whereas the judge has limited the arbitrator to the length of time during which the rural district councils might be expected to continue, to wit, only a moment of time. The answer is that the right of each district council, even during that one moment, was a right to compensation for the whole length of time in the future during which the increased burden might be expected to fall on the ratepayers, and it was that right which devolved on the amalgamated council. In my judgment, therefore, amalgamation does not destroy the rights of those ratepayers whose councils are amalgamated. It only transfers them to the amalgamated body.

So much for the main point in the case. But there still remains the question: How is the compensation to be assessed? Is it to be assessed as if the rural district councils had never been amalgamated, or is regard to be had to the fact that they have been amalgamated? There is a decision of this court which helps us here. In the *Godstone* case (1) it was decided that if a subsequent event lessened the burden on the ratepayers, it should be taken into account in assessing the compensation. It follows, therefore, that if the amalgamation lessens the burden on the ratepayers of the rural districts, as it may well do, it will go to reduce the amount payable by Newport. Suppose, for

instance, that it is found to be more economical to provide services for the one combined district than for the two districts separately. That would mean some relief to the rates, and would lessen the burden suffered by the ratepayers owing to losing the rich grounds. In such a case, Newport would only be bound to pay compensation for the lessened burden because that would be the only burden which "will be" in fact incurred by the ratepayers.

- A A complication does arise, however, because the Minister's Order did not simply combine the two rural districts. It carved a piece out of one of them, that is, out of the rural district of Magor, and transferred it to a new urban district of Pontypool. Does this affect the compensation payable by the borough of Newport to the combined rural districts? This is a nice question which can best be considered by asking how a claim by the rural district of Magor alone
- B would have been affected by the subtraction of the piece. The answer is, I think, reasonably plain. On the one hand, if the piece was profitable to the rural district of Magor, in that it brought in more money than it cost, then, if there had been no amalgamation, the loss of that profitable area might provide a ground of claim by the rural district of Magor against Pontypool, but it would not deprive the rural district of Magor of its claim against Newport.
- C The compensation for the increase of burden on the remaining ratepayers of Magor (namely, those left after the district had been shorn of rich grounds both to Newport and to Pontypool) would have to be apportioned between Newport and Pontypool. On the other hand, if the subtracted piece was burdensome for the rural district of Magor in that it cost more than it brought in, then any lessening of the burden on the remaining ratepayers of Magor, because
- D they were well rid of it, would go to reduce the amount payable by Newport. That, I think, follows again from the *Godstone* case (1), but it must be borne in mind that, in such a case, Pontypool might have a claim against the rural district. Indeed, I see that Pontypool has already been paid £343 as a "financial adjustment." That expense would have to be taken into account before it could be said that the amount payable by Newport should be reduced.
- E To put it shortly, only the net lessening of the burden on the ratepayers would go in relief of Newport.

That seems to me the way in which a proper adjustment could be made on account of the subtracted piece if there had been no amalgamation. Now superimpose the amalgamation on the top of it, and the solution to the whole tangle is this. The new combined rural district council is entitled to compensation

- F from the borough of Newport. The compensation is to be assessed having regard to the fact that the two former rural districts have been amalgamated and have lost a piece to Pontypool, but also that they have had to pay compensation to Pontypool. In that way the arbitrator will ascertain what burden "will be," in fact, incurred by the remaining ratepayers, and he must compare it with what would have been their position if the rural districts had not been
- G shorn of their various grounds or undergone an amalgamation. The rules show that regard must be had to the burden on the ratepayers which would have been incurred "had no alteration of boundaries or other changes taken place," but the total sum which would have been borne by the whole of the former districts must be apportioned so as to show what the ratepayers who are now left would have paid, had there been no change. To put it shortly, a comparison
- H must be made between the number of shillings in the pound which the ratepayers of the present combined rural district will have to pay after the changes and the number of shillings they would have had to pay if there had been no changes, and they are to be compensated for the net increase in the amount which they, as ratepayers, have to pay by reason of the changes. I venture to think that this is not only the sensible solution, but the one provided by the Act of Parliament, and judicially stated in the House of Lords in *Newport Borough Council v. Monmouthshire County Council* (5): see particularly

per VISCOUNT SIMON ([1947] 1 All E.R. 904) and *per* LORD NORMAND. LORD NORMAND put it very succinctly (*ibid.*, 915):

" . . . the arbitrator's mandate requires him to perform the very simple operation of finding the difference between the burden of the rate-payers in the reduced area in the post-severance period and the burden which they would have borne in the same period if there had been no severance . . . "

My answers to the specific questions are, therefore: (i) Yes; (ii) Yes; (iii*a*) The former; (iii*b*) The latter, but apportioned so as to relate only to the ratepayers who are now left. I would, therefore, allow the appeal.

SOMERVELL, L.J. : I have had the advantage of reading the judgments just delivered by my brethren. I agree with the conclusion and reasoning of my brother COHEN and have very little I wish to add. The decision in *Godstone Rural District Council v. Croydon Corpn.* (1), though of assistance, does not, I agree, conclude the matter. The wording of the relevant provisions, particularly the first rule of sched. V to the Local Government Act, 1933, seem to me apt to cover a claim by the local authority affected by the alteration of areas and not some other authority into which it has been in whole or in part absorbed. It would appear to make the measure of the sum to be paid the burden on the ratepayers which will be properly incurred by that local authority in meeting the cost of executing its functions and the burden which would have been incurred had no alteration taken place. If the local authority ceases to exist, no burden will be incurred by it. Assuming that its right to compensation can be assigned, this must, as it seems to me, be limited *prima facie*, at any rate, to the rights which it has, which, if I am right, are to be measured by the extent of its life, if known at the time. I am inclined also to think that if the legislature had intended that these claims would survive total or partial amalgamation or absorption, provision would have been made as to how the matter was to be dealt with. It is said that this conclusion defeats the plain intention of the County of Monmouth Review Order. It may be so, but I do not think it is necessarily so. If claims such as this cannot be made in respect of periods after an amalgamation, that would be a matter to be taken into account when deciding on an amalgamation, which, no doubt, in itself often provides some relief to ratepayers. The point is, I think, a difficult one, but, for the reasons given by COHEN, L.J., and those I have stated, I think the appeal fails and must be dismissed with costs.

Appeal dismissed with costs.

Solicitors: *Torr & Co.*, agents for *Wade & Son*, Newport, Mon. (for the rural district council); *Rees & Freres*, agents for *J. G. Iles*, town clerk, Newport (for the borough council).

[Reported by C. N. BEATTIE, Esq., Barrister-at-Law.]

NOTE.

HOWSON (INSPECTOR OF TAXES) v. MONSELL.

[CHANCERY DIVISION (Danckwerts, J.), November 7, 1950.]

A *Income Tax—Profit from profession or vocation—Authoress—Lump sum received for film rights of books—Capital or income—Income Tax Act, 1918 (c. 40), sched. D, case II.*

CASE STATED by the General Commissioners of Income Tax for Rye, Sussex.

B The taxpayer's wife was an authoress who owned the copyright in her books and received royalties in respect thereof. In the years 1946-47, 1947-48 and 1948-49 the wife received lump sums in return for the grant by her of the right to reproduce two of her books in the form of cinematograph films. The Crown claimed income tax from the taxpayer in respect of the money so received by his wife under the Income Tax Act, 1918, sched. D, case II. The commissioners held that the receipts were of a capital nature, and so did not attract tax. The Crown appealed.

Cases referred to:

- (1) *Withers v. Nethersole*, [1948] 1 All E.R. 400; [1948] L.J.R. 805; 28 Tax Cas. 501; 2nd Digest Supp.
(2) *Glasson v. Rougier*, [1944] 1 All E.R. 535; 26 Tax Cas. 86; 2nd Digest Supp.

D *Sir Walter Monckton, K.C.*, and *R. P. Hills* for the Crown.
Honeyman for the taxpayer.

E **DANCKWERTS, J.**, said it was plain that the taxpayer's wife received the sums in question by reason of the fact that she was carrying on the vocation of writer or authoress of books founded on history and that the receipt by her was in the course of carrying on that vocation. That being so, it was no answer to say that the receipts were of a capital nature and so were not chargeable under the Income Tax Act, 1918, sched. D, case II. On the contrary, it seemed that, as they had been received by virtue of her work and in the course of her vocation, they were so chargeable.

F Solicitors: *Solicitor of Inland Revenue* (for the Crown); *Pothecary & Barratt* (for the taxpayer).

C.N.B.

MACDONALD v. GREEN.

[COURT OF APPEAL (Cohen, Asquith and Denning, L.JJ.), November 28, 1950.]

Gaming—Promise to pay person money paid by him in respect of gaming contract—Loan to repay lost bets—Term that loan should be applied in payment of betting debt—Gaming Act, 1892 (c. 9), s. 1.

The defendant was indebted to a bookmaking company, of which the plaintiff was the managing director, in the sum of £4,020 in respect of betting transactions. On the plaintiff pressing for payment and threatening to report the defendant to Tattersalls, the defendant asked the plaintiff to lend him the money privately and promised to pay it back in weekly instalments. The plaintiff agreed to the proposal, drew up a letter for signature by the defendant acknowledging the loan and agreeing to repay it by weekly instalments of £80, and sent a clerk of the company to the defendant with the draft letter and a cheque for £4,020 in favour of the defendant. The defendant signed the letter and endorsed the cheque which he handed back to the clerk who paid it into the company's bank account. The defendant repaid £2,160 of the loan. In an action by the plaintiff to recover the balance outstanding, the plaintiff gave evidence to the effect that it was at all times understood that the cheque should be merely endorsed by the defendant and returned for payment into the company's account.

HELD: since there was a stipulation, to be inferred from the circumstances, that the money was to be applied solely in payment of the betting debt to the company, the transaction fell within s. 1 of the Gaming Act, 1892, and the plaintiff was not entitled to recover.

Hill v. Fox (1859) (4 H. & N. 359), *applied*.

Re O'Shea, Ex p. Lancaster ([1911] 2 K.B. 981), *discussed and explained*.

Per DENNING, L.J.: Since the Act of 1892 *Ex p. Pyke, Re Lister* (1878) (8 Ch.D. 754) is not good law.

[AS TO MONEY LENT IN CONNECTION WITH WAGERING CONTRACTS, see HALSBURY, Hailsham Edn., Vol. 15, pp. 486, 487, paras. 885, 886; and FOR CASES, see DIGEST, Vol. 25, pp. 414-416, Nos. 180-194.]

Cases referred to:

- (1) *Tatam v. Reeve*, [1893] 1 Q.B. 44; 67 L.T. 683; 57 J.P. 118; *sub nom., Tatham v. Reeve*, 62 L.J.Q.B. 30; 25 Digest 411, 146.
- (2) *Saffery v. Mayer*, [1901] 1 K.B. 11; 70 L.J.Q.B. 145; 83 L.T. 394; 64 J.P. 740; 25 Digest 414, 175.
- (3) *Re O'Shea, Ex p. Lancaster*, [1911] 2 K.B. 981; 81 L.J.K.B. 70; 105 L.T. 486; 25 Digest 415, 192.
- (4) *Ex p. Pyke, Re Lister*, (1878), 8 Ch.D. 754; 38 L.T. 923; *sub nom., Re Lister, Ex p. Pike*, 47 L.J.Bey. 100; 25 Digest 415, 191.
- (5) *Hill v. Fox*, (1859), 4 H. & N. 359; 157 E.R. 879; *sub nom., Fox v. Hill*, 32 L.T.O.S. 337; 23 J.P. 261; 25 Digest 415, 190.
- (6) *Hyams v. Stuart King*, [1908] 2 K.B. 696; 77 L.J.K.B. 794; 99 L.T. 424; 25 Digest 401, 58.
- (7) *Hill v. William Hill (Park Lane), Ltd.*, [1949] 2 All E.R. 452; [1949] A.C. 530; [1949] L.J.R. 1383; 2nd Digest Supp.

APPEAL by the defendant from a decision of SLADE, J., dated July 17, 1950, whereby he held that the plaintiff was entitled to recover from the defendant £1,860, being the balance of £4,020 lent by the plaintiff to the defendant.

The plaintiff was the managing director and the principal shareholder of Hector Macdonald, Ltd., a company carrying on the business of bookmakers and commission agents. In June, 1949, the defendant, a professional backer of

horses, owed the company £4,020 in respect of bets, and at the end of July the plaintiff threatened to report him to Tattersalls. On July 29, during a telephone conversation, the defendant asked the plaintiff whether he could lend him privately the money which he owed to the company, promising that he would pay it back weekly and sign any agreement in connection with the loan which the plaintiff had drawn up. The plaintiff agreed to make the loan and to accept repayment at the rate of £80 a week, and the same day the defendant sent to the plaintiff the first instalment of £80, and requested the plaintiff to forward an agreement for his signature. On July 30 a document, purporting to be written at the defendant's address, was sent by the plaintiff to the defendant. It was in the following terms:

A
B “ Dear Sir, I beg to acknowledge receipt of cheque value £4,020 by way of loan, which sum I undertake to repay to you by weekly instalments of £80 each on the Monday of each week commencing on Aug. 1 next, and continuing on the Monday of each week thereafter until such time as the whole of the said sum of £4,020 shall have been repaid by me to you . . . ”

C That document, together with a cheque to order for £4,020 in favour of the defendant crossed “ Not negotiable,” was delivered to the defendant by a servant of the company. The defendant signed the document, endorsed the cheque, and handed it back to the company's servant, who paid it into the company's banking account. The defendant repaid £2,160 of the loan, but in and after March, 1950, he failed to make any further payment. SLADE, J., was of opinion that it was neither a term of the oral agreement, nor a term of the contract, if any, for the loan, that the money lent should be applied by the defendant only in discharge of his liability to the company, and, therefore, held that it was not money paid in respect of a wager within the meaning of the Gaming Act, 1892, s. 1, and was recoverable by the plaintiff.

D
E *King-Hamilton* for the defendant.
 Quass for the plaintiff.

COHEN, L.J.: This is an appeal from a judgment of SLADE, J., given on July 17, 1950, by which he decided that the plaintiff was entitled to recover £1,860 and costs.

F There is no doubt that the origin of this transaction between the parties was a gaming transaction, but the question is whether, having regard to all the circumstances, the plaintiff is deprived of his right to recover the amount in question by reason of the provisions of s. 1 of the Gaming Act, 1892. That section provides:

G “ Any promise, express or implied, to pay any person any sum of money paid by him under or in respect of any contract or agreement rendered null and void by the Gaming Act, 1845 or to pay any sum of money by way of commission, fee, reward, or otherwise in respect of any such contract, or of any services in relation thereto or in connexion therewith, shall be null and void, and no action shall be brought or maintained to recover any such sum of money.”

H [HIS LORDSHIP stated the facts, reviewed the evidence, and continued:] It seems to me that the only possible inference from the evidence given by the plaintiff is that the oral agreement contained an express provision that the moneys received should be applied in discharge of the defendant's obligations to the company, and that the plaintiff took, with the defendant's consent, every possible step to ensure that that obligation was performed. I refer in particular to the plaintiff's evidence in answer to counsel for the defendant in cross-examination.

"Q.—It was at all times the understanding that the cheque should be merely endorsed on the back by Mr. Green [the defendant] and returned for payment into the firm's account? A.—That was exactly his idea. He drew the whole thing up himself."

I would add that he ensured the performance of that obligation by sending the company's servant with the cheque with instructions to await its return as soon as it had been endorsed, and that he then caused it to be paid into the company's account. It seems to me that, in those circumstances, the only possible inference is that it was an express term that the money should be applied in that particular way. If the learned judge thought that to be the right view of the facts, I think he would have agreed with the conclusion which I have reached, because he states the law quite plainly, and I respectfully agree with his statement of it. He says:

"There are two lines of authority. The first is contained in *Tatam v. Reeve* (1), which was approved by the Court of Appeal in *Saffery v. Mayer* (2). I understand those authorities to decide that where money is paid at request to discharge losses already incurred in transactions which are null and void within the meaning of s. 18 of the Gaming Act, 1845, direct by the person who provides the money to the winner, such money paid at request is money paid 'in respect of' a wager and is, therefore, not recoverable by the person who provides the money from the person who asks him to provide it, by reason of the provisions of s. 1 of the Gaming Act, 1892."

Then he contrasts that position with the second line of authority, which is represented by the decision of this court in *Re O'Shea, Ex p. Lancaster* (3), and the learned judge says:

"I understand that case to decide that a person who lends money to another person who has already lost bets for the express purpose of enabling that person to use the money so borrowed to discharge his liability to the winner in respect of those bets, can recover because it is not money paid 'in respect of' a wager."

There, again, I agree with the learned judge's statement as to what was decided in that case.

Before I part with *Re O'Shea* (3) I ought to refer to an argument which counsel for the plaintiff addressed to us based on some observations of COZENS-HARDY, M.R., where he said ([1911] 2 K.B. 984):

"This court in the case of *Ex p. Pyke, Re Lister* (4) in the year 1878 drew a distinction to the effect that the money was not lent to the bankrupt to enable him to make a bet, but it was lent to him to pay for a bet which he had already made and lost, and as the law then stood the court held that there was no objection to that, and it took the view that the Act must be construed strictly, and that there was nothing in the earlier Acts to hit the transaction, which was a loan to enable the payment of a bet that had already been made and lost. Now has that law been altered by the Act of 1892? It is said, and the learned registrar seems to have taken that view, that the case was within the language or the spirit of the Queen's Bench decision in *Tatam v. Reeve* (1), which was approved by the Court of Appeal in *Saffery v. Mayer* (2). I am unable to accept that view."

It is clear that the Master of the Rolls is approving, within limits, *Ex p. Pyke, Re Lister* (4) but I read him, not as saying that, if it was a term of the loan that the money should be paid in a particular way, that would not be within the mischief of the Act, but merely as saying that, if there was a loan which the borrower was entitled to deal with as he liked, then it would not be within the

mischief of the Act notwithstanding that it was the intention of both parties that it should be applied in a particular way. If that is what he meant, I respectfully agree. If, however, he was intending to say that it would not be within the mischief of the Act, notwithstanding that there was a definite bargain to apply the money in discharging the indebtedness in respect of a wagering transaction, then I think that would be in direct contravention of the Act of 1892.

A After citing *Re O'Shea* (3) the learned judge goes on to refer to HALSBURY'S LAWS OF ENGLAND, 2nd ed., vol. 15, p. 487, note (p), which is to this effect:

B "In relation to wagers the distinction between money lent and money paid at request appears to be this, that in the case of a loan the money is not paid by the lender 'under or in respect of' a wager, the lender being unconcerned with its application; whereas in the case of a payment by request the money is allocated to a particular purpose, and the payment is 'in respect of' a wager. When, however, the transaction is strictly a loan, and yet hampered with a stipulation that it shall be applied in respect of a wager, the transaction may perhaps stand upon a different footing (*cf. Hill v. Fox* (5)); at any rate, if the nature of the arrangement between the lender and borrower is such that a payment made by the latter in pursuance of it would in effect be a payment made by the lender, as in *Saffery v. Mayer* (2)."

C Assuming this to be a loan for the moment, it seems to me that the present case is exactly that contemplated by the note, namely, that there was a stipulation that it should be applied in respect of a wager. In those circumstances, D it is, I think, worth while looking at what was said by the Court of Exchequer Chamber in *Hill v. Fox* (5), although that case deals with a different Act. In that case the headnote reads as follows:

E "The defendant, being indebted to the plaintiff and other persons for money lost by betting on a horse race, applied to the plaintiff for a loan. The plaintiff lent the defendant £2,000 upon the security of a deed, which assigned to the plaintiff certain policies of assurance, and contained a covenant by the defendant to pay the £2,000, and interest. On the settling day the defendant paid the plaintiff his bets out of the £2,000. In an action by the plaintiff on the covenant, the defendant pleaded that the deed was a mortgage security, part of the consideration for which was a gaming debt. At the trial F the judge told the jury that if the £2,000 was advanced in pursuance of a stipulation or agreement between the plaintiff and defendant that out of it the plaintiff should be paid the money which he had won of the defendant by betting it was a mere colourable loan and evasion of the statute; but that if there was no such stipulation or agreement, and the plaintiff advanced the £2,000 as a loan for the defendant to dispose of as he pleased, the deed G was valid, although the plaintiff expected to be paid out of the money so lent. *Held*, in the Exchequer Chamber, on a bill of exceptions, that the direction was right."

That seems to me exactly the kind of direction which, if the present case had been tried by a jury, the judge should have given to the jury.

H Counsel for the plaintiff did the best he could to support the judgment and he advanced three propositions. He said (i) that the contract was a contract of loan, (ii) that there was no term in that contract that the money should be applied in paying the debt due to the plaintiff's company, and (iii) that, even if he was wrong on the second point, the money was still recoverable. I feel some doubt whether he is right in saying that the contract was a contract of loan having regard to the collateral stipulation, which, in my view, undoubtedly existed, but I will assume in his favour that it was. On that basis I think it is plain, for

the reasons I have already given, that it was a term of the contract that the money should be applied in paying the debt due to the company. If that be so, it seems to me that, applying the principle of *Hill v. Fox* (5), and considering, as I do, that the direction which should have been given to the jury, if there had been one in this case, would be on the same lines as that which was given in *Hill v. Fox* (5) and approved by the Court of Exchequer Chamber, the money advanced by the plaintiff is irrecoverable because it is within the mischief of s. 1 of the Gaming Act, 1892. For these reasons, I think the appeal should be allowed.

ASQUITH, L.J.: I agree. The following principles seem to me to be deducible from the authorities. (i) When "X" at the request of a loser of a bet pays the amount of that bet direct to the winner, "X" cannot enforce a promise by the loser to repay him. That is decided in *Tatam v. Reeve* (1), and the case is directly within the mischief of s. 1 of the Act of 1892, because there one has the promise by the loser to pay a person—that is "X"—a sum of money paid by that person, "X," to the winner in respect of a bet. (ii) Where "X" makes a loan to the loser so as to enable, but not so as to bind, the loser to apply the proceeds by paying the sum lost to the winner, "X" can claim repayment. That is decided in *Re O'Shea* (3), and, in my view, also in *Ex p. Pyke, Re Lister* (4). (iii) Where "X" makes a loan to the loser stipulating contractually that the loser can apply it by way of paying the winner the amount of the debt and not otherwise, "X" cannot claim repayment. That is *Hill v. Fox* (5), from which my Lord quoted.

In my view, this case falls within the third of those three rules. It cannot be gainsaid—here I think counsel for the plaintiff is right—that there was strong evidence that the transaction was one of loan, but the evidence seems to me to establish plainly that the application of the money lent to the payment of the debt to Macdonald, Ltd., was a true term of the contract. That seems to emerge in particular from the two questions which my Lord has quoted and which were put by the learned judge himself to the plaintiff, when he asked him:

"Q.—You do not dispute that you would not have lent the £4,020 except on the terms that it should be used to discharge the defendant's indebtedness to your firm? A.—When Jack Green put it to me the way he did and explained it to me, you are quite correct, my Lord.

"Q.—The whole agreement, according to you, was that the money should be lent, not for him to spend a holiday in the south of France, but to pay the firm? A.—Definitely."

I can only suppose that the learned judge had overlooked the replies to those questions put by himself when he reached the conclusion that it was not a term of the loan that its proceeds should be applied in the way I have indicated. It seems to me clear that both parties would have agreed, if they had been asked, that, if the defendant had kept this cheque instead of endorsing and returning it, the plaintiff would have been entitled to stop it.

Counsel for the plaintiff has relied on the absence of any such express stipulation from the so-called written contract, the letter of July 30. I do not think that that agreement is either exhaustive of the terms of the actual bargain between the parties or that it superseded the original oral agreement made between them, and this last agreement seems to me clearly to have been subject to a stipulation that the money lent should be applied in payment of the bets lost and not otherwise. For these reasons I agree that the appeal should be allowed.

DENNING, L.J.: If we were to uphold the decision of SLADE, J., we should present bookmakers with a means of evading the Gaming Acts which would be as effective as *Hyams v. Stuart King* (6) was until it was overruled by *Hill v. William Hill (Park Lane), Ltd.* (7). All that a bookmaking company would have

to do would be to send a messenger to the backer, with a letter and cheque in favour of the managing director, and get them both returned signed. The transaction in the present case seems to me to fall precisely within the words of the Act of 1892. The money for which the plaintiff sues is money which his bank paid to the bookmaking company in respect of the betting debts which the defendant had incurred. I do not think it matters whether in point of law the plaintiff's claim against the defendant is for money lent or for money paid at the defendant's request. Even if it were disguised in the form of a loan, the substance of it is that the plaintiff paid the defendant's losses and seeks to recover the amount from the defendant. That he cannot do.

Counsel for the plaintiff suggested that *Ex p. Pyke* (4) was still good law, relying on a *dictum* of the Master of the Rolls in *Re O'Shea* (3) ([1911] 2 K.B. 985). I do not think that counsel interpreted the *dictum* aright, but, in any event, I am clear that since the Act of 1892 *Ex p. Pyke* (4) is not good law, because the lender there paid the betting debts direct. Counsel for the defendant also said that *Tatam v. Reeve* (1) must be read with the qualification which FLETCHER MOULTON, L.J., put on it in *Hyams v. Stuart King* (6) ([1908] 2 K.B. 715), namely, there must be a knowledge on the part of the person paying that it is in respect of a betting debt. I agree, but in this case the plaintiff well knew that he was paying the money in respect of betting debts.

The distinction is clear enough. A loan which leaves the borrower at liberty to apply the money as he wishes is not invalidated by the Act of 1892, even though it is contemplated by both parties that he will probably pay betting debts with it, but when a loan is hampered by a stipulation that the money is to be used for payment of a betting debt, then, no matter whether the stipulation is express or implied or to be inferred from the circumstances, the loan is a payment in respect of the betting debt and is hit by the Act. In this case there was a stipulation, to be inferred from the circumstances, that the money was to be applied solely in payment of the betting debt. The statute, therefore, prevents its recovery. I agree with my Lords that the appeal must be allowed.

Appeal allowed with costs.

Solicitors: *King-Hamilton & Co.* (for the defendant); *Ronald M. Simons* (for the plaintiff).

[Reported by C. N. BEATTIE, ESQ., Barrister-at-Law.]

G *Re YOUNG (deceased). YOUNG v. YOUNG AND OTHERS.*

[CHANCERY DIVISION (Danckwerts, J.), November 29, 1950.]

Will—"All his worldly goods and chattels both real and personal"—Inclusion of real property.

Will—Attestation—Attestation by beneficiary under secret trust—Wills Act, 1837 (c. 26), s. 15.

Trust—Secret trust—Purposes communicated orally to one executor—Trusts to take effect after death of that executor by means of will of executor—Establishment of terms of trust by affidavit evidence.

Charity—Relief of poverty—"For the permanent aid of distressed gentlefolk and similar purposes."

By his will, dated Apr. 25, 1942, a testator, who died on Dec. 20, 1943, provided: "This is the last will and testament of R.P.Y. and is to the

effect that he leaves all his worldly goods and chattels both real and personal unto his wife E.M.Y. for her life-time only and he appoints the said E.M.Y. together with J.T.M. . . . to be his executors it being a condition of this will that after the testator's death the said E.M.Y. makes a new will leaving R.P.Y.'s estate for the purposes she knows he desires it to be used for—~~for~~ for the permanent aid of distressed gentlefolk and similar purposes such will to be held by and administered by Messrs. M. & Co. . . . leaving such small legacies as she knows I wish to be paid and Messrs. M. & Co. to be allowed to charge reasonable fees for the work they do." J.T.M. died soon after the testator's death and probate of the testator's will was granted to E.M.Y. Questions of construction of the will arose, and, in applying to the court for directions, E.M.Y. deposed: "Prior to executing his said will the testator discussed with me the devolution of his estate after my death and I was well aware of his wishes in regard thereto, which were as follows, namely, that T.C. . . . should receive a legacy of £2,000, and that G.S. . . . should receive a legacy of £1,000, and that, subject thereto, his estate should be used to found and endow a home for distressed gentlefolk." T.C. was one of the witnesses who attested the testator's will. The testator's estate consisted of pure personalty and real property. The testator possessed no leasehold property at the date of his death.

HELD: (i) on the true construction of the will, the words "all his worldly goods and chattels both real and personal" included all the deceased's property both real and personal.

Dictum of LORD HARDWICKE, L.C., in *Grayson v. Atkinson* (1752) (1 Wils. K.B. 334), *not applied*.

(ii) having regard to the imperative terms of the will and especially to the words "it being a condition of this will," the testator intended to impose a trust on his executors with regard to the dispositions of his estate after his widow's death, and notwithstanding that the testator's wishes were not made known to both his executors and that the dispositions were not intended to take effect until after the death of the widow, the trust so created was an effective secret trust established by the affidavit evidence of the widow.

Re Hetley ([1902] 2 Ch. 866), *distinguished*.

Blackwell v. Blackwell ([1929] A.C. 318), and *Re Gardner* ([1920] 2 Ch. 523), *applied*.

(iii) the gift "for the permanent aid of distressed gentlefolk and similar purposes" was charitable, being for the relief of poor persons, and its charitable nature was unaffected by the reference to "similar purposes."

(iv) although T.C. was an attesting witness, his beneficial interest was not rendered ineffective by the Wills Act, 1837, s. 15, because he was interested under the secret trust and not under the will.

Re Fleetwood (1880) (15 Ch.D. 594), *not followed*.

O'Brien v. Condon ([1905] 1 I.R. 51), *Cullen v. A.-G. for Ireland* (1866) (14 W.R. 869) and *Re Gardner* ([1923] 2 Ch. 230), *followed*.

[AS TO SECRET TRUSTS, see HALSBURY, *Hailsham Edn.*, Vol. 33, pp. 104-107, paras. 173-183; and FOR CASES, see DIGEST, Vol. 43, pp. 596-602, Nos. 446-491.]

Cases referred to:

- (1) *Grayson v. Atkinson*, (1752), 1 Wils. K.B. 333; 95 E.R. 6417.
- (2) *Perrin v. Morgan*, [1943] 1 All E.R. 187; [1943] A.C. 399; 112 L.J.Ch. 81; 168 L.T. 177; 2nd Digest Supp.
- (3) *Comiskey v. Bowring-Hanbury*, [1905] A.C. 84; 74 L.J.Ch. 263; 92 L.T. 241; 44 Digest 963, 8165.

- (4) *Re Hetley*, [1902] 2 Ch. 866; 71 L.J.Ch. 769; 87 L.T. 265; 43 Digest 592, 415.
- (5) *Re Gardner*, [1920] 2 Ch. 523; 89 L.J.Ch. 649; 124 L.T. 49; 43 Digest 598, 465.
- (6) *Blackwell v. Blackwell*, [1929] A.C. 318; 98 L.J.Ch. 251; 140 L.T. 444; Digest Supp.
- A (7) *Moss v. Cooper*, (1861), 1 John. & H. 352; 4 L.T. 790; 70 E.R. 782; 43 Digest 601, 484.
- (8) *Re Coxen*, [1948] 2 All E.R. 492; [1948] Ch. 747; [1948] L.J.R. 1590; 2nd Digest Supp.
- (9) *Re Fleetwood*, (1880), 15 Ch.D. 594; 49 L.J.Ch. 514; 43 Digest 598, 463.
- (10) *O'Brien v. Condon*, [1905] 1 I.R. 51; 38 I.L.T. 252; 43 Digest 596, 447 *iii*.
- B (11) *Cullen v. A.-G. for Ireland*, (1866), 14 W.R. 869; 1 Eng. & Irish Reports 190; 21 Digest 65, *g*.
- (12) *Re Gardner*, [1923] 2 Ch. 230; 92 L.J.Ch. 569; 129 L.T. 206; 43 Digest 598 (annotation).

C ADJOURNED SUMMONS to determine the true nature and effect of dispositions contained in the will of Roger Pilkington Young, deceased. The will is set out in full in the judgment of DANCKWERTS, J.

Raymond Jennings, K.C., and *B. S. Tatham* for the plaintiff, the testator's widow and executrix.

Harold Christie, K.C., and *Plowman* for the first four defendants, interested on the testator's intestacy.

D *M. J. Albery* for the fifth and sixth defendants, who claimed to be entitled by virtue of a trust imposed on the testator's widow by the will.

Denys B. Buckley for the Attorney-General.

E DANCKWERTS, J.: The testator died on Dec. 20, 1943, having made his will, dated Apr. 25, 1942, by which he appointed his wife, Eveleen Mary Young, and a solicitor, named John Teddie Marriott, to be his executors. The second executor died very shortly after the testator's death, and, consequently, on Oct. 23, 1944, the testator's will was proved by the widow alone.

F Although the testator left an estate amounting to over £94,000 and possessed an estate of as large an amount as that at the date of the will, he did not think fit to employ the services of experts in the preparation of his will, but undertook that work himself with the usual unfortunate results, that is to say, he has left a will which has caused everybody concerned, including the court, a great deal of trouble in understanding and construing it. It is a short will and it is in these terms:

G "This is the last will and testament of Roger Pilkington Young and is to the effect that he leaves all his worldly goods and chattels both real and personal unto his wife Eveleen Mary Young for her life-time only and he appoints the said Eveleen Mary Young together with John Teddie Marriott of Shortacre Alderley Edge in the county of Cheshire solicitor to be his executors it being a condition of this will that after the testator's death the said Eveleen Mary Young makes a new will leaving Roger Pilkington Young's estate for the purposes she knows he desires it to be used for—for the permanent aid of distressed gentlefolk and similar purposes such will to be held by and administered by Messrs. Marriott & Co. of 10, Norfolk Street Manchester leaving such small legacies as she knows I wish to be paid and Messrs. Marriott & Co. to be allowed to charge reasonable fees for the work they do."

H The first question arises on the first few lines of the will. The only disposition of property in terms by the will is of "all his worldly goods and chattels both real and personal." The testator left comprised in that large estate no lease-

holds, which are technically called by the law "chattels real", but he left real estate in the shape of freeholds of the value of about £28,000. The words "worldly goods and chattels" are singularly inappropriate to a gift of freehold land. That great lawyer, LORD HARDWICKE, L.C., in 1752 in *Grayson v. Atkinson* (1), when faced with provisions of rather a similar character, the words in that case being:

" . . . all the rest of my goods and chattels real and personal moveable and immoveable, as houses . . . tenements . . ."

expressed the view that the words "goods and chattels real and personal moveable and immoveable" would not have carried the lands by the law of England but for a context which enabled him to reach a different conclusion. That, however, was mere *obiter dicta* so far as the decision in that case was concerned, because he had a context which enabled him to reach a different conclusion, and, notwithstanding the great respect I have for LORD HARDWICKE and his decision, it seems to me that, in 1950 and assisted, as I am, by a more liberal meaning given to careless phrases used by a testator in such cases as *Perrin v. Morgan* (2), I am at liberty to give a more generous meaning to the phrase used in the present will. The impression which is conveyed to me by the phrase, and one to which I feel at liberty to give effect, is that the testator intended to leave to his wife for her life all his property both real and personal even though he included in the description such inapt words as "worldly goods and chattels." Accordingly, I reach the conclusion that, so far as the wife's beneficial interest is concerned, she is entitled for her life to the whole of the testator's estate.

That deals with the first point, but more difficulties are raised by the form of the testator's will. Affidavit evidence has been given by the widow (which I have come to the conclusion is admissible) in the following terms:

"Prior to executing his said will the testator discussed with me the devolution of his estate after my death and I was well aware of his wishes in regard thereto, which were as follows, namely, that the defendant, Thomas Copp, who had been employed by the testator for many years as a chauffeur and general factotum, should receive a legacy of £2,000, and that the defendant, Gerald Summerfield, who was the testator's land agent and personal friend, should receive a legacy of £1,000, and that, subject thereto, his estate should be used to found and endow a home for distressed gentlefolk."

She says she is anxious to give effect to those wishes so far as she lawfully may.

There is, therefore, no doubt what the testator's intentions were. The question is whether he adopted such legal methods that they can be given effect. It is plain that, though there is reference to some will-making power given to the testator's widow, the court may find that there is an executory gift on the death of the widow for the benefit of certain beneficiaries whom the testator intended to benefit. An example of that is to be found in *Comiskey v. Bowring-Hanbury* (3), though the circumstances of that case are, no doubt, different from those of the present case. First, it is objected that the widow is given an estate after her death, and, therefore, there is nothing here that she could deal with, and she has merely a power of disposing of property. In those circumstances it is not possible to make reference, it is contended, to parol evidence to ascertain something outside the will, as is shown by *Re Hetley* (4). That seems to me a case which is plainly distinguishable from the present one. In *Re Hetley* (4) there was, in effect, nothing but a power. In the present case there is to be found in the will something much more definite than any power. Everything which I find in this will is imperative. Once you find the directions in the will are imperative,

then they relate to the creation of trusts rather than to the creation of a power. The words in the present will "it being a condition of this will" that something shall be done, plainly, to my mind, point to an imperative trust.

It is said that there is no estate for the widow on which any trusts can be tacked which can be proved by parol evidence. That seems to me not to be the case. It is to be observed that the testator appointed the widow and the solicitor, John Teddie Marriott, to be the executors of the will, and, therefore, on the testator's death, the estate by law vested in those executors although John Teddie Marriott died before they were able to perfect their title by means of the grant of probate. It was also said that the trusts in question, being obviously intended to take effect after Mrs. Young's death, must be ineffective because she could not be a trustee for any purpose after she was dead. At first sight, that seems a reasonable statement. When it is examined, in my view, it is found to be based on a fallacy. Mrs. Young, and, if he had survived, Mr. Marriott, would have been trustees for purposes which were to take effect on the testator's death as soon as the will came into effect. It is quite true they related to future interests and future purposes, but they were none the less trustees for those purposes.

- A A very good example of what is known as a secret trust being founded in that way is to be seen in *Re Gardner* (5). There the testatrix, by her will dated in 1909, bequeathed all her real and personal estate to her husband for his use and benefit during his life "knowing that he will carry out my wishes." Four days after the date of her will she signed an unattested memorandum expressing her wish that "the money I leave to my husband" should, on his death, be equally divided among certain named beneficiaries. She died in 1919 and her husband died four days later. After the wife's death the memorandum was found in the husband's safe and there was parol evidence that shortly after the execution of the will the testatrix had said, in his presence, that her property after his death was to be equally divided between the named beneficiaries and that he assented thereto. Those were held to be effective trusts binding on his estate. There again, the trusts in question were only operative after the husband was dead, and they were operative in respect of an estate which did not devolve on him by reason of the dispositions contained in the wife's will because she gave him only a life interest. But they were interests which vested in him by virtue of operation of law. Accordingly, it seems to me there is no difficulty in regard to the fact that these trusts are to operate after the death of the widow.

- F The conclusion which I come to is that these trusts are secret trusts which are established by parol evidence given by the widow in her affidavit and that they are effective in respect of this estate. It is to be observed that they were communicated to the wife in the testator's lifetime before the date of the will. They were communicated only to her and not to her co-executor, but, on the authorities, that would have been sufficient to bind the co-executor equally with her if he had survived long enough to obtain grant of probate, so that he was concerned with the operation of the will and the trusts as well as the widow. In *Blackwell v. Blackwell* (6) I find the principle expressed by LORD WARRINGTON ([1929] A.C. 341):

- H "Further in *Moss v. Cooper* (7) WOOD, V.-C., said: 'If, on the faith of a promise by A., a gift is made in favour of A. and B., the promise is fastened on to the gift to both, for B. cannot profit by A.'s fraud'."

So, *prima facie*, it seems to me that here there are secret trusts which should be given effect.

Another objection which is taken, however, is that as Mrs. Young took no beneficial interest after her death she was incapable of making a will as required by the testator. She could not make a will for the testator and she could not

leave the property herself because she had no beneficial interest in it. I do not think that is the intention of the testator. It seems to me that what he is doing is to create a trust through the estate which by law vests in the executors for the benefit of the beneficiaries, the names of whom he has communicated to his wife in his lifetime. When he says, "it being a condition of this will" that his wife shall make a new will dealing with the property in the way in which she knows he desires it to be dealt with, what he really has in mind is that, trusts having been created, she is to declare them by her will in the sense that she puts them on record. I can see nothing ineffective in that. That is the result of the directions which are given by the testator, though it may well be that he has not expressed his intentions in a very intelligible manner. One has to examine the will to give effect to the substance of the matter as one finds it in the will.

One other point has regard to the gift "for the permanent aid of distressed gentlefolk and similar purposes." It seems to me that that is a good charitable gift since it is for the relief of poor persons, and the reference to "similar purposes" does not detract from the charitable nature, being controlled by the words which precede the three words "and similar purposes." In the result, I find that the legacies referred to do not fail, and, therefore, I do not think there is any difficulty such as has arisen in some cases where there was a gift for charitable purposes, which would otherwise be valid, of a portion of an estate, and a portion given to purposes which were invalid. If there were any failure, it seems to me that the gift for the charitable purpose would swallow up any part of the estate which was not effectively disposed of otherwise on the principles discussed by JENKINS, J., in *Re Coxen* (8).

A further point concerns the validity of one of these legacies. The widow has testified that the testator's intention was, as communicated to her, that Copp, who had been employed by the testator for many years as chauffeur and general factotum, should receive a legacy of £2,000. Thomas Copp was one of the two attesting witnesses to the will, and, if he takes the legacy under the terms of the will, the result of the Wills Act, 1837, s. 15, is to make his legacy ineffective. But, does he take the legacy under the will? Counsel for the next-of-kin has referred me to *Re Fleetwood* (9), a case of a secret trust, decided in 1880 by HALL, V.-C. In that case, undoubtedly, it was held that as a lady who was intended to be a beneficiary, Miss Mary Head, was one of the attesting witnesses to the fourth codicil, the trust for her failed as to her beneficial interest, as it would have done, as HALL, V.-C., said, had the trust been declared in the codicil. It appears, however, that the matter was not argued in that case, which was concerned with the decision of many other points, and it seems to me that it is contrary to principle. The whole theory of the formation of a secret trust is that the Wills Act, 1837, has nothing to do with the matter, because the forms required by the Wills Act are entirely disregarded in effect, the persons who take beneficially taking, not by virtue of the gift in the will, which is made to a trustee, but by virtue of the secret trusts which are imposed on the apparent beneficiary who does, in fact, take under the will. In the Irish case, *O'Brien v. Condon* (10), SIR ANDREW PORTER, M.R., had to consider the matter with *Re Fleetwood* (9) before him. He points out in a judgment which seems to me, if I may respectfully say so, to be entirely in accordance with principle and common sense, that *Re Fleetwood* (9) was inconsistent with the principle of the matter and inconsistent with certain other cases, one of which was a decision of the House of Lords on an Irish appeal, viz., *Cullen v. A.-G. for Ireland* (11) decided in 1886. SIR ANDREW PORTER, M.R., pointed out that the point was not argued before HALL, V.-C., in *Re Fleetwood* (9), and, accordingly, he decided to differ from the decision in *Re Fleetwood* (9) and apply what seems to me to be the proper statement of the principle. I agree with that Irish decision and I think it is right for me

to follow it in the circumstances of this case, because I think that the matter was not properly argued before HALL, V.-C., and I think his judgment on this particular point was given *per incuriam*. In accordance with the decision in *Cullen v. A.-G. for Ireland* (11), and the later decision in *Re Gardner* (12), every consideration connected with the principle of the matter requires me to reach the conclusion that a beneficiary under a secret trust does not take under the will, and, therefore, is not affected by the provisions of the Wills Act, 1837, s. 15. Accordingly, the legacy, though given in an indirect manner and intended for Thomas Copp, is effective and he has not forfeited it.

Declaration accordingly. Costs of all parties as between solicitor and client to be paid out of the estate in due course of administration.

Solicitors: *Foyer, White & Prescott*, agents for *Dunning, Rundle & Stamp*, Honiton (for the plaintiff and the fifth and sixth defendants); *Corner & Co.* (for the first four defendants); *Treasury Solicitor*.

[*Reported by R. D. H. OSBORNE, Esq., Barrister-at-Law.*]

R. v. FAITHFUL.

[COURT OF CRIMINAL APPEAL (Lord Goddard, C.J., Byrne and Parker, JJ.), November 21, 1950.]

Criminal Law—Sentence—Committal to quarter sessions by court of summary jurisdiction—Duty of quarter sessions to ascertain whether appeal against conviction pending—Criminal Justice Act, 1948 (c. 58), s. 29 (1).

On Aug. 30, 1950, the applicant was committed, under the Criminal Justice Act, 1948, s. 29 (1), to the County of London Quarter Sessions for sentence on his conviction of larceny by a metropolitan magistrate, and on Sept. 8 he was sentenced to three years' corrective training. On Sept. 11 he gave notice of appeal to the quarter sessions against his conviction, and on Oct. 5 the appeal was dismissed.

HELD: (i) an appeal committee of quarter sessions which meet frequently, before passing sentence on an offender after a committal under s. 29 (1), should satisfy themselves that the time for appealing against the conviction has expired. If the time for appealing has not expired and the offender informs them that he intends to appeal, the committee should adjourn consideration of the sentence.

(ii) an appeal committee which do not meet so frequently, before passing sentence in any case in which the time for appealing against conviction has not expired, should ascertain whether the offender intends to appeal. If he informs them he intends to appeal, the committee should offer an adjournment and inform the offender of the possible delay and that he must remain in custody.

[FOR THE CRIMINAL JUSTICE ACT, 1948, s. 29, see HALSBURY'S STATUTES, 2nd Edn., Vol. 14, p. 1013.]

APPLICATION for leave to appeal against sentence. The facts appear in the judgment.

The applicant did not appear and was not represented.

BYRNE, J., delivered the following judgment of the court. On Aug. 30, 1950, the applicant was convicted by a metropolitan magistrate of larceny and was committed to the County of London Quarter Sessions for sentence under s. 29 (1) of the Criminal Justice Act, 1948. On Sept. 8 he was sentenced to

three years' corrective training by the deputy chairman. On Sept. 9 he gave notice of appeal to this court against that sentence, and on Sept. 11 he gave notice of appeal to quarter sessions against his conviction by the magistrate. On Oct. 5 that appeal was heard by the appeal committee of quarter sessions and was dismissed. Thus, it is seen that the applicant's appeal against conviction was heard and disposed of after he had been committed for sentence and had been sentenced. That, in the view of this court, is an undesirable state of affairs. It results from a difficulty which has arisen by reason of the new legislation, and this court desires to make one or two observations with regard to the correct procedure to be adopted.

In the case of appeal committees which meet frequently, such as the appeal committees of the County of London Sessions or of the Middlesex Quarter Sessions or various appeal committees of quarter sessions in the north of England, the appeal committee, before passing sentence on a committal under s. 29 (1) should satisfy themselves that the time for appealing against the conviction has expired. If the time has not expired, the appeal committee should inquire whether the offender intends to appeal, and, if he says he does so intend, they should adjourn the question of sentence. In the case of an appeal committee which does not meet so frequently, if the time for appealing against the conviction has not expired, it is desirable that they should ascertain before passing sentence whether the offender proposes to appeal. If he says he intends to appeal, they should offer an adjournment and warn the offender of the delay that may take place before the appeal against conviction is heard and inform him that they cannot grant bail.

The present application is without merit, and, in the view of the court, the sentence of three years' corrective training was a proper sentence.

Appeal dismissed.

[Reported by H. McL. MORRISON, ESQ., Barrister-at-Law.]

END OF VOLUME TWO.



